Case 3

P.A.T.I. v. Johnson

Cases and Related Materials

"The Government in the Sunshine Law," 5 U.S.C. § 552b

Breyer and Stewart, *The Government in the Sunshine Law*, pp. 1079-85

Hubbard Broadcasting v. City of Afton, 323 N.W.2d 757 (Minn. 1989)

Northwest Publications v. City of Saint Paul, 435 N.W.2d 64 (Minn. 1982)

Keyishian v. Board of Regents, 385 U.S. 589 (1967)

Minn. Stat. § 13D.01

5 U.S.C.A. § 552b

§ 552b. Open meetings

Currentness

"The Government in the Sunshine Law"

(a) For purposes of this section--

(1) the term "agency" means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3) the term "member" means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to--

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

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(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would--

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d)(1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to

any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: *Provided*, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

(e)(1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

(3) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

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(f)(1) For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9)(A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

(2) The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting or portion was held, whichever occurs later.

(g) Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any person, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.

(h)(1) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (b) through (f) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of the transcript, electronic recording, or minutes of a meeting closed to the public, and may take such additional evidence as it deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to

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the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

(2) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose.

(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

(j) Each agency subject to the requirements of this section shall annually report to the Congress regarding the following:

(1) The changes in the policies and procedures of the agency under this section that have occurred during the preceding 1-year period.

(2) A tabulation of the number of meetings held, the exemptions applied to close meetings, and the days of public notice provided to close meetings.

(3) A brief description of litigation or formal complaints concerning the implementation of this section by the agency.

(4) A brief explanation of any changes in law that have affected the responsibilities of the agency under this section.

(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof required by any other provision of law to be open.

(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.

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CREDIT(S)

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Notes of Decisions (68)

5 U.S.C.A. § 552b, 5 USCA § 552b
Current through P.L. 115-68.

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requirement for agencies to notify submitters of requests for information.[55] Does due process require such notice? [56]

2. *The Government in the Sunshine Law*

a. Introduction

Requirements that administrative agencies deliberate in public were first developed at the state level. By 1962, 26 states had passed laws requiring open meetings by administrative boards, commissions, and similar bodies, and presently every state and the District of Columbia has an open meeting law or constitutional provision.[57]

In 1976 an overwhelming majority of Congress passed the Government in the Sunshine Act, whose open-meeting provisions are codified in 5 U.S.C. §552b.[58] For the first time, meetings of multi-member federal agencies[59] must be open to the public. "Meeting" is defined by the Act to include the deliberations of at least a quorum of members where the deliberations determine or result in the conduct of agency business — indicating that some degree of formality is required before a gathering is considered to be a meeting. The Act requires that every part of every meeting must be open to the public unless it falls within one of ten specific exemptions.

No meeting may be closed unless a majority of the membership votes to take that action. At least one week in advance, the members must identify the proposed agenda and compare it with the Act's ten provisions exempting described meeting subjects from the open meeting requirement. The chief legal officer of the agency must prepare and file a statement certifying and giving reasons why the meeting may be closed. A copy of each vote on closing a meeting must be made available to the public in order to inform the public as to the voting record of agency members on open meetings. The agency must announce the time and a place of a closed

55. See Patten & Weinstein, supra note 29, at 204.

56. Cf. GTE Sylvania, Inc. v. Consumer Product Safety Commn., 443 F. Supp. 1152, 1156-1157 (D. Del. 1977).

57. Florida's open meeting statute has been expansively interpreted in such a manner as to constitute the most comprehensive open meeting law in the nation. At the other extreme, a number of acts have been rendered largely ineffective because of statutory or judicially created exemptions for executive sessions, which permit public "re-runs" after basic issues have been settled in private. See S. Rep. No. 354, 94th Cong., 1st Sess. 7 (1975); Ga. Code §23-802 ("[P]rovided, however, that before or after said public meetings, said bodies may hold executive sessions privately. . . ."); Selkowe v. Bean, 109 N.H. 247, 249 A.2d 35 (1968). See Note, Open Meeting Statutes: The Press Fights for the "Right to Know," 75 Harv. L. Rev. 1199, 1204 (1962).

58. Other provisions dealing with ex parte communications are discussed at pp. 539-557, supra. The bill passed the Senate 94-0 and passed the House by a vote of 390-5.

59. The Act covers all agencies, as defined in 5 U.S.C. §552(e), headed by a collegial body of two or more members, a majority of whom are appointed by the President with the advice and consent of the Senate. 5 U.S.C. §552b(a)(1).

meeting, announce that it is closed, make available a statement of the reasons for the closing, and make public a list of all nonmembers who will attend.

If the majority votes to close the meeting, a full verbatim transcript or electronic recording of the meeting is required. Any portion of the transcript or recording which does not fit within one of the exemptions must be promptly released to the public. This requirement, which goes beyond state open meeting legislation, was one of the most controversial provisions in the Act, and several exceptions to the full transcript requirement were included in the final version of the Sunshine Act.[60]

Seven of the ten exemptions from the Act's open meetings requirement parallel exemptions of the FOIA. Under these seven exemptions, a meeting may properly be closed if it will involve matters which (1) are vital to the national defense or foreign policy; (2) are concerned with the internal personnel rules and practices of the agency; (3) are specifically exempted from disclosure by another statute; (4) concern trade secrets and confidential commercial or financial information; (5) would constitute a clearly unwarranted invasion of personal privacy; (6) would disclose investigatory records compiled for law enforcement purposes under certain limited circumstances; or (7) relate to bank or financial institution examination reports. Three exemptions which do not closely parallel FOIA exemptions permit the closing of meetings if matters will be discussed which (1) involve accusing any person of a crime, or formally censuring any person; (2) would frustrate implementation of a proposed agency action if prematurely known; or (3) concern the agency's participation in formal rulemaking or litigation.[61]

When a meeting is announced to be closed and a person wishes to attend, the Act creates a cause of action to enjoin the closing. The court may enjoin the meeting pendente lite and the burden of proof to support the closing is on the agency. Within sixty days after a closed meeting the agency may be sued for equitable relief and for access to the transcript of the closed meeting. Any person may sue to enforce the Act's requirements. Unlike the FOIA, a Sunshine Act plaintiff may obtain an injunction barring future violations of the Act. In ruling on whether an agency has justifiably invoked one of the exemptions, a court may review portions of the meeting transcript that have not been publicly released.

Open meetings of executive branch advisory committees are required by the 1972 Federal Advisory Committee Act, 86 Stat. 770, 5 U.S.C. App. I. The Act regulates the creation, composition, and functioning of advisory committees. It requires that their meetings be open to the public unless the subject matter falls within specified exemptions; originally, the exemptions were those in the FOIA, but amendments in 1976 provided that the Sunshine Act's exemptions from its open meeting principle should also apply to advisory committees.[62]

60. If an agency votes to close a meeting pursuant to Exemption Eight (bank reports), Nine (a) (information likely to lead to financial speculation), and Ten (adjudicatory proceedings or litigation matters), it may elect to keep minutes rather than a transcript or a recording. 5 U.S.C. §552b(f)(1).

61. 5 U.S.C. §552b(c). For a lengthier discussion of the ten Sunshine Act exemptions, see Note, Government in the Sunshine Act: Opening Federal Agency Meetings, 26 Am. U.L. Rev. 154, 172-195 (1976).

62. Sections 5(b) and 5(c) of the Federal Advisory Committee Act provide that the

b. Assessments of the Open Meeting Principle

Although it is difficult to publicly oppose "open government" in the "post-Watergate" era, disputes exist concerning the appropriate limits. Such disputes center on the applicability of open meeting laws to subordinate agencies or subcommittees which may be solely designed as recommendatory bodies, the point in the decisionmaking process at which a meeting may be said to occur, and the appropriateness of particular enforcement mechanisms, and the subject matter and scope of exemptions.[63]

Consider the following evaluation:[64]

> The basic argument for open meetings is that public knowledge of the considerations upon which governmental action is based is essential to the democratic process. The people must be able to "go beyond and behind" the decisions reached and be apprised of the "pros and cons" involved if they are to make sound judgments on questions of policy and to select their representatives intelligently. The presence of outside observers is an invaluable aid in making such information available, for official reports, even if issued, will seldom furnish a complete summary of the discussion leading to a particular course of action. Even though only newspaper reporters and a few interested citizens actually are present, the benefit of granting access to governmental meetings will inure to a far larger segment of the population, because those who do attend will pass on the information obtained. It is further argued that decisions which result in the expenditure of public funds ought to be made openly so that the people can see how their money is being spent; publicity of expenditures further serves to deter misappropriations, conflicts of interest, and all other forms of official misbehavior. Several other considerations support the principle of open meetings. Government will be more responsive to the governed if officials are able to ascertain public reaction to proposed measures. Public meetings also may operate to provide officials with more accurate information; individual citizens will be able to correct factual misconceptions, par-

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membership of advisory committees shall "be fairly balanced in terms of the points of view represented and the functions to be performed," and that their advice and recommendations will "not be inappropriately influenced . . . by any special interest." Senator Lee Metcalf and a private citizen brought suit challenging the composition of the National Petroleum Council, a committee created to advise the Secretary of the Interior on petroleum policy, as violative of these provisions, because 140 of the council's members were officers or employees of petroleum companies. In Metcalf v. National Petroleum Council, 553 F.2d 176 (D.C. Cir. 1977), the court held that plaintiffs lacked standing to sue.

63. Comment, Government in the Sunshine Act: A Danger of Overexposure, 14 Harv. J. Leg. 620 (1977).

A number of state open meeting laws provide for criminal penalties. In Florida, where there has been some confusion as to whether the state open meeting act is applicable to chance gatherings where official business is mentioned, two city commissioners were arrested and tried after they met in a public restaurant for lunch and discussed golf, weather, and current city business. They were acquitted, Little & Tompkins, Open Government: An Insider's View, 53 N.C. L. Rev. 451 (1975).

64. Note, Open Meeting Statutes: The Press Fights for the "Right to Know," 75 Harv. L. Rev. 1199, 1200-1203 (1962).

ticularly in local government where the public is apt to have greater knowledge of the issues involved. Then too, as people better understand the demands of government and the significance of particular issues, they will be better prepared "to accept necessary, and perhaps difficult and unpalatable, measures essential to the public good." Finally, open meetings foster more accurate reporting of governmental activities. Even when meetings are closed, some hint of what occurs generally reaches the press; but such reports are often incomplete and slanted according to the views of the informant. To restrict the press to such sources of information is a disservice both to the public, which is misled, and to the officials, who may be judged on the basis of these distorted reports.

Granting the virtue of open meetings in general, substantial objections can be made to enacting the principle as a legal requirement. Publicizing proposed governmental action may benefit citizens whose interests are adverse to the general community or harm individual reputations. In some cases, particularly when sharply conflicting interests must be accommodated, freedom from the pressure of public opinion may be desirable; the delegates to the Constitutional Convention, for example, felt constrained to work in secrecy. Even in less unique circumstances "there is something to be said for open covenants, unopenly arrived at." One public official has remarked that "there are many details, ramifications and opinions that no sound administrator . . . would care to express in public," and it appears that officials are often reluctant to request information at open meetings lest they create a public image of ignorance.[65] In addition, public officials are prone to waste time making speeches for the benefit of an audience, while in a closed meeting they "are less on their dignity, less inclined to oratory." If the meeting is for preliminary consideration of action, there are additional objections. An open meeting requirement will tend to disadvantage subordinate officials by publicizing their disagreement with policies that they must administer. And publicity of proposals put forth during preliminary discussions may frustrate ultimate agreement, for an official hesitates to abandon a view that he has publicly advocated. A final objection to an open meeting requirement arises from the tendency of the press toward "sensational" reporting. All too frequently newspaper stories are distorted by the bias of the reporter or his paper. Even when there is no bias, newspapers prefer to emphasize as "newsworthy" only "controversial matters about which there is some conflict or . . . those items which tend to make legislators appear substantially less than bright." It has even been contended that the need for "right to know" laws has been exaggerated, as "editorials and news articles on star chamber sessions and the like have long been an easy, inevitably irrefutable, and popularly accepted part of every experienced, and frequently cynical, news editor's bag of tricks." Although these

65. A Letter From Chief Editorial Writer of the Chicago Sun-Times to the Harvard Law Review, Nov. 28, 1961, states: "[I]t is not so much an unwillingness to express public views that accounts for the desire for secrecy as it is the need to cover up just plain ignorance that so many public officials have. That is the basis for the one argument for secret meetings that might have some validity. . . . In a secret meeting a public official can honestly confess ignorance of a subject and seek enlightenment from his fellow committee members and witnesses. He would not be able to bring himself to do this in a public meeting and such reluctance might have an adverse effect on the proceedings."

arguments cannot be ignored, they do not compel the conclusion that a legal requirement of open meetings is untenable. Some have urged that the benefits of requiring that all governmental activity be done openly outweighs any disadvantages that may result; perhaps a more rational approach would be to seek to devise a legal standard affording the fullest possible degree of openness while recognizing the interests promoted by governmental secrecy.

Notes and Questions

1. Given similar exemptions, is the case for open meetings stronger than the case for public disclosure of agency documents, or the reverse?

2. Given the recent enactment of the Government in the Sunshine Act, there is as yet no judicial gloss on its provisions. Would you expect that open meeting litigation to be as voluminous as FOIA litigation? Which interests are likely to benefit sufficiently from open meetings in order to initiate litigation to enforce the Sunshine Act's requirements? Will we see "Reverse Sunshine" litigation?

Consider the remarks of Representative McCloskey in the House debates on the Act:

> . . . But, by and large, the ones who will be taking advantage of this bill's provisions will be corporate and other special interests attempting to stave off what they deem to be unfavorable Government action. We have seen too many cases where agency action was unnecessarily protracted due to long, drawn-out court battles. This bill gives the special interests just one more forum in which to fight the agency.[66]

3. Does it make any sense to limit the open meeting principle to collegial multimember agencies, such as the FTC or CAB, while ignoring the number of federal agencies headed by a single person?

4. What forms of discussion among agency members constitute a "meeting" for purposes of the Act?

Should the Act apply when two out of the FTC's five members confer about agency business when they meet in the corridor? When they plot how to engineer a given result at the next formal meeting of the commission? When they attend a trade association luncheon together and discuss agency policies with association officials?

Would your answers to the above questions differ if the incidents involved three commissioners rather than two?

State courts have struggled with similar questions under state statutes. An expansive view was taken in Bigelow v. Howze, 291 So.2d 645 (Fla. 1974). In *Bigelow*, two of five county commissioners traveled to another state to investigate and report on the ability of two firms to do a reappraisal of county property values. While in the other state, the two commissioners agreed in private they would support the awarding of the contract to one of the firms. This was held to constitute

66. 122 Cong. Rec. H7875 (daily ed. July 28, 1976).

a nonpublic "meeting" in violation of Florida's open meeting statute. Compare Dayton Newspapers, Inc. v. City of Dayton, 28 Ohio App. 95, 274 N.E.2d 766 (Ct. App. 1971), where a newspaper publisher and its reporter brought an action against city commissioners for a permanent injunction enjoining the commissioners from denying plaintiffs access to any meetings of the city commissioners. The relevant ordinance provided that "[a]ll meetings of the Commission shall be public." After considering various definitions of the term "meeting," the court considered the propriety of informal executive sessions:

> The present issue . . . concerns gatherings of commissioners when they confer together and with each other; and when they collaborate in doing what may be called their "homework." It is important that they do so freely and without restraint. Like all who have the responsibility of making important decisions, they need an opportunity to express, exchange and test ideas, to deliberate freely, off the record, and without the restraint of outside influence. Freedom of discussion and the exchange of ideas is essential to an understanding of a problem. It cannot be satisfactorily accomplished under a spotlight or before a microphone.
>
> Such a procedure is widely and necessarily practiced in various branches of government. After an open public trial, the jury is required to deliberate in privacy. A grand jury, whose duty is investigative, must proceed in strict secrecy, for vital and evident reasons. Ours, like any multiple court, regularly withdraws from the public courtroom to deliberate uninterruptedly in chambers.

5. Will broad interpretations of the term "meeting" simply force the "real" decisionmaking underground, leaving public meetings an empty ritual? How can Sunshine Act plaintiffs ascertain whether this is indeed happening? Do the principles developed in the *Morgan* litigation, pp. 760-766, supra, bar discovery on this question? In any event, what relief can the courts provide? Compare the analogous question under FOIA whether broad disclosure requirements will simply lead administrators to avoid committing important matters to written form.

6. Why does the Sunshine Act require that a verbatim transcript be kept of all agency meetings governed by the Act? Consider again the comments of Representative McCloskey:

> [The verbatim recording or transcript requirement] is simultaneously the bill's most onerous and its most useless provision. It is onerous because of the tremendous expense involved in meeting this requirement — not only the costs of the recording equipment or stenographer, but the costs of transcribing the verbatim record, reviewing it to see if any portions of it can be made public, and, if so, making the necessary deletions in the transcript. It is useless because, under the act, these transcripts, made at considerable expenses, will never be made publicly available if the meeting was legally closed. . . .
>
> This provision will undermine the goals of the two principal planks of Federal information policy, the Freedom of Information Act and the Privacy Act. If these transcripts are in existence, their disclosure will undoubtedly

> be the object of a significant amount of Federal Court litigation. One way or another, some of the information in those transcripts will become public — and the protections provided for individuals contained in the Privacy Act, and for various types of exempt matters in the Freedom of Information Act, will be eroded.[67]

Note also that the courts will be required to examine transcripts in camera, raising all of the problems with in camera review discussed under the FOIA. However, is there any other way to ensure that the Act's requirements will be met?

7. Do the above questions persuade you that the Sunshine Act and, similarly, the FOIA, are simplistic, largely ineffective, and excessively costly mechanisms for dealing with agency discretion? Or are they nonetheless justified, warts and all?

67. Ibid.

323 N.W.2d 757
Supreme Court of Minnesota.

HUBBARD BROADCASTING, INC., et al., Appellants,
v.
CITY OF AFTON, et al., Respondents.

No. 81-506.
|
Aug. 27, 1982.

Applicants brought declaratory judgment action against city to review city's denial of special use permit and to secure issuance of such permit for construction of satellite station or, in alternative, determination that there had been taking of property without just compensation. The District Court, Washington County, John F. Thoreen, J., concluded that city had properly denied permit application for legally sufficient reasons supported by facts in record and that there had been no compensable taking, and applicants appealed. The Supreme Court, Wahl, J., held that: (1) review of permit denials was properly conducted on record; (2) both parties acquiesced in determination of permit and constitutional issues on record; (3) applicants had not met their burden of showing that city council's action in denying special-use permit was taken without legally sufficient reason with factual support in record; (4) conversation between two city council members over lunch regarding permit application did not constitute open meeting law violation; (5) city acted reasonably in refusing to issue building permit for satellite station differing only in that tower was shorter; and (6) refusal to issue permits did not constitute taking of property without just compensation.

Affirmed.

Peterson, J., concurred in part and dissented in part and filed opinion.

Todd and Yetka, JJ., joined in dissent of Peterson, J.

West Headnotes (17)

[1] **Zoning and Planning**

Record

Review of denial of special-use permit application for construction of satellite station was properly conducted on administrative record where that record was clear and complete and applicants failed to augment record by stipulation or by motion.

1 Cases that cite this headnote

[2] **Zoning and Planning**

Record

Where, in ordering that review of denial of special-use permit would be on record, no mention was made of constitutional taking issue nor was there mention in subsequent briefs of parties, parties made no effort on record to clarify order or procedure, and both parties submitted proposed findings and conclusions when invited to do so, including proposed findings and conclusions on taking issue, both parties acquiesced in determination of both permit and constitutional issues on record. 48 M.S.A., Rules Civ.Proc., Rule 42.02.

2 Cases that cite this headnote

[3] **Zoning and Planning**

Grounds for grant or denial in general

Special-use permits may be denied for reasons relating to public health, safety and general welfare or because of incompatibility between proposed use and municipality's comprehensive municipal plan.

8 Cases that cite this headnote

[4] **Zoning and Planning**

Permits, certificates, and approvals

On review of denial of special-use permit for construction of satellite station, unsuccessful applicants bore burden of persuasion that reasons stated by city council for denial of permit were either without factual support in record or were legally insufficient.

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21 Cases that cite this headnote

[5] **Zoning and Planning**
Permits, certificates, and approvals

Determination of city council that proposed satellite station would be inconsistent with comprehensive municipal plan had evidentiary support, was within bounds of city council's informed discretion in interpreting plan, and was legally sufficient reason for denial of special-use permit for construction of satellite station.

7 Cases that cite this headnote

[6] **Zoning and Planning**
Telecommunications towers and facilities

City's determination that satellite station was commercial use and one which did not fit nature of area zoned agricultural and, therefore, not permitted use was legally sufficient reason, supported by record, for denial of special-use permit for construction of satellite station where applicant was profit-seeking business and satellite station was part of commercial enterprise and would be taxed as commercial use.

Cases that cite this headnote

[7] **Zoning and Planning**
Nature and necessity in general

Applicants for special-use permits must be treated uniformly.

Cases that cite this headnote

[8] **Zoning and Planning**
Propriety of classification and uniformity of operation in general

Municipalities have great deal of discretion in classifying zoning districts.

Cases that cite this headnote

[9] **Zoning and Planning**
Telecommunications towers and facilities

Uses permitted in agricultural district, including airport, utilities, commercial animal training, commercial feed lots, animal kennels, nursery and garden supply and recreation equipment sales, were rationally related to serving purposes articulated by municipal comprehensive plan, and thus denial of special-use permit for construction of satellite station did not result in inconsistent and unequal treatment under ordinance, where permitted uses were agricultural related except for airport and utilities which had power of condemnation overriding local zoning power.

1 Cases that cite this headnote

[10] **Zoning and Planning**
Permits, certificates, and approvals

Notwithstanding conflicting testimony of applicant's real estate agent that there would be no adverse impact on property values from applicant's proposed construction of satellite station, testimony of real estate agents practicing in area that there would be adverse impact on property values and that property values would be reduced by construction of tower provided factual basis to support city's legally sufficient determination, in denying special-use permit, that satellite station would impact on general welfare of community by reason of impact on property values of area.

1 Cases that cite this headnote

[11] **Zoning and Planning**
Permits, certificates, and approvals

City's determination, in denying special-use permit for construction of satellite station, that station would have “adverse environmental impact” due to microwave transmissions was not supported by sufficient evidence.

Cases that cite this headnote

[12] **Zoning and Planning**

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Permits, certificates, and approvals

Evidence was sufficient to support city's determination, in denying special-use permit for construction of satellite station, that mound upon and around which station was to be constructed was geologically rare formation and was of aesthetic value to community.

1 Cases that cite this headnote

[13] **Zoning and Planning**

Grounds for grant or denial in general

Although such environmental characteristics as geologically rare formation at proposed site for development of which special-use permit is sought may not in and of themselves provide legally sufficient reason to deny special-use permit, they are factors which may be considered in context of municipal comprehensive plan and conservancy district purposes.

3 Cases that cite this headnote

[14] **Zoning and Planning**

Grounds for grant or denial in general

Not all of reasons stated for denial of special-use permit need be legally sufficient and supported by facts in record.

6 Cases that cite this headnote

[15] **Zoning and Planning**

Access;open meetings

Conversation between two city council members over lunch regarding application for special-use permit for construction of satellite station did not constitute open meeting law violation. M.S.A. §§ 471.705, 471.705, subds. 1, 2.

4 Cases that cite this headnote

[16] **Zoning and Planning**

Telecommunications towers and facilities

City acted reasonably in refusing to issue building permit for satellite station identical to that for which special-use permit was denied except that tower was shorter where use remained commercial and was not permitted in area zoned agricultural.

Cases that cite this headnote

[17] **Eminent Domain**

Particular cases

Applicants for special-use and building permits for construction of satellite station had failed to show that they had been deprived of all reasonable use by city's refusal to issue permits, and therefore that refusal constituted taking of property without just compensation, where owners could continue to use most of land for agricultural purposes and site could be used to fulfill open-space requirements for subdivision development. U.S.C.A.Const.Amends. 5, 14.

9 Cases that cite this headnote

***759** *Syllabus by the Court*

1. The district court properly conducted a review of the record to determine the validity of a special-use permit application denial where that record was clear and complete, and did not err in deciding on the record where the appellants failed to supplement the record and by their actions acquiesced in the district court's procedure.

2. The City of Afton stated legally sufficient reasons with a factual basis in the record in its denial of appellants' special-use permit application, and did not violate the open meeting laws.

3. The City of Afton properly declined to issue a building permit for a nonpermitted commercial use in an agriculture-zoned district.

4. The denial of the special-use and building permits does not constitute an unconstitutional taking of property where reasonable uses of the property remained.

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Attorneys and Law Firms

Peterson, Popovich, Knutson & Flynn, Peter S. Popovich and Thomas M. Sipkins, St. Paul, for appellants.

Larkin, Hoffman, Daly & Lindgren, Christopher J. Dietzen and Forrest D. Nowlin, Minneapolis, for respondents.

Heard, considered and decided by the court en banc.

Opinion

WAHL, Justice.

Appellants brought this declaratory judgment action against the City of Afton (Afton) to review Afton's denial of a special-use permit and to secure the issuance of such a permit for the construction of a satellite station or, in the alternative, a determination that there had been a taking of property without just compensation. The district court concluded that Afton had properly denied appellants' application for legally sufficient reasons supported by facts in the record and that there had been no compensable taking. We affirm.

In 1976, Hubbard Broadcasting, Inc. (Hubbard) sought to acquire property for the construction of a satellite communication and receiving tower, equipment building and antennae (satellite station) in an area free from electronic interference. The satellite station would permit Hubbard to receive and transmit non-network television programming via satellite. Hubbard's agents analyzed the metropolitan and surrounding area and determined that the optimum site for the satellite station would be a Bissell's Mound [1] located in Afton on the property of Herman and Dorothy Froehner. The Bissell's Mound would shield the satellite receiver, located at the base of the Mound, from microwave interference and also provide sufficient height for the 125-foot tower to be constructed on top of the Mound to allow Hubbard to transmit in a line-of-sight between its satellite station and its studios located in St. Paul.

The satellite station would consist of a 125-foot tower with a 2-foot-square base located on top of the Mound, a satellite communication dish 20 feet in diameter and 36 feet high located at the base of the Mound, and an equipment building located next to the satellite dish. The areas around the base of the Mound and the tower on top of the Mound would be protected by an 8-foot-high fence topped with barbed wire.

On January 5, 1978, Hubbard entered into an option agreement with Herman and Dorothy Froehner for the purchase of 10 acres, the Bissell's Mound and adjacent land, conditioned upon the granting by Afton of a special-use permit to construct the satellite station. When the Afton Planning and Zoning Commission (Commission) voted to recommend denial of a variance at its November 14, 1978, meeting, Hubbard obtained an option on an additional 7 acres, thereby complying with Afton's 300-foot-frontage requirement and avoiding the need for a variance.

***760** Hubbard then applied for a special-use permit to construct its satellite station, which would occupy 1 1/2 acres. Hubbard proposed that the remainder of the 17 acres would be left for open space and park; and, for those portions surrounding the Mound which are capable of being farmed, the Froehners would have a lease back from Hubbard to continue farming. At its September 11, 1979, meeting, the Commission heard testimony, received exhibits from representatives of Hubbard and the public, and voted to recommend that the Afton City Council (Council) deny Hubbard's request for the special-use permit.

The Council reviewed the transcript of the Commission's September 11, 1979, meeting and, on October 3 and 17, 1979, held two hearings on Hubbard's application. Between the Council's hearings, two members of the Council had a private discussion regarding Hubbard's application. At its October 17, 1979, meeting, the Council voted to deny the application on the following grounds stated orally by Council member Mucciacciaro:

> [I]t does not conform to the overall intent of the comprehensive plan; does not fit with the nature of the uses in the particular area; placement of the antenna does not fit conservancy district requirements; impacts on the general welfare of the community by reason of the impact on the property values of the area; it has an adverse environmental impact; that our Planning Commission members

> were not satisfied that it was not technically possible to place a facility in a more suitable area; that the geologists' report that the Bissell Mounds are geological [sic] rare, I think that's another reason; and also I believe that is a commercial use in a zoned agricultural area which is not permitted in our ordinance.

In January 1980, Hubbard commenced this action in district court and also delivered plans and an application to the Afton Plans Inspector for the purpose of obtaining a building permit to construct a satellite station that included a 45-foot tower. By a letter dated February 6, 1980, the Afton Zoning Administrator advised Hubbard on behalf of the Zoning Administration Committee that the proposed satellite station was in an agriculture-conservancy zone and could be constructed only following the issuance of a special-use permit, and that the following would also be required: conditional-use permit, driveway permit, grading permit and building permit.

The Zoning Administrator also informed Hubbard that an appeal from the Zoning Administration Committee's decision could be taken to the Commission or the Council. No appeal was taken, but appellants amended their complaint in district court to allege that the denial of the building permit application was arbitrary, capricious and unreasonable.

At a pretrial conference conducted on June 3, 1980, the issue of scope of review was discussed. Hubbard and the Froehners sought a trial de novo, and Afton sought a review on the record. The district court, in an order dated June 4, 1980, stated alternative procedures to be used, depending on which scope of review it followed. The order stated that, because Hubbard indicated that there were additional matters or records that should be added to the record, the parties could stipulate to additional evidence that would make the record complete and that an aggrieved party could make a motion to supplement the record. No motions were made regarding the taking of further evidence.

On August 14, 1980, the district court issued an order limiting the scope of review to the record, quashing Hubbard's subpoenas to depose members of the Commission and Council and directing briefs to be filed on the facts with specific references to the record concerning the sufficiency of the evidence for the denial of the application.

On January 28, 1981, the district court issued findings of fact, conclusions of law and order for judgment concluding that Afton's action in denying appellants' application was not arbitrary, capricious or unreasonable and was not unlawful; that appellants were not entitled to the permits requested; that there was no unconstitutional ***761** taking of appellants' property; that respondents did not violate the open-meeting law; and that Afton was not entitled to judgment for additional expenses incurred in processing plaintiffs' application. Plaintiffs appealed from the order denying their motion for a new trial.

This appeal raises the following issues:

1. Whether appellants are entitled, under the facts of this case, to a trial de novo or to a supplementary evidentiary hearing in district court.

2. Whether there are legally sufficient reasons with a factual basis in the record to support the City of Afton's denial of Hubbard's special-use permit application; and, if so, whether the denial was invalid because of an alleged open-meeting law violation.

3. Whether the City of Afton's action regarding Hubbard's building permit application for a satellite station with a 45-foot antenna was lawful.

4. Whether the City of Afton's denial of the permits sought by Hubbard constituted a taking of the Froehner's property without just compensation.

[1] 1. Appellants contended in the court below and initially on appeal to this court that they were entitled to a trial de novo or an evidentiary hearing on all issues before the district court. After we requested supplementary briefs on the nature and scope of review in light of our decision in *Honn v. City of Coon Rapids*, 313 N.W.2d 409 (Minn.1981), appellants basically reversed themselves and considered such a hearing as to the permit denial to be of "marginal" value. We agree. The very clear and complete record developed before the Commission and Council, [2] as well as the district court's June 4, 1980, order allowing plaintiffs to augment the record by stipulation or by motion, "permitted the parties to present their respective

positions fully" to the district court.[3] *Id.* at 418. The district court properly conducted the review of the permit denials on the record.

Whether an evidentiary hearing was properly denied on the constitutional issue, however, is less clear. Citing *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn.1980), the district court noted that the right to use property as one wishes is subject to, and limited by, the proper exercise of the police power in the regulation of land use and that such regulation does not constitute a compensable taking unless it deprives the property of all reasonable use.

Ordinarily an evidentiary hearing is for the purpose of determining whether the denial of a special-use permit has deprived the owner of the property in question of all reasonable use. *McShane*, 292 N.W.2d at 257; *see Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

Appellants, in their complaint, sought issuance of a special-use permit or, in the alternative, damages suffered because of the unconstitutional taking of property without compensation. Appellants, in their June 2, 1980, motion for summary judgment that the permit sought be issued, raised the issue of the district court's scope of review. They argued that discovery should be permitted and that the trial court should admit additional evidence on the issue of the permit. At that time, their memorandum to the court reveals, they expected that if no further evidence could be admitted on that issue, they would be afforded the opportunity to present evidence on the constitutional issue. Respondent, also, in its memorandum in support of its motion for partial summary judgment, urged that the court decide the validity of the denial of the permits on the record and "[t]hereafter, * * * try the Plaintiffs' allegation ***762** that the Defendant's actions were unconstitutional."

[2] While the district court did not bifurcate the proceedings pursuant to Minn.R.Civ.P. 42.02, such bifurcation would be unnecessary if a review of the permit issue was on the record with a trial only on the constitutional issue. The district court stated in its June 4, 1980, order that it would decide the question of scope of review and, until such decision was made, permit the augmentation of the record by stipulation or motion. Logically, appellants would not waive their right to add to the record on the constitutional issue prior to the district court's decision regarding scope of review because, if a trial were to be conducted, no stipulation or motion would be necessary.

On August 14, 1980, the district court ordered that review of the permit denial would be on the record and that the parties were to "file briefs on the facts with specific reference to the record concerning the sufficiency of the evidence denying the application." Appellants' efforts to conduct further discovery were also terminated. No mention was made of the constitutional issue in this order or in the subsequent briefs of the parties. The parties made no effort on the record to clarify the court's order or procedure.

In January 1981, however, when the court invited both parties to submit proposed findings of fact and conclusions of law, both parties did so, and both parties submitted proposed findings and conclusions on the taking issue. We conclude that at this point both parties acquiesced in the court's determining both issues on the record.

2. We consider next whether there is a legally and factually sufficient basis in the record to support the City of Afton's denial of Hubbard's special-use permit application.

The actions of the Council were taken pursuant to a comprehensive municipal plan (plan) adopted in 1975 and a zoning ordinance (ordinance) enacted the same year to implement the development standards of the plan. The plan states goals, policies and standards to guide land use and directly expresses the intention to preserve and enhance the low-density residential-agricultural character of the community and its scenic beauty. Community Policy 5 in the plan provides:

> To the extent feasible and practicable, the following physical features of the City shall be preserved in a natural state and be properly maintained as such:
>
> a) Swamps and other low, wet areas.
>
> b) Lakes, streams, and ponds in an unpolluted state.
>
> c) Drainageways and other features of the surface water drainage pattern.
>
> d) Tree cover.

e) Wildlife areas.

f) “Protection” areas.

Policy 16 provides that “[n]on-residential development will be encouraged to locate adjacent to Highway 12 and within the ‘Old Village’ as parts of an integrated commercial development. Strip and spot commercial development will be strongly opposed.”

Appellants' lands are located within an area designated by the plan-map for agriculture-low-density residential development. In addition, the land use plan-map classifies the Bissell's Mound as being in a general “protection-open space” area.

The 17 acres involved are within the district zoned agricultural, and the area that includes the Bissell's Mound is designated as a “conservancy” district. The express purpose of the conservancy district is to “manage areas unsuitable for development due to wet soils, steep slopes, or large areas of exposed bedrock; and [to] manage areas of unique natural and biological characteristics in accordance with compatible uses.” Afton, Minn., Zoning Ordinance § 613.01 (1975).

The permitted and special uses allowed in the conservancy district are the same as those in the agricultural district. The ordinance, in section 604, lists the following as special uses in an agricultural district: “Antennae or Towers over 45# in Height”; “Essential Services-Transmission services, buildings and enclosed storage”; and “Utility Substations.” The following are not permitted ***763** uses in agricultural districts by the ordinance: “Broadcasting Studios” and “Offices.” “Office Uses” are defined to include “radio broadcasting, and similar uses.” *Id.*, § 302.01 (116).

Section 506.01 of the ordinance specifies the standards which must be considered in granting a special-use permit:

> The Afton City Council may grant a special use permit in any district, provided the proposed use is listed as a special use for the district in Section 6. In granting a special use permit, the City Council shall consider the effect of the proposed use upon the health, safety, morals, convenience, and general welfare of the occupants of surrounding lands, existing and anticipated traffic conditions including parking facilities on adjacent streets and land, the effect on utility and school capacities, the effect on property values and scenic views in the surrounding area, and the effect of the proposed use on the Comprehensive Plan. If it shall determine that the proposed use will not be detrimental to the health, safety, convenience, morals, or general welfare of the County, nor will cause serious traffic congestion nor hazards, nor will seriously depreciate surrounding property values, and that said use is in harmony with the general purpose and intent of this Ordinance and the Comprehensive Plan, the City Council may grant such special use permit.

The relationship between the ordinance and the plan is further clarified in section 421.03 of the ordinance, which provides: “In granting any rezoning, special use permit, variance, or other permit as provided for in this Ordinance, the Planning Advisory Commission shall find that the proposed development is in substantial compliance with the policy, goals, standards, and plans as contained in the Comprehensive Plan for the area.”

[3] **[4]** Special-use permits may be denied for reasons relating to public health, safety and general welfare or because of incompatibility between the proposed use and a municipality's comprehensive municipal plan. *C. R. Investments, Inc. v. Village of Shoreview*, 304 N.W.2d 320, 324 (Minn.1981). In our review we focus on the decision of Afton's City Council, *id.* at 325, noting that appellants bear the burden of persuasion that the reasons stated by the Council for denial of the permit are either without factual support in the record or are legally insufficient. *Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712, 717 (Minn.1978).

The Council stated eight specific reasons for denying the special-use permit. We find the reasons discussed below

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to be legally sufficient and to have a factual basis in the record.

[5] The Council denied the special-use permit in the first instance because it "does not conform to the overall intent of the Comprehensive Plan." In *Barton*, we stated that "[a] municipality may weigh whether the proposed use is consistent with its land-use plan in deciding whether to grant a special-use permit," and noted that the Afton Comprehensive Plan "is * * * permeated with evidence of a strong desire to preserve the rural character and unique scenic beauty of Afton and the St. Croix Valley." 286 N.W.2d at 717. On the facts of this case, the Council's determination that the satellite station located at the base and on top of the Bissell's Mound would be inconsistent with the plan had evidentiary support and was within the bounds of the Council's informed discretion in interpreting the plan. Afton's determination that the Hubbard proposal was inconsistent with its comprehensive plan was a legally sufficient reason for denial of a special-use permit.

The Council's next stated reasons were that the satellite station "does not fit with the nature of the uses in the particular area" and "is a commercial use in a zoned agricultural area which is not permitted in [Afton's] ordinance."

[6] The satellite station is a commercial use which is not a permitted use in the agricultural district or allowed by issuance of a special-use permit. Hubbard contended ***764** that the use was "special" and could not be categorized as commercial because there would be no regular employees, traffic congestion, noise or litter. However, billboards have the same passive characteristics but have been deemed to be commercial for zoning purposes. *Naegele Outdoor Advertising Co. v. Village of Minnetonka*, 281 Minn. 492, 499, 162 N.W.2d 206, 212 (1968). And, in *Village of St. Louis Park v. Casey*, 218 Minn. 394, 397-98, 16 N.W.2d 459, 460-61 (1944), we looked to see to what use an antenna was put in determining whether the use was "business." Here, Hubbard is a profit-seeking business, and the satellite station is a part of a commercial enterprise and would be taxed as a commercial use. Afton's determination that the satellite station is a commercial use and one which does not fit the nature of an area zoned agricultural and, therefore, not a permitted use is a legally sufficient reason supported by the record.

[7] **[8]** **[9]** Hubbard contends that, even if the satellite station is commercial, denying the permit results in inconsistent and unequal treatment under the ordinance because other commercial uses are allowed within the agricultural low-density district: airport, utilities, commercial animal-training, commercial feed lots, animal kennels, nursery and garden supply and recreation equipment sales. These uses are agricultural-related uses except for the airport and utilities, which have the power of condemnation, a power which overrides local zoning. Hubbard cites *Northwestern College v. City of Arden Hills*, 281 N.W.2d 865 (Minn.1979) for the proposition that applicants must be uniformly treated. It is true that applicants must be treated uniformly, but *Northwestern College* deals with the application of an ordinance to two applicants wishing to make the same use of property and not to a determination as to whether a particular use-one which is not an agricultural use-is compatible with the nature of uses in an area zoned agricultural. Municipalities have a great deal of discretion in classifying districts, *Honn*, 313 N.W.2d at 417, and those uses permitted in the agricultural district are rationally related to serving the purposes articulated by the comprehensive plan.

Another reason the Council gave for denying the special-use permit was that the satellite station "does not fit the conservancy district requirements." The purpose of the conservancy district is to "manage areas unsuitable for development * * * and * * * areas of unique natural and biological characteristics in accordance with compatible uses." Afton, Minn. Zoning Ordinance § 613.01. All uses permitted in the agricultural use district are permitted in the conservancy district as well. Failure of the satellite station to fit the nature of the uses in the agricultural district also means that such a use does not fit the conservancy district.

[10] The Council also stated that the satellite station would "impact[ ] on the general welfare of the community by reason of the impact on the property values of the area." In *Barton*, testimony of an experienced real estate broker that gravel mining would have an adverse effect on the value of surrounding property provided a factual basis for part of the Council's legally sufficient determination with regard to the welfare of the surrounding landowners. 268 N.W.2d at 718. Here, there was conflicting testimony. Hubbard's real estate agent testified that there would be no adverse impact on property values. Two real estate agents

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who practice in the area presented evidence. One testified that there would be an adverse impact on property values, and the other submitted by letter his opinion that property values would be reduced by construction of the tower. Such testimony provides a factual basis to support Afton's legally sufficient determination with regard to the general welfare of the community.

[11] **[12]** **[13]** The Council found that the satellite station would have an "adverse environmental impact" and "that geologists report that the Bissell Mounds are geologically rare." Testimony and evidence presented regarding these two reasons focused on potential health problems due to microwave ***765** transmissions and the impact of the satellite station on the Bissell's Mound and resulting aesthetic impact on the community. There is insufficient evidence to establish that the satellite station would have an adverse environmental impact due to microwave transmissions, but there is ample evidence that the Bissell's Mound is a geologically rare formation and is of aesthetic value to the community. While such environmental characteristics may not in and of themselves provide a legally sufficient reason to deny a special-use permit, they are factors which may be considered, as the district court noted, in the context of the comprehensive plan and conservancy district purposes.

[14] We hold that appellants have not met their burden of showing that the Council's action was taken without legally sufficient reasons with factual support in the record. [4]

Appellants contend that a violation of the open meeting law, Minn.Stat. § 471.705 (1980), [5] deprived them of their rights to be fully informed of discussions that were crucial to their permit applications and demonstrated the arbitrariness of Afton's denial of the special-use permit. By answer to interrogatories, Council member M. A. Cournoyer stated that he had discussed Hubbard's applications with a Commission member after the September 11, 1979, Commission meeting and with a Council member over lunch between the October 3, 1979, and October 17, 1979, Council meetings.

Appellants seek invalidation of the Council's action due to the discussion between two Council members over lunch of Hubbard's application. Minn.Stat. § 471.705, subd. 2 (1980) provides statutory penalties in the form of fines or removal from office for any violation of the open meeting law. In *Sullivan v. Credit River Township*, 299 Minn. 170, 217 N.W.2d 502 (1974), a case instituted prior to the adoption of the above statutory penalties, we noted that the statute neither provided for enforcement nor "specif[ied] that action taken at a meeting which is not public [should] be invalid." *Id.* at 176, 217 N.W.2d at 507. In the present case, we are not concerned with a meeting where action was taken, only with one where discussion occurred, and note that "deliberation cannot be nullified." Note, *The Minnesota Open Meeting Law after Twenty Years-A Second Look*, 5 Wm. Mitchell L.Rev. 375, 417 (1979).

[15] The attorney general has expressed the opinion that conversations between members of two separate government bodies do not constitute a meeting for purposes of the open meeting law. Op.Atty.Gen. 471-e (May 23, 1978). In *Minnesota Education Association v. Bennett*, 321 N.W.2d 395 (Minn., 1982), we stated that "it is the power to decide, as opposed to the right to recommend, that determines whether one is a member of a governing body." At 397. Therefore, the conversation between Cournoyer and the Commission member does not constitute an open meeting law violation.

The extensive procedural requirements established in connection with the review of municipal actions regarding special-use permits and the extremely clear and complete record in this case have ensured free and open discussion, deliberations and informed public decision-making. Like the zoning review situation in *Einarsen v. City of Wheat Ridge*, 43 Colo.App. 232, 604 P.2d 691 (1979), all evidence was presented and all actions were taken at public meetings. No open meeting law violation was found in *Einarsen*, and we conclude that none occurred here.

3. Hubbard next argues that Afton's refusal to issue a building permit for a satellite station was unlawful. After being denied ***766** a special-use permit, Hubbard modified its plans by reducing the height of the tower to 45 feet. Hubbard contends that such a tower is a permitted use and argues that Afton was arbitrary and capricious in denying the issuance of the building permit.

Afton's zoning administrator informed Hubbard that the proposed use was a "broadcasting studio; essential-transmission services, building and enclosed storage; manufacturing, limited; offices; storage, enclosed principal use; utility substation," and that the following

permits would be required prior to issuance of a building permit: special-use, conditional-use, driveway and grading. While the ordinance does not have a classification of "satellite station," the nature of the use is similar to those listed above, which are either not permitted or require the issuance of a special-use permit.

[16] As to the type of use proposed, we do not agree with Hubbard's contention that the height of its tower is determinative. Rather the Council properly looked to the nature of the entire complex, which includes the antenna, a satellite receiving dish and equipment building. We have upheld Afton's denial of a special-use permit for reasons articulated by the Council. We also find that the city acted reasonably in refusing to issue a building permit for an identical satellite station which differs only in that the tower is shorter. The use remains commercial and is not permitted in the area which is zoned agricultural.

[17] 4. Finally, we consider whether Afton's refusal to issue special-use permits constitutes a taking of the Froehner's property without just compensation. Regulation through zoning ordinances "does not constitute a compensable taking unless it deprives the property of all reasonable use." *McShane*, 292 N.W.2d at 257, citing *Euclid*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303. The district court concluded from the record that the property could be used for agricultural and residential uses and, therefore, that appellants had failed to show that they had been deprived of all reasonable use. We agree. The owners can continue to use most of the land for agricultural purposes as at present, and it is clear from the record that, under the subdivision ordinances of the City of Afton, the Mound itself could be used to fulfill the open-space requirement for subdivision development. The posture of this case is that only one functional use of the land has been denied. It is purely speculative to conclude that the appellants have been denied all reasonable use of the land that comprises the Mound. Only under rare circumstances can we conceive of a special-use permit denial resulting in an unconstitutional taking.

At oral argument appellants cited *Kraft v. Malone*, 313 N.W.2d 758 (N.Dak.1981), where the North Dakota court found that a constructive denial of a building permit resulted in a taking. Kraft is distinguishable because the property involved was an urban lot and, absent the right to construct a building, the court concluded that there would be no reasonable use of the land. Here, a denial of the permits necessary to build a satellite station does not foreclose other reasonable uses of this property. We hold that denial of the special-use permits did not constitute a taking of the property without just compensation and affirm the judgment of the district court.

Affirmed.

PETERSON, Justice (concurring in part; dissenting in part).
I concur in the opinion of the court in all respects except its affirmance of the denial of a building permit for the establishment of a tower 45 feet in height, for I believe this is clearly authorized by section 407.16(6) of the zoning ordinance. That section places a height limitation of 45 feet on "transmission towers of commercial and private radio broadcasting stations, [and] television antennae." Section 604 requires the issuance of a special-use permit only if towers over 45 feet in height are to be constructed in an agricultural district. Read together, these two sections of the ordinance imply that towers less than 45 feet are permitted uses in an agricultural district. ***767** To conclude otherwise results in an absurd situation where towers of 45 feet are specially permitted uses, but towers less than 45 feet are not permitted at all. (As the majority opinion notes, all uses permitted in the agricultural use district are permitted in the conservancy district as well.) I would accordingly order the issuance of a building permit for a tower of that height pursuant to Hubbard's amended application.

TODD, Justice (dissenting).
I join in the dissent of Justice Peterson.

YETKA, Justice (dissenting).
I join in the dissent of Justice Peterson.

All Citations

323 N.W.2d 757

Footnotes

1 The Bissell's Mound is a hill that remains at the end of a long history of erosion. There are several in Afton, and each consists of St. Peter sandstone with an overlying Platteville cap rock extending approximately 60 feet above the surface of the surrounding land. The Mounds are unique in Afton because there are no other hills with similar features. They are geologically rare in Washington County and the State of Minnesota.

2 *Cf. Town of Grant v. Washington County*, 319 N.W.2d 713 (Minn.1982).

3 Where "city councils and zoning boards do not * * * make records of their proceedings as complete and as formal as those of a state administrative agency or commission," the proper procedure for review before the district court provides that "[n]ew or additional evidence *may* be received at the trial." *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 415-16 (Minn.1981) (emphasis added).

4 Not all of the reasons stated need be legally sufficient and supported by facts in the record. *See Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712 (Minn.1978).

5 Minn.Stat. § 471.705, subd. 1 (1980) provides in pertinent part:

> Except as otherwise expressly provided by statute, all meetings, including executive sessions, of * * * the governing body of any * * * city * * * and of any committee, subcommittee, board, department or commission thereof, shall be open to the public.

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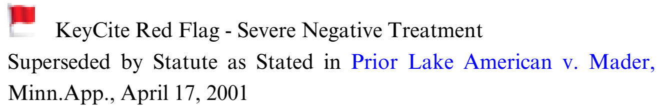
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Superseded by Statute as Stated in Prior Lake American v. Mader, Minn.App., April 17, 2001

435 N.W.2d 64
Court of Appeals of Minnesota.

NORTHWEST PUBLICATIONS, INC., Petitioner, Respondent,
v.
CITY OF SAINT PAUL, et al., Appellants.

No. C2-88-1474.
|
Jan. 17, 1989.
|
Review Denied March 29, 1989.

Publisher sued city to compel opening of a scheduled closed meeting to the public. The District Court, Ramsey County, James M. Campbell, J., granted petition, and city appealed. The Court of Appeals, Norton, J., held that: (1) attorney-client privilege exception to state open-meeting law did not apply where legal advice at meeting in question would be directed at strengths and weaknesses of proposed changes to nude-dancing ordinance, with avoidance of potential litigation a factor, but the advice would not be directed towards strategy on specific litigation, and (2) even if privileged matter were to be discussed, city would have to demonstrate need for confidentiality outweighed public right of access to public affairs before meeting could be closed.

Affirmed.

West Headnotes (3)

[1]
Municipal Corporations
Rules of Procedure and Conduct of Business

Attorney-client privilege did not apply to permit city council to hold closed session on proposed changes to nude-dancing ordinance, despite claim that meeting was planned to avoid potential litigation. M.S.A. § 471.705, subd. 1; U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[2]
Municipal Corporations
Rules of Procedure and Conduct of Business

Attorney-client privilege exception to open-meeting law did not apply to permit a closed session on proposed changes to nude-dancing ordinance, where meeting would involve general legal advice on strengths and weaknesses of ordinance which might give rise to future litigation, as opposed to strategy relating to existing litigation. M.S.A. § 471.705, subd. 1; U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[3]
Municipal Corporations
Rules of Procedure and Conduct of Business

City council could not close meeting regarding proposed changes to nude-dancing ordinance, absent demonstration that need for confidentiality outweighed public's right of access to public affairs, despite risk of future litigation. M.S.A. § 471.705, subd. 1; U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

***65** *Syllabus by the Court*

1. The trial court correctly determined that the attorney-client privilege exception to the open meeting law did not apply to the city council's scheduled meeting.

2. A governing body which seeks to close a public meeting must demonstrate that the need for confidentiality outweighs the public's right of access to public affairs.

Attorneys and Law Firms

Michael J. Vanselow, Oppenheimer, Wolff & Donnelly, St. Paul, for respondent.

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Edward P. Starr, City Atty., Philip B. Byrne, Asst. City Atty., St. Paul, for appellants.

Patricia Hirl Longstaff, Associate Gen. Counsel, Star Tribune, Mark Anfinson, Minnesota Newspaper Assn., Minneapolis, for amicus curiae.

Heard, considered and decided by FOLEY, P.J., and NORTON and FLEMING [*], JJ.

OPINION

NORTON, Judge.

The City of St. Paul and the St. Paul City Council appeal from a preemptory writ of mandamus ordering that a city council meeting for discussion of proposed city ordinance amendments be open to the public. We affirm.

FACTS

For several months the St. Paul City Council had been considering proposed changes in city ordinances relative to on-sale liquor establishments and nude dancing. The proposed amendments intend to prevent liquor establishment patrons from viewing nude dancers through glass partitions which separate the liquor establishment from adjacent unlicensed premises.

The proposed amendments have undergone several changes during the hearing process. Some suggested changes have been controversial. One proposal would require license applicants to obtain the support of 60% of the property owners within 200 feet of the liquor establishment before the city council would consider the license applications. Attorneys for four affected businesses have submitted briefs to the city council in opposition to the proposed amendments.

On June 7, 1988, the city council scheduled a closed meeting for June 14, 1988. According to Assistant St. Paul City Attorney Philip Byrne the purpose of the meeting was to discuss threatened litigation over the proposed ordinances, including the strengths and weaknesses of the positions and issues involved.

On June 13, 1988, respondent brought a petition for a writ of mandamus. Respondent sought an order directing the city council to open the June 14 meeting to the public. The trial court heard arguments on the petition on the 13th, and issued its memorandum and order for a peremptory writ of mandamus later that day. The order directed the city council to open the scheduled meeting to the public. The city council did not hold a closed session on June 14, 1988.

On appeal, appellants contend that because litigation is threatened, the city council was entitled to close its meeting under the attorney-client privilege exception to the Minnesota Open Meeting Law.

The trial court stated that litigation over the proposed amendments was "a virtual certainty." The court determined, however, ***66** that the advice the city attorney sought to give the council was general legal advice. Accordingly, the court determined that the proposed discussions were not subject to the attorney-client privilege. The trial court further stated that even if privileged matters were to be discussed, the city must demonstrate that the need for confidentiality outweighed the right of the public to have access to public affairs. The city failed to make such a showing. The trial court concluded that in this case the need for confidentiality was outweighed by the public's right of access.

ISSUES

I. Did the trial court err in determining that the attorney-client privilege exception to the open meeting law did not apply?

II. Must a governing body demonstrate that the need for confidentiality outweighs the public's right of access in order to hold a closed meeting?

ANALYSIS

Standard of Review

A trial court's order in a mandamus case will be reversed only where there is no evidence reasonably tending to sustain its finding. *Tyo v. Ilse,* 380 N.W.2d 895, 897

(Minn.Ct.App.1986) (citing *State ex rel. Banner Grain Co. v. Houghton,* 142 Minn. 28, 30, 170 N.W. 853, 853 (1919)). In deciding issues of law, the appellate court is not bound by the trial court's conclusions. *A.J. Chromy Construction Co. v. Commercial Mechanical Services, Inc.,* 260 N.W.2d 579, 582 (Minn.1977). A reviewing court, however, is bound to accept the trial court's conclusions of law based on findings that are not clearly erroneous. *In re Estate of Hoffbeck,* 415 N.W.2d 447, 449 (Minn.Ct.App.1987), *pet. for rev. denied* (Minn. Jan. 28, 1988).

I.

The Minnesota Open Meeting Law provides in part that:

> Except as otherwise expressly provided by statute, all meetings, including executive sessions, of any state agency, board, commission or department when required or permitted by law to transact public business in a meeting, and the governing body of any school district however organized, unorganized territory, county, city, town, or other public body, and of any committee, subcommittee, board, department or commission thereof, shall be open to the public, * * *

Minn.Stat. § 471.705, subd. 1 (1986).

The Minnesota Supreme Court has identified the purposes of the Minnesota Open Meeting Law as (1) "to prohibit actions being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning * * * decisions or to detect improper influences," *Lindahl v. Independent School District No. 306,* 270 Minn. 164, 167, 133 N.W.2d 23, 26 (1965); (2) "to assure the public's right to be informed," *Channel 10, Inc. v. Independent School District No. 709,* 298 Minn. 306, 313, 215 N.W.2d 814, 821 (1974); and (3) "to afford the public an opportunity to present its views" in matters of public concern, *Sullivan v. Credit River Township,* 299 Minn. 170, 175, 217 N.W.2d 502, 506-07 (1974).

The Open Meeting Law is to be liberally construed in order to protect the public's right to full access to the decision-making process of public bodies. *St. Cloud Newspapers v. District 742 Community Schools,* 332 N.W.2d 1, 6 (Minn.1983).

A limited exception to the Open Meeting Law exists for attorney-client meetings. *Minneapolis Star & Tribune Co. v. Housing & Redevelopment Authority,* 310 Minn. 313, 251 N.W.2d 620 (1976) (*HRA*). The court in *HRA* held that the Open Meeting Law did not require that a meeting between an agency and its counsel be open to the public where the meeting was for the purpose of discussing litigation strategy. In *HRA,* the housing authority had been sued and was involved in immediate, active litigation.

While the attorney-client privilege exception is operable to implement the confidentiality of the attorney-client relationship, the exception will almost never extend to the mere request for general legal advice ***67** or opinion. *Id.* at 323-24, 251 N.W.2d at 626. Application of the exception as a barrier against public access to public affairs will not be tolerated. *Id.* at 324, 251 N.W.2d at 626.

[1] Appellants claim that the trial court erred by failing to allow a closed meeting under the attorney-client exception to the Open Meeting Law. Appellants argue that a closed meeting should be permitted when a governing body seeks to avoid potential litigation. Appellants rely on *Sutter Sensible Planning, Inc. v. Sutter County Board of Supervisors,* 122 Cal.App.3d 813, 176 Cal.Rptr. 342 (1981). In *Sutter,* the county board held a closed session to discuss an environmental impact statement opposed by a community group. The court approved the meeting under circumstances where the board reasonably inferred the threat of litigation.

We decline to adopt the reasoning of the California court. It is not clear that closure of public meetings reduces the risk of future litigation. In *Sutter,* litigation ensued despite the county board's closed session. In some situations, the only feasible way to avoid litigation may be to abandon enactment of controversial proposals. The decision whether to adopt or abandon a proposal, however, is just the sort of decision which should be made openly.

Moreover, we believe that *Sutter* is inconsistent with the purposes of the Minnesota Open Meeting Law. The Open Meeting Law states that "all meetings * * * shall be open to the public." Minn.Stat. § 471.705, subd. 1. The statutory language evidences a presumption of openness.

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St. Cloud Newspapers, 332 N.W.2d at 5. The Minnesota Supreme Court has stated that the legislature intended that all meetings of public agencies be open, with "rare and carefully restrained exception." *Id.*

[2] Appellants further contend that the trial court erred by characterizing the advice sought to be given by the city attorney as "general legal advice." The trial court found that the purpose of the scheduled closed meeting was to discuss strengths and weaknesses of the proposed amendments, positions likely to be taken by potential litigants, and the chances of prevailing in future litigation. The trial court reasoned that advising governmental bodies of the constitutionality of proposed enactments and the likelihood of success in the event of a future challenge is basic legal advice common to the deliberative process of any public body. Consequently, the trial court concluded that the attorney-client privilege exception did not apply to the discussions at issue. We agree. The attorney-client exception properly applies when a governing body seeks legal advice concerning litigation strategy. The privilege is not available, however, when a governing body seeks instead to discuss the strengths and weaknesses of the underlying proposed enactment which may give rise to future litigation.

II.

[3] The trial court determined that even if privileged matters were to be discussed, it would be incumbent on the city to demonstrate that the need for confidentiality outweighs the right of the public to have access to public affairs. Appellants contend that when litigation is pending or threatened, no showing of the need for confidentiality is required. We do not disagree with the trial court's interpretation of *HRA* to require a demonstration of the need for confidentiality.

The attorney-client exception will be upheld "if the balancing of [the] conflicting public policies dictates the need for absolute confidentiality." *HRA,* 310 Minn. at 324, 251 N.W.2d at 626. The court in *HRA* sanctioned a closed meeting only after a thorough consideration of the record, which disclosed that members of the agency were involved in active litigation in their capacities as members of a public agency. The court based application of the attorney-client privilege exception on an assessment of specific facts and not only on the existence of litigation. We believe that the court contemplated a balancing of interests when a public body seeks to hold a closed meeting. The public body must demonstrate that a legitimate need for confidentiality ***68** requires closure. Many actions considered by public bodies may pose a risk of future litigation. Sensitive or controversial issues are especially likely to face opposition. These very issues, however, require public participation in the decision-making process. A showing by the governing body that the need for confidentiality outweighs the public's right of access is a reasonable protection of the public interest.

In the present case, the trial court determined that no such need for confidentiality justified closure of the scheduled meeting. The trial court impliedly recognized that this case did not present the specific facts of *HRA.* Considering the high standard of review in a mandamus case, we cannot say that the trial court erred in ordering the scheduled city council meeting be opened to the public. To agree with appellants has the potential for a creeping expansion of the attorney-client privilege exception. The strong Minnesota policy in favor of openness, as well as important First Amendment overtones in the Open Meeting Law, require that exceptions to this law be narrowly construed.

DECISION

The trial court correctly determined that the attorney-client privilege exception to the open meeting law was inapplicable. The trial court was also correct in concluding that a governing body which seeks to close a public meeting must demonstrate that the need for confidentiality outweighs the public's right of access to public affairs.

AFFIRMED.

All Citations

435 N.W.2d 64, 16 Media L. Rep. 1292

Footnotes

* Acting as judge of the Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 2.

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Declined to Extend by United States v. Christie, 9th Cir.(Hawai'i), June 14, 2016

87 S.Ct. 675
Supreme Court of the United States

Harry KEYISHIAN et al., Appellants,
v.
The BOARD OF REGENTS OF the UNIVERSITY OF the STATE OF NEW YORK et al.

No. 105.
|
Argued Nov. 17, 1966.
|
Decided Jan. 23, 1967.

Action by members of faculty of university for declaratory and injunctive relief that New York plan, formulated partly in statutes and partly in administrative regulations, which state utilized to prevent appointment or retention of subversive employees in state employment, violated Federal Constitution. A three-judge United States District Court for the Western District of New York, 255 F.Supp. 981, entered judgment holding that plan was constitutional and probable jurisdiction of appeal was noted. The Supreme Court, Mr. Justice Brennan, held, inter alia, that New York statutory provisions making treasonable or seditious words or acts grounds for removal from public school system or state employment, barring from employment in public schools any person willfully advocating or teaching doctrine of forcible overthrow of government and disqualifying public school employee involved with distribution of written matter advocating or teaching doctrine of forcible overthrow and who himself advocates, teaches or embraces duty or propriety of adopting doctrine, all as implemented by statute relating to administrative procedures concerning persons violating those statutes are unconstitutionally vague and violate First Amendment.

Reversed and remanded.

Mr. Justice Clark, Mr. Justice Harlan, Mr. Justice Stewart and Mr. Justice White dissented.

West Headnotes (13)

[1] **Federal Courts**
Review of federal district courts

Action of New York education officials in rescinding requirement that teachers sign certificate to the effect that they were not Communists and if they had been they had so informed education official and providing instead that each applicant be informed that state statutes relating to disqualification of employees who advocate overthrow of government by force or unlawful means and making treasonable or seditious words or acts grounds for dismissal were part of teaching contract did not render moot constitutional questions raised by state university employees threatened with discharge because of their refusal to sign certificates. Education Law N.Y. §§ 3021, 3022; Civil Service Law N.Y. § 105.

54 Cases that cite this headnote

[2] **Constitutional Law**
Vagueness in General

Dangers fatal to First Amendment freedoms inhere in the word “seditious”, and the word “treasonable”, if left undefined, is no less dangerously uncertain. U.S.C.A.Const. Amend. 1.

34 Cases that cite this headnote

[3] **Education**
Protected activities in general
Public Employment
Protected activities

It is no answer of constitutional question raised by statute which might render a teacher carrying a copy of the Communist Manifesto on a public street an advocate of criminal anarchy in violation of state penal law to say that the statute would not be applied in such case, since court cannot gainsay potential effect of obscure wording on those with a

conscientious and scrupulous regard for such undertakings. Penal Law N.Y. §§ 160, 161; Civil Service Law N.Y. § 105 and subd. 3; Education Law N.Y. § 3021.

25 Cases that cite this headnote

[4] **Federal Courts**
Determination and Disposition of Cause

Although United States Supreme Court did not have benefit of judicial gloss by New York courts on the scope of statutes relating to employment of subversives in public school system and other state employees and statute providing administrative machinery for the enforcement thereof, abstention pending state court interpretation would be inappropriate in action by university teachers raising constitutional questions concerning those statutes. Education Law N.Y. §§ 3021, 3022; Civil Service Law N.Y. § 105.

7 Cases that cite this headnote

[5] **Constitutional Law**
Education

Although there can be no doubt of legitimacy of New York's interest in protecting its education system from subversion, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. U.S.C.A.Const. Amend. 1.

36 Cases that cite this headnote

[6] **Constitutional Law**
Academic freedom

Our nation is deeply committed to safeguarding academic freedom which is of transcendent value to all and not merely to the teachers concerned, and that freedom is therefore a special concern of the First Amendment which does not tolerate laws that cast a pall of orthodoxy over the classroom. U.S.C.A.Const. Amend. 1.

204 Cases that cite this headnote

[7] **Constitutional Law**
Vagueness

Standards of permissible statutory vagueness are strict in the area of free expression since First Amendment freedoms need breathing space to survive, and government may regulate in area only with narrow specificity. U.S.C.A.Const. Amend. 1.

72 Cases that cite this headnote

[8] **Constitutional Law**
Employees

Danger of the chilling effect upon exercise of First Amendment rights which arise when one must guess what conduct or utterance may lose him his position must be guarded against by sensitive tools which clearly inform teachers what is being proscribed. U.S.C.A.Const. Amend. 1.

128 Cases that cite this headnote

[9] **Constitutional Law**
Education

Constitutional Law
Political speech, beliefs, or activities

Constitutional Law
Political speech, beliefs, or activity

Education
Eligibility and qualification

Public Employment
Particular cases and contexts in general

Public Employment
Prohibited practices and discrimination in general

States
Appointment or employment and tenure of agents and employees in general

New York statutory provisions making treasonable or seditious words or acts grounds for removal from public school system or state employment, barring from employment in public school system any person willfully advocating, or teaching doctrine of forcible overthrow of government

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and disqualifying public school employee who is involved with distribution of written matter advocating or teaching doctrine of forcible overthrow and who himself advocates, teaches or embraces duty or propriety of adopting doctrine, all as implemented by statute relating to administrative procedures concerning persons violating those statutes, are unconstitutionally vague and violate First Amendment. Education Law N.Y. §§ 3021, 3022; Civil Service Law N.Y. § 105, subds. 1(a, b), 3; U.S.C.A.Const. Amend. 1.

146 Cases that cite this headnote

[10] Public Employment
Grounds for and Propriety of Selection; Eligibility and Qualification

Principle that public employment, including academic employment, may be conditioned upon surrender of constitutional rights which could not be abridged by direct government action is no longer applicable. U.S.C.A.Const. Amend. 1.

130 Cases that cite this headnote

[11] Education
Eligibility and qualification
Public Employment
Prohibited practices and discrimination in general

Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion of persons from teaching positions in public school system.

7 Cases that cite this headnote

[12] Attorney and Client
Misconduct in other than professional capacity
Insurrection and Sedition
Offenses and prosecutions

Mere Communist Party membership, even with knowledge of party's unlawful goals, cannot suffice to justify criminal punishment or warrant a finding of moral unfitness justifying disbarment.

1 Cases that cite this headnote

[13] Education
Validity of statutes
Public Employment
Political beliefs or affiliation

Subsection of New York statute, related primarily to teacher activities, and subsection of statute, covering all state employees, which make membership in the Communist Party prima facie evidence of disqualification were constitutionally invalid insofar as they sanctioned mere knowing membership without any showing of specific intent to further the unlawful aims of Communist Party of United States or of State of New York. Civil Service Law N.Y. § 105, subd. 1(c); Education Law N.Y. § 3022, subd. 2.

12 Cases that cite this headnote

Attorneys and Law Firms

****677** ***591** Richard Lipsitz, Buffalo, N.Y., for appellants.

Ruth V. Iles and John C. Crary, Jr., Albany, N.Y., for appellees.

Opinion

Mr. Justice BRENNAN delivered the opinion of the Court.

Appellants were members of the faculty of the privately owned and operated University of Buffalo, and became state employees when the University was merged in 1962 into the State University of New York, an institution of higher education owned and operated by the State of New York. As faculty members of the State University their continued employment was conditioned upon their ****678** compliance with a New York plan, formulated ***592** partly in statutes and partly in administrative regulations,[1] which the State utilizes to prevent the

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appointment or retention of 'subversive' persons in state employment.

Appellants Hochfield and Maud were Assistant Professors of English, appellant Keyishian an instructor in English, and appellant Garver, a lecturer in Philosophy. Each of them refused to sign, as regulations then in effect required, a certificate that he was not a Communist, and that if he had ever been a Communist, he had communicated that fact to the President of the State University of New York. Each was notified that his failure to sign the certificate would require his dismissal. Keyishian's one-year-term contract was not renewed because of his failure to sign the certificate. Hochfield and Garver, whose contracts still had time to run, continue to teach, but subject to proceedings for their dismissal if the constitutionality of the New York plan is sustained. Maud has voluntarily resigned and therefore no longer has standing in this suit.

Appellant Starbuck was a nonfaculty library employee and part-time lecturer in English. Personnel in that classification were not required to sign a certificate but were required to answer in writing under oath the question, 'Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the Government of the United States or of any political subdivisions thereof should be overthrown or overturned by force, violence or any unlawful means?' Starbuck refused to answer the question and as a result was dismissed.

Appellants brought this action for declaratory and injunctive relief, alleging that the state program violated the Federal Constitution in various respects. A three- ***593** judge federal court held that the program was constitutional. 255 F.Supp. 981.[2] We noted probable jurisdiction of appellants' appeal, 384 U.S. 998, 86 S.Ct. 1921, 16 L.Ed.2d 1012. We reverse.

I.

We considered some aspects of the constitutionality of the New York plan 15 years ago in Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517. That litigation arose after New York passed the Feinberg Law which added s 3022 to the Education Law, McKinney's Consol. Laws, c. 16.[3] The Feinberg Law was enacted to implement and enforce two earlier statutes. The first was a 1917 law, now s 3021 of the Education Law, under which 'the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act' is a ground for dismissal from the public school system. The second was a 1939 law which was s 12—a of the Civil Service Law when Adler was decided and, as amended, is now s 105 of that law, McKinney's Consol.Laws, c. 7. This law disqualifies from the civil service and from employment in the educational system any person who advocates the overthrow of government by force, violence, or any unlawful means, or publishes material advocating such overthrow or organizes or joins any society or group of persons advocating such doctrine.

****679** The Feinberg Law charged the State Board of Regents with the duty of promulgating rules and regulations providing procedures for the disqualification or removal of persons in the public school system who violate the 1917 law or who are ineligible for appointment to or ***594** retention in the public school system under the 1939 law. The Board of Regents was further directed to make a list, after notice and hearing, of 'subversive' organizations, defined as organizations which advocate the doctrine of overthrow of government by force, violence, or any unlawful means. Finally, the Board was directed to provide in its rules and regulations that membership in any listed organization should constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the State.

The Board of Regents thereupon promulgated rules and regulations containing procedures to be followed by appointing authorities to discover persons ineligible for appointment or retention under the 1939 law, or because of violation of the 1917 law. The Board also announced its intention to list 'subversive' organizations after requisite notice and hearing, and provided that membership in a listed organization after the date of its listing should be regarded as constituting prima facie evidence of disqualification, and that membership prior to listing should be presumptive evidence that membership has continued, in the absence of a showing that such membership was terminated in good faith. Under the regulations, an appointing official is forbidden to make an appointment until after he has first inquired of an applicant's former employers and other persons to ascertain whether the applicant is disqualified or ineligible for appointment. In addition, an annual inquiry must be made to determine whether an appointed employee

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has ceased to be qualified for retention, and a report of findings must be filed.

Adler was a declaratory judgment suit in which the Court held, in effect, that there was no constitutional infirmity in former s 12-a or in the Feinberg Law on their faces and that they were capable of constitutional application. But the contention urged in this case that ***595** both s 3021 and s 105 are unconstitutionally vague was not heard or decided. Section 3021 of the Education Law was challenged in Adler as unconstitutionally vague, but because the challenge had not been made in the pleadings or in the proceedings in the lower courts, this Court refused to consider it. 342 U.S., at 496, 72 S.Ct., at 386. Nor was any challenge on grounds of vagueness made in Adler as to subdivisions 1(a) and (b) of s 105 of the Civil Service Law. [4] Subdivision 3 of s 105 was not added until 1958. Appellants in this case timely asserted below the unconstitutionality of all these sections on grounds of vagueness and that question is now properly before us for decision. Moreover, to the extent that Adler sustained the provision of the Feinberg Law constituting membership in an organization advocating forceful overthrow of government a ground for disqualification, pertinent constitutional doctrines have since rejected the premises upon which that conclusion rested. Adler is therefore not dispositive of the constitutional issues we must decide in this case.

II.

A 1953 amendment extended the application of the Feinberg Law to personnel of any college or other institution of higher education owned and operated by the State or its subdivisions. In the same year, the Board of Regents, after notice and hearing, listed the Communist Party of the United States and of the State of New York as 'subversive organizations.' ****680** In 1956 each applicant for an appointment or the renewal of an appointment was required to sign the so-called 'Feinberg Certificate' declaring that he had read the Regents Rules and understood that the Rules and the statutes ***596** constituted terms of employment, and declaring further that he was not a member of the Communist Party, and that if he had ever been a member he had communicated that fact to the President of the State University. This was the certificate that appellants Hochfield, Maud, Keyishian, and Garver refused to sign.

In June 1965, shortly before the trial of this case, the Feinberg Certificate was rescinded and it was announced that no person then employed would be deemed ineligible for continued employment 'solely' because he refused to sign the certificate. In lieu of the certificate, it was provided that each applicant be informed before assuming his duties that the statutes, ss 3021 and 3022 of the Education Law and s 105 of the Civil Service Law, constituted part of his contract. He was particularly to be informed of the disqualification which flowed from membership in a listed 'subversive' organization. The 1965 announcement further provides: 'Should any question arise in the course of such inquiry such candidate may request * * * a personal interview. Refusal of a candidate to answer any question relevant to such inquiry by such officer shall be sufficient ground to refuse to make or recommend appointment.' A brochure is also given new applicants. It outlines and explains briefly the legal effect of the statutes and invites any applicant who may have any question about possible disqualification to request an interview. The covering announcement concludes that 'a prospective appointee who does not believe himself disqualified need take no affirmative action. No disclaimer oath is required.'

[1] The change in procedure in no wise moots appellants' constitutional questions raised in the context of their refusal to sign the now abandoned Feinberg Certificate. The substance of the statutory and regulatory complex remains and from the outset appellants' basic claim has been that they are aggrieved by its application.

***597** III.

Section 3021 requires removal for 'treasonable or seditious' utterances or acts. The 1958 amendment to s 105 of the Civil Service Law, now subdivision 3 of that section, added such utterances or acts as a ground for removal under that law also. [5] The same wording is used in ****681** both statutes—that 'the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts' shall be ground for removal. But there is a vital difference between the two laws. Section 3021 does not define the terms 'treasonable or ***598** seditious' as used in that section; in contrast, subdivision 3 of s 105 of the Civil Service Law provides that the terms 'treasonable word or act' shall mean 'treason' as defined in the Penal Law and the terms 'seditious word or act' shall mean 'criminal anarchy' as defined in the Penal Law.

[2] Our experience under the Sedition Act of 1798, 1 Stat. 596, taught us that dangers fatal to First Amendment freedoms inhere in the word 'seditious.' See New York Times Co. v. Sullivan, 376 U.S. 254, 273—276, 84 S.Ct. 710, 722—724, 11 L.Ed.2d 686. And the word 'treasonable,' if left undefined, is no less dangerously uncertain. Thus it becomes important whether, despite the omission of a similar reference to the Penal Law in s 3021, the words as used in that section are to be read as meaning only what they mean in subdivision 3 of s 105. Or are they to be read more broadly and to constitute utterances or acts 'seditious' and 'treasonable' which would not be so regarded for the purposes of s 105?

[3] Even assuming that 'treasonable' and 'seditious' in s 3021 and s 105, subd. 3 have the same meaning, the uncertainty is hardly removed. The definition of 'treasonable' in the Penal Law presents no particular problem. The difficulty centers upon the meaning of 'seditious.' Subdivision 3 equates the term 'seditious' with 'criminal anarchy' as defined in the Penal Law. Is the reference only to Penal Law, McKinney's Consol.Laws c. 40, s 160, defining criminal anarchy as 'the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means'? But that section ends with the sentence 'The advocacy of such doctrine either by word of mouth or writing is a felony.' Does that sentence draw into s 105, Penal Law s 161, proscribing 'advocacy of criminal anarchy'? If so, the ***599** possible scope of 'seditious' utterances or acts has virtually no limit. For under Penal Law s 161, one commits the felony of advocating criminal anarchy if he '* * * publicly displays any book * * * containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means.'[6] Does the teacher who carries a copy of the Communist Manifesto on a public street thereby advocate criminal anarchy? It is no answer to say that the statute would not be applied in such a case. We cannot gainsay the potential effect of this obscure wording on 'those with a conscientious and scrupulous regard for such undertakings.' Baggett v. Bullitt, 377 U.S. 360, 374, 84 S.Ct. 1316, 1323, 12 L.Ed.2d 377. Even were it certain that the definition referred to in s 105 was solely Penal Law s 160, the scope of s 105 still remains indefinite. The teacher cannot know the extent, if any, to which a 'seditious' utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine. The crucial consideration is that no teacher can know just where the line is drawn between ****682** 'seditious' and nonseditious utterances and acts.

Other provisions of s 105 also have the same defect of vagueness. Subdivision 1(a) of s 105 bars employment of any person who 'by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine' of forceful overthrow of government. This provision is plainly susceptible of sweeping and improper application. It may well prohibit the employment of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others, or incite ***600** others to action in furtherance of unlawful aims.[7] See Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066; Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356; Noto v. United States, 367 U.S. 290, 81 S.Ct. 1517, 6 L.Ed.2d 836; Scales v. United States, 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782. And in prohibiting 'advising' the 'doctrine' of unlawful overthrow does the statute prohibit mere 'advising' of the existence of the doctrine, or advising another to support the doctrine? Since 'advocacy' of the doctrine of forceful overthrow is separately prohibited, need the person 'teaching' or 'advising' this doctrine himself 'advocate' it? Does the teacher who informs his class about the precepts of Marxism or the Declaration of Independence violate this prohibition?

Similar uncertainty arises as to the application of subdivision 1(b) of s 105. That subsection requires the disqualification of an employee involved with the distribution of written material 'containing or advocating, advising or teaching the doctrine' of forceful overthrow, and who himself 'advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein.' Here again, mere advocacy of abstract doctrine is apparently included.[8] And does ***601** the prohibition of distribution of matter 'containing' the doctrine bar histories of the evolution of Marxist doctrine or tracing the background of the French, American, or Russian revolutions? The additional requirement, that the person participating in distribution of the material be one who 'advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine' of forceful overthrow, does not alleviate the uncertainty in the scope of the section, but exacerbates it. Like the language

of s 105, subd. 1(a), this language may reasonably be construed to cover mere expression of belief. For example, does the university librarian who recommends the reading of such materials thereby 'advocate * * * the * * * propriety of adopting the doctrine contained therein'?

[4] We do not have the benefit of a judicial gloss by the New York courts enlightening us as to the scope of this complicated plan.[9] In light of the intricate ****683** administrative machinery for its enforcement, this is not surprising. The very intricacy of the plan and the uncertainty as to the scope of its proscriptions make it a highly efficient in terrorem mechanism. It would be a bold teacher who would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery. The uncertainty as to the utterances and acts proscribed increases that caution in 'those who believe the written law means what it says.' Baggett v. Bullitt, supra, 377 U.S., at 374, 84 S.Ct., at 1324. The result must be to stifle 'that free play of the spirit which all teachers ought especially to cultivate and practice * * *.'[10] That probability is enhanced by the provisions requiring an ***602** annual review of every teacher to determine whether any utterance or act of his, inside the classroom or out, came within the sanctions of the laws. For a memorandum warns employees that under the statutes 'subversive' activities may take the form of '(t)he writing of articles, the distribution of pamphlets, the endorsement of speeches made or articles written or acts performed by others,' and reminds them 'that it is a primary duty of the school authorities in each school district to take positive action to eliminate from the school system any teacher in whose case there is evidence that he is guilty of subversive activity. School authorities are under obligation to proceed immediately and conclusively in every such case.'

[5] There can be no doubt of the legitimacy of New York's interest in protecting its education system from subversion. But 'even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231. The principle is not inapplicable because the legislation is aimed at keeping subversives out of the teaching ranks. In De Jonge v. State of Oregon, 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278, the Court said:

> 'The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.'

***603** **[6]** Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' Shelton v. Tucker, supra, 364 U.S., at 487, 81 S.Ct., at 251. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.' United States v. Associated Press, D.C., 52 F.Supp. 362, 372. In ****684** Sweezy v. State of New Hampshire, 354 U.S. 234, 250, 77 S.Ct. 1203, 1211, 1 L.Ed.2d 1311, we said:

> 'The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few,

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> if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.'

[7] **[8]** We emphasize once again that '(p)recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,' ***604** N.A.A.C. P. v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405; '(f)or standards of permissible statutory vagueness are strict in the area of free expression. * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' Id., at 432—433, 83 S.Ct., at 337—338. New York's complicated and intricate scheme plainly violates that standard. When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone * * *.' Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. For '(t)he threat of sanctions may deter * * * almost as potently as the actual application of sanctions.' N.A.A.C.P. v. Button, supra, 371 U.S., at 433, 83 S.Ct., at 338. The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed. See Stromberg v. People of State of California, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117; Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285; Baggett v. Bullitt, supra.

The regulatory maze created by New York is wholly lacking in 'terms susceptible of objective measurement.' Cramp v. Board of Public Instruction, supra, at 286, 82 S.Ct., at 280. It has the quality of 'extraordinary ambiguity' found to be fatal to the oaths considered in Cramp and Baggett v. Bullitt. '(M)en of common intelligence must necessarily guess at its meaning and differ as to its application * * *.' Baggett v. Bullitt, supra, 377 U.S., at 367, 84 S.Ct., at 1320. Vagueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross-references to interrelated enactments and rules.

[9] We therefore hold that s 3021 of the Education Law and subdivisions 1(a), 1(b) and 3 of s 105 of the Civil Service Law as implemented by the machinery created pursuant to s 3022 of the Education Law are unconstitutional.

***605** IV.

[10] Appellants have also challenged the constitutionality of the discrete provisions of subdivision 1(c) of s 105 and subdivision 2 of the Feinberg Law, which make Communist Party membership, as such, prima facie evidence of disqualification. The provision was added to subdivision 1(c) of s 105 in 1958 after the Board of Regents, following notice and hearing, listed the Communist Party of the United States and the Communist Party of the State of New York as 'subversive' organizations. Subdivision 2 of the Feinberg Law was, ****685** however, before the Court in Adler and its constitutionality was sustained. But constitutional doctrine which has emerged since that decision has rejected its major premise. That premise was that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action. Teachers, the Court said in Adler, 'may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere.' 342 U.S., at 492, 72 S.Ct., at 385. The Court also stated that a teacher denied employment because of membership in a listed organization 'is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice.' Id., at 493, 72 S.Ct., at 385.

However, the Court of Appeals for the Second Circuit correctly said in an earlier stage of this case, '* * * the theory that public employment which may be denied altogether may be subjected to any conditions, regardless ***606** of how unreasonable, has been uniformly rejected.' Keyishian v. Board of Regents, 345 F.2d 236, 239. Indeed, that theory was expressly rejected in a series of decisions

following Adler. See Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216; Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692; Cramp v. Board of Public Instruction, supra; Baggett v. Bullitt, supra; Shelton v. Tucker, supra; Speiser v. Randall, supra; see also Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796; Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982. In Sherbert v. Verner, 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965, we said: 'It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.'

[11] We proceed then to the question of the validity of the provisions of subdivision 1 of s 105 and subdivision 2 of s 3022, barring employment to members of listed organizations. Here again constitutional doctrine has developed since Adler. Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by appellants.

[12] In Elfbrandt v. Russell, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321, we said, 'Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees.' Id., at 17, 86 S.Ct., at 1241. We there struck down a statutorily required oath binding the state employee not to become a member of the Communist Party with knowledge of its unlawful purpose, on threat of discharge and perjury prosecution if the oath were violated. We found that '(a)ny lingering doubt that proscription of mere knowing membership, without any showing of 'specific intent,' would run afoul of the Constitution was set at rest by our decision in Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992.' Elfbrandt v. Russell, supra, at 16, 86 S.Ct., at 1240. In Aptheker we held that Party membership, without knowledge ***607** of the Party's unlawful purposes and specific intent to further its unlawful aims, could not constitutionally warrant deprivation of the right to travel abroad. As we ****686** said in Schneiderman v. United States, 320 U.S. 118, 136, 63 S.Ct. 1333, 1342, 87 L.Ed. 1796, '(U)nder our traditions beliefs are personal and not a matter of mere association, and * * * men in adhering to a political party or other organization * * * do not subscribe unqualifiedly to all of its platforms or asserted principles.' 'A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here.' Elfbrandt, supra, at 19, 86 S.Ct., at 1242. Thus mere Party membership, even with knowledge of the Party's unlawful goals, cannot suffice to justify criminal punishment, see Scales v. United States, 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782. Noto v. United States, 367 U.S. 290, 81 S.Ct. 1517, 6 L.Ed.2d 836; Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356; [11] nor may it warrant a finding of moral unfitness justifying disbarment. Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796.

[13] These limitations clearly apply to a provision, like s 105, subd. 1(c), which blankets all state employees, regardless of the 'sensitivity' of their positions. But even the Feinberg Law provision, applicable primarily to activities of teachers, who have captive audiences of young minds, are subject to these limitations in favor of freedom of expression and association; the stifling effect on the academic mind from curtailing freedom of association in such manner is manifest, and has been documented in recent studies. [12] Elfbrandt and Aptheker state the ***608** governing standard: legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations.

Measured against this standard, both Civil Service Law s 105, subd. 1(c), and Education Law s 3022, subd. 2 sweep overbroadly into association which may not be proscribed. The presumption of disqualification arising from proof of mere membership may be rebutted, but only by (a) a denial of membership, (b) a denial that the organization advocates the overthrow of government by force, or (c) a denial that the teacher has knowledge of such advocacy. Lederman v. Board of Education, 276 App.Div. 527, 96 N.Y.S.2d 466, aff'd 301 N.Y. 476, 95 N.E.2d 806. [13] Thus proof of nonactive membership or a showing of the absence of intent to further unlawful aims will not rebut the presumption and defeat dismissal. This is emphasized in official administrative interpretations. For example, it is said in a letter addressed to prospective appointees by the President of the State University, 'You will note that * * *both ****687** the Law and regulations are very specifically directed toward the elimination and nonappointment of 'Communist' from or to our teaching ranks * * *.' The Feinberg Certificate was

even more explicit: 'Anyone who is a ***609** member of the Communist Party or of any organization that advocates the violent overthrow of the Government of the United States or of the State of New York or any political subdivision thereof cannot be employed by the State University.' (Emphasis supplied.) This official administrative interpretation is supported by the legislative preamble to the Feinberg Law, s 1, in which the legislature concludes as a result of its findings that 'it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced.' (Emphasis supplied.)

Thus s 105, subd. 1(c), and s 3022, subd. 2, suffer from impermissible 'overbreadth.' Elfbrandt v. Russell, supra, 384 U.S. at 19, 86 S.Ct. at 1242; Aptheker v. Secretary of State, supra; N.A.A.C.P. v. Button, supra; Saia v. People of State of New York, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574; Schneider v. State of New Jersey, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; cf. Hague v. C.I.O., 307 U.S. 496, 515—516, 59 S.Ct. 954, 963—964, 83 L.Ed. 1423; see generally Dombrowski v. Pfister, 380 U.S. 479, 486, 85 S.Ct. 1116, 1120, 14 L.Ed.2d 22. They seek to bar employment both for association which legitimately may be proscribed and for association which may not be proscribed consistently with First Amendment rights. Where statutes have an overbroad sweep, just as where they are vague, 'the hazard of loss or substantial impairment of those precious rights may be critical,' Dombrowski v. Pfister, supra, at 486, 85 S.Ct., at 1120, since those covered by the statute are bound to limit their behavior to that which is unquestionably safe. As we said in Shelton v. Tucker, supra, 364 U.S., at 488, 81 S.Ct., at 252, 'The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.'

We therefore hold that Civil Service Law s 105, subd. 1(c), and Education Law s 3022, subd. 2, are invalid insofar as they proscribe mere knowing membership ***610** without any showing of specific intent to further the unlawful aims of the Communist Party of the United States or of the State of New York.

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

APPENDIX TO OPINION OF THE COURT.

CIVIL SERVICE LAW.

s 105. Subversive activities; disqualification

1. Ineligibility of persons advocating overthrow of government by force or unlawful means. No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

****688** (b) prints, publishes, edits, issues or sells any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

***611** (c) organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

For the purposes of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division thereof.

2. A person dismissed or declared ineligible pursuant to this section may within four months of such dismissal or

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declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order or ineligibility.

3. Removal for treasonable or seditious acts or utterances. A person in the civil service of the state or of ***612** any civil division thereof shall be removable therefrom for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean 'treason', as defined in the penal law; a seditious word or act shall mean 'criminal anarchy' as defined in the penal law.

EDUCATION LAW.

s 3021. Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances

A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

s 3022. Elimination of subversive persons from the public school system

1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any ****689** college or other institution of higher education owned and operated by the state or any subdivision thereof who violate the provisions of section three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

***613** 2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute prima facie evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

***614** RULES OF THE BOARD OF REGENTS.

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(Adopted July 15, 1949.)

ARTICLE XVIII.

SUBVERSIVE ACTIVITIES.

Section 244 Disqualification or removal of superintendents, teachers and other employes.

1. The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions of section 3021 of the Education Law or section 12-a* of the Civil Service Law.

a. Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities, shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive **690 in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

b. The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred *615 to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

c. The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision b of this paragraph.

d. The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision b of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justifies such action, or to reject the recommendations for such action.

e Following the determination required in subdivision d of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

616 2. Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12-a of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute prima facie evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership

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has continued, in the absence of a showing that such membership has been terminated in good faith.

****691** 3. On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by their presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions ***617** herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

4. Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted.

PENAL LAW.

s 160. Criminal anarchy defined

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

***618** s 161. Advocacy of criminal anarchy

Any person who:

1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

****692** 4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine.

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both.

RESOLUTIONS OF THE BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK

Resolved that Resolution 65—100 adopted May 13, 1965, be and the same hereby is, amended to read as follows: Resolved that Resolution No. 56—98 adopted on October 11, 1956, incorporated into the Policies of ***619** the Board of Trustees as Section 3 of Title B of Article

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XI thereof, and the Procedure on New Academic Appointments therein referred to, be, and the same hereby are, Rescinded, and

Further Resolved that Title B of Article XI of the Policies of the Board of Trustees be amended by adding a new Section 3 thereto to read as follows:

s 3. Procedure for appointments.
Before any initial appointment shall hereafter be made to any position certified to be in the professional service of the University pursuant to Section 35 of the Civil Service Law the officer authorized to make such appointment or to make the initial recommendation therefor shall send or give to the prospective appointee a statement prepared by the President concisely explaining the disqualification imposed by Section 105 of the Civil Service Law and by Section 3022 of the Education Law and the Rules of the Board of Regents thereunder, including the presumption of such disqualification by reason of membership in organizations listed by the Board of Regents. Such officer, in addition to due inquiry as to the candidate's record, professional training, experience and personal qualities, shall make or cause to be made such further inquiry as may be needed to satisfy him as to whether or not such candidate is disqualified under the provisions of such statute and rules. Should any question arise in the course of such inquiry such candidate may request or such officer may require a personal interview. Refusal of a candidate to answer any question relevant to such inquiry by such officers shall be sufficient ground to refuse to make or recommend appointment. An appointment or recommendation for appointment shall constitute a certification by the appointing or ***620** recommending officer that due inquiry has been made and that he finds no reason to believe that the candidate is disqualified for the appointment.
Further Resolved that this resolution shall become effective July 1, 1965, provided, however, that this resolution shall become effective immediately with respect to appointments made or recommended prior to July 1, 1965 to take effect on or after that date.

Resolved that any person presently employed or heretofore employed by the University who has failed to sign the certificate required by the Procedure on New Academic Appointments adopted on October 11, 1956, shall not be deemed disqualified or ineligible solely by reason of such failure, for appointment or reappointment in the professional service of the University in the manner provided in new Section 3 of Title B of Article XI of the Policies of the Board of Trustees as adopted by resolution this day; and
Further Resolved that any person presently employed by the University shall not be deemed ineligible or disqualified ****693** for continuance in his employment during the prescribed term thereof, nor be subject to charges of misconduct, solely by reason of such failure, provided he is found qualified for such continuance by the Chief Administrative officer of the institution at which he is employed in accordance with the procedures prescribed in said new Section 3 of Title B of Article XI of the Policies of the Board of Trustees.

Mr. Justice CLARK, with whom Mr. Justice HARLAN, Mr. Justice STEWART and Mr. Justice WHITE join, dissenting.

The blunderbuss fashion in which the majority couches 'its artillery of words,' together with the morass of cases it cites as authority and the obscurity of their application ***621** to the question at hand, makes it difficult to grasp the true thrust of its decision. At the outset, it is therefore necessary to focus on its basis.

This is a declaratory judgment action testing the application of the Feinberg Law to appellants. The certificate and statement once required by the Board of Trustees of the State University and upon which appellants base their attack were, before the case was tried, abandoned by the Board and are no longer required to be made. Despite this fact the majority proceeds to its decision striking down New York's Feinberg Law and other statutes as applied to appellants on the basis of the old certificate and statement. It does not explain how the statute can be applied to appellants under procedures which have been for almost two years a dead letter. The issues posed are, therefore, purely abstract and entirely speculative in character. The Court under such circumstances has in the past refused to pass upon constitutional questions. In addition, the appellants have neither exhausted their administrative remedies, nor pursued the remedy of judicial review of agency action as provided earlier by subdivision (d) of s 12—a of the Civil Service Law. Finally, one of the sections stricken, s 105,

subd. 3, has been amended by a revision which under its terms will not become effective until September 1, 1967. (Laws 1965, c. 1030, s 240.15, Revised Penal Law of 1965.)

I.

The old certificate upon which the majority operates required all of the appellants, save Starbuck, to answer the query whether they were Communists, and if they were, whether they had communicated that fact to the President of the State University. Starbuck was required to answer whether he had ever advised, taught, or been a member of a group which taught or advocated the doctrine that the Government of the United States, or any ***622** of its political subdivisions, should be overthrown by force, violence, or any unlawful means. All refused to comply. It is in this nonexistent frame of reference that the majority proceeds to act.

It is clear that the Feinberg Law, in which this Court found 'no constitutional infirmity' in 1952, has been given its death blow today. Just as the majority here finds that there 'can be no doubt of the legitimacy of New York's interest in protecting its education system from subversion' there can also be no doubt that 'the be-all and end-all' of New York's effort is here. And, regardless of its correctness, neither New York nor the several States that have followed the teaching of Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517, for some 15 years, can ever put the pieces together again. No court has ever reached out so far to destroy so much with so little.

The section (s 3021 of the Education Law) which authorizes the removal of superintendents, teachers, or employees in the public schools in any city or school ****694** district of New York for the utterance of any treasonable or seditious word or words is also struck down, even though it does not apply to appellants, as we shall discuss below.

Also declared unconstitutional are the subdivisions (1(a), 1(b) and 1(c) of s 105 of the Civil Service Law) which prevent the appointment and authorize the discharge of any superintendent, principal, or teacher in any part of New York's public education establishment who wilfully advocates, advises, or teaches the doctrine that the Government of the United States, or of any State or any political subdivision thereof should be overthrown by force, violence, or any other unlawful means (1(a)); or who prints, publishes, edits, issues, or sells any book, paper, document, or written or printed matter, in any form, containing such doctrine and 'who advocates, advises, teaches, or embraces the duty, necessity or ***623** propriety of adopting the doctrine contained therein' (1(b)); or who organizes or helps to organize or becomes a member of any society or group which teaches or advocates such doctrine (1(c)). This latter provision was amended in 1958, while still part of s 12-a of the Civil Service Law, to make membership in the Communist Party prima facie proof of disqualification. The language 'advocate, advise, teach,' etc., obviously springs from federal statutes, particularly the Smith Act, s 2(a)(1), (2) and (3), 54 Stat. 671, which was approved by this Court in Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). State statutes of similar character and language have been approved by this Court. See Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317 (1951); Beilan v. Board of Education, School District of Philadelphia, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414 (1958).

Lastly stricken is the subdivision (3 of s 105) which authorizes the discharge of any person in the civil servic of the State or any civil division thereof who utters any treasonable or seditious word or commits any treasonable or seditious act, although this subdivision is not and never has been a part of the Feinberg Law and New York specifically disclaims its applicability to the appellants. In addition, how can the Court pass upon this law as applied when the State has never attempted to and now renounces its application to appellants?

II.

This Court has again and again, since at least 1951, approved procedures either identical or at the least similar to the ones the Court condemns today. In Garner v. Board of Public Works of Los Angeles, supra, we held that a public employer was not precluded, simply because it was an agency of the State, 'from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service.' 341 U.S., at 720, 71 S.Ct., at 912. The oath there used practically the same language ***624** as the Starbuck statement here and the affidavit reflects the sam type of inquiry as was made in the old certificate condemned here. Then in 1952, in Adler v. Board of Education, supra, this Court passed upon the identical statute condemned here. It, too, was

a declaratory judgment action—as in this case. However, there the issues were not so abstractly framed. Our late Brother Minton wrote for the Court:

'A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society cannot be doubted.' At 493 of 342 U.S., at 385 of 72 S.Ct.

****695** And again in 1958 the problem was before us in Beilan v. Board of Education, School District of Philadelphia, supra. There our late Brother Burton wrote for the Court:

'By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher.' 357 U.S., at 405, 78 S.Ct. at 1321.

And on the same day in Lerner v. Casey, 357 U.S. 468, 78 S.Ct. 1311, 2 L.Ed.2d 1423 our Brother Harlan again upheld the severance of a public employee for his refusal to answer questions concerning his loyalty. And also on the same day my Brother Brennan himself cited Garner with approval in Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958).

Since that time the Adler line of cases has been cited again and again with approval: ***625** Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960), in which both Adler and Beilan were quoted with approval, and Garner and Lerner were cited in a like manner; likewise in Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961), Adler was quoted twice with approval; and, in a related field where the employee was discharged for refusal to answer questions as to his loyalty after being ordered to do so, Nelson v. Los Angeles County, 362 U.S. 1, 80 S.Ct. 527, 4 L.Ed.2d 494 (1960), the Court cited with approval all of the cases which today it says have been rejected, i.e., Garner, Adler, Beilan and Lerner. Later Konigsberg v. State Bar, 366 U.S. 36 (1961), likewise cited with approval both Beilan and Garner. And in our decision in In re Anastaplo, 366 U.S. 82, 81 S.Ct. 978, 6 L.Ed.2d 135 (1961), Garner, Beilan and Lerner were all referred to. Finally, only three Terms ago my Brother White relied upon Cramp, which in turn cited Adler with approval twice. See Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964).

In view of this long list of decisions covering over 15 years of this Court's history, in which no opinion of this Court even questioned the validity of the Adler line of cases, it is strange to me that the Court now finds that the 'constitutional doctrine which has emerged since * * * has rejected (Adler's) major premise.' With due respect, as I read them, our cases have done no such thing.

III.

The majority also finds that Adler did not pass upon s 3021 of the Education Law, nor subdivision 3 of s 105 of the Civil Service Law nor upon the vagueness questions of subdivisions 1(a), 1(b) and 1(c) of s 105. I will now discuss them.

1. Section 3021 is not applicable to these appellants. As Attorney General Lefkowitz of New York says on behalf of the State, the Board of Regents and the Civil Service Commission, this section by its own terms applies only to superintendents, teachers and employees in the ***626** 'public schools, in any city or school district of the state * * *.' It does not apply to teachers in the State University at all. *

****696** 2. Likewise subdivision 3 of s 105 is also inapplicable. It was derived from s 23—a of the Civil Service Law. The latter provision was on the books at the time of the Feinberg Law as well as when Adler was decided. The Feinberg Law referred only to s 12—a of the Civil Service Law, not s 23—a. Section 12—a was later recodified as subdivisions 1(a), (b) and (c) of s 105 of the Civil Service Law. Section 23—a (now s 105, subd. 3) deals only with the civil divisions of the civil service of the State. As the Attorney General tells us, the law before us has to do with the qualifications of college level personnel not covered by civil service. The Attorney General also advises that no superintendent, teacher, or employee of the educational system has ever been charged with violating s 105, subd. 3. The Court seems to me to be building straw men.

3. The majority also says that no challenge or vagueness points were passed upon in Adler. A careful examination of the Briefs in that case casts considerable doubt on this conclusion. In the appellants' brief, point 3, in Adler, the question is stated in this language: 'The statutes and the regulations issued thereunder violate the due process clause of the Fourteenth Amendment because of their vagueness.' Certainly the word 'subversive' is attacked as vague and the Court finds that it 'has a ***627** very definite meaning, namely, an organization that teaches and advocates the overthrow of government by force or violence.' 342 U.S., at 496, 72 S.Ct., at 387. Significantly this is the language of subdivisions 1(a) and (b) which the majority now finds vague, as covering one 'who merely advocates the doctrine in the abstract * * *' citing such criminal cases as Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066 (1937), which was on our books long before the Adler line of cases. Also significant is the fact that the Adler opinion's last sentence is 'We find no constitutional infirmity in s 12—a (now subdivisions 1(a), 1(b) and 1(c) of s 105) of the Civil Service Law of New York or in the Feinberg Law which implemented it * * *.' At 496 of 342 U.S., at 387 of 72 S.Ct.

IV.

But even if Adler did not decide these questions I would be obliged to answer them in the same way. The only portion of the Feinberg Law which the majority says was not covered there and is applicable to appellants is s 105, subd. 1(a), 1(b) and 1(c). These have to do with teachers who advocate, advise, or teach the doctrine of overthrow of our Government by force and violence, either orally or in writing. This was the identical conduct that was condemned in Dennis v. United States, supra. There the Court found the exact verbiage not to be unconstitutionally vague, and that finding was of course not affected by the decision of this Court in Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356. The majority makes much over the horribles that might arise from subdivision 1(b) of s 105 which condemns the printing, publishing, selling, etc., of matter containing such doctrine. But the majority fails to state that this action is condemned only when and if the teacher also personally advocates, advises, teaches, etc., the necessity or propriety of adopting such doctrine. This places this subdivision on the same ***628** footing as 1(a). And the same is true of subdivision 1(c) where a teacher organizes, helps to organize or becomes a member of an organization which teaches or advocates such doctrine, for scienter would also be a necessary ingredient under our opinion in Garner, supra. Moreover, membership is only prima facie evidence of disqualification and could be rebutted, leaving the burden of proof on the State. Furthermore, all of these procedures are protected by an adversary hearing with full judicial review.

In the light of these considerations the strained and unbelievable suppositions that the majority poses could hardly occur. ****697** As was said in Dennis, supra, 'we are not convinced that because there may be borderline cases' the State should be prohibited the protections it seeks. At 516 of 341 U.S., at 871 of 71 S.Ct. Where there is doubt as to one's intent or the nature of his activities we cannot assume that the administrative boards will not give him offended full protection. Furthermore, the courts always sit to make certain that this is done.

The majority says that the Feinberg Law is bad because it has an 'overbroad sweep.' I regret to say—and I do so with deference—that the majority has by its broadside swept away one of our most precious rights, namely, the right of self-preservation. Our public educational system is the genius of our democracy. The minds of our youth are developed there and the character of that development will determine the future of our land. Indeed, our very existence depends upon it. The issue here is a very narrow one. It is not freedom of speech, freedom of thought, freedom of press, freedom of assembly, or of association, even in the Communist Party. It is simply this: May the State provide that one who, after a hearing with full judicial review, is found to have wilfully and deliberately advocated, advised, or taught that our Government should be overthrown by force or violence ***629** or other unlawful means; or to have wilfully and deliberately printed, published, etc., any book or paper that so advocated and to have personally advocated such doctrine himself; or to have wilfully and deliberately become a member o an organization that advocates such doctrine, is prima facie disqualified from teaching in its university? My answer, in keeping with all of our cases up until today, is 'Yes'!

I dissent.

All Citations

385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629

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Footnotes

1 The text of the pertinent statutes and administrative regulations in effect at the time of trial appears in the Appendix to the opinion.

2 The District Court initially refused to convene a three-judge court, 233 F.Supp. 752, and was reversed by the Court of Appeals for the Second Circuit. 345 F.2d 236.

3 For the history of New York loyalty-security legislation, including the Feinberg Law, see Chamberlain, Loyalty and Legislative Action, and that author's article in Gellhorn, The States and Subversion 231.

4 The sole 'vagueness' contention in Adler concerned the word 'subversive,' appearing in the preamble to and caption of s 3022. 342 U.S., at 496, 72 S.Ct., at 387.

5 There is no merit in the suggestion advanced by the Attorney General of New York for the first time in his brief in this Court that s 3021 of the Education Law and s 105, subd. 3 of the Civil Service Law are not 'pertinent to our inquiry.' Section 3022 of the Education Law incorporates by reference the provisions of both, thereby rendering them applicable to faculty members of all colleges and institutions of higher education. One of the reasons why the Court of Appeals ordered the convening of a three-judge court was that a substantial federal question was presented by the fact that 'Adler * * * refused to pass upon the constitutionality of section 3021 * * * (and that) several statutory amendments, such as Section 105(3) of the Civil Service Law, are all subsequent to Adler.' 345 F.2d 236, 238. The three-judge court also properly found these provisions applicable to appellants in holding them constitutional. It is significant that appellees consistently defended the constitutionality of these sections in the courts below. Moreover, the three-judge court rendered its decision upon the basis of a 'Stipulation of Fact,' paragraph 20 of which recites:

'Section 3022 incorporates in full by reference and implements Section 105 of the Civil Service Law and Section 3021 of the New York State Education Law as follows: Subdivision (1) of Section 3022, as amended * * * directs the Board of Regents to adopt and enforce rules and regulations for the elimination of persons barred from employment in the public school system or any college or institution of higher education owned by the State of New York or any political subdivision thereof, by reason of violation of any of the provisions of Section 105 of the Civil Service Law or Section 3021 of the New York State Education Law.'

6 Penal Law ss 160—161 are to be replaced effective September 1, 1967, by a single provision entitled 'criminal advocacy.'

7 The New York State Legislative Committee on Public Employee Security Procedures, in describing this provision, noted: 'In disqualifying for employment those who advocate or teach the 'doctrine' of the violent overthrow of government, (s 105) is to be distinguished from the language of the Smith Act (18 U.S.C. ss 371, 2385), which has been construed by the Supreme Court to make it criminal to incite to 'action' for the forcible overthrow of government, but not to teach the 'abstract doctrine' of such forcible overthrow. Yates v. United States, 354 U.S. 298 (77 S.Ct. 1064, 1 L.Ed.2d 1356) (1957).' 1958 N.Y. State Legis. Annual 70, n. 1.

8 Compare the Smith Act, 18 U.S.C. s 2385, which punishes one who 'prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of' unlawful overthrow, provided he is shown to have an 'intent to cause the overthrow or destruction of any such government.'

9 This is not a case where abstention pending state court interpretation would be appropriate, Baggett v. Bullitt, supra, at 375—379, 84 S.Ct., at 1324—1327; Dombrowski v. Pfister, 380 U.S. 479, 489—490, 85 S.Ct. 1116, 1122—1123, 14 L.Ed.2d 22.

10 Wieman v. Updegraff, 344 U.S. 183, 195, 73 S.Ct. 215, 221, 97 L.Ed.2d 216 (Frankfurter, J., concurring).

11 Whether or not loss of public employment constitutes 'punishment,' cf. United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252, there can be no doubt that the repressive impact of the threat of discharge will be no less direct or substantial.

12 See Lazarsfeld & Thielens, The Academic Mind 92—112, 192—217; Biddle, The Fear of Freedom 155 et seq.; Jahoda & Cook, Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs, 61 Yale L.J. 295 (1952). See generally, MacIver, Academic Freedom in Our Time; Hullfish, Educational Freedom in an Age of Anxiety; Konvitz, Expanding Liberties 86—108; Morris, Academic Freedom and Loyalty Oaths, 28 Law & Contemp.Prob. 487 (1963).

13 In light of our disposition, we need not consider appellants' contention that the burden placed on the employee of coming forward with substantial rebutting evidence upon proof of membership in a listed organization is constitutionally impermissible. Compare Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460.

* Now section 105.

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* Now section 105.

* The Court points to a stipulation of counsel that s 3022 incorporates s 3021 into the Feinberg Law. However, Attorney General Lefkowitz did not sign the stipulation itself, but in an addendum thereto, agreed only that it constituted the record of fact—not of law. His brief contends that s 3021 is not incorporated into the law. The legislature, of course, is the only body that could incorporate s 3021 into the Feinberg Law. It has not done so.

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13D.01 MEETINGS MUST BE OPEN TO THE PUBLIC; EXCEPTIONS.

Subdivision 1. **In executive branch, local government.** All meetings, including executive sessions, must be open to the public

(a) of a state

(1) agency,

(2) board,

(3) commission, or

(4) department,

when required or permitted by law to transact public business in a meeting;

(b) of the governing body of a

(1) school district however organized,

(2) unorganized territory,

(3) county,

(4) statutory or home rule charter city,

(5) town, or

(6) other public body;

(c) of any

(1) committee,

(2) subcommittee,

(3) board,

(4) department, or

(5) commission,

of a public body; and

(d) of the governing body or a committee of:

(1) a statewide public pension plan defined in section 356A.01, subdivision 24; or

(2) a local public pension plan governed by sections 424A.091 to 424A.096, or chapter 354A, or Laws 2013, chapter 111, article 5, sections 31 to 42.

Subd. 2. **Exceptions.** This chapter does not apply

(1) to meetings of the commissioner of corrections;

(2) to a state agency, board, or commission when it is exercising quasi-judicial functions involving disciplinary proceedings; or

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(3) as otherwise expressly provided by statute.

Subd. 3. **Subject of and grounds for closed meeting.** Before closing a meeting, a public body shall state on the record the specific grounds permitting the meeting to be closed and describe the subject to be discussed.

Subd. 4. **Votes to be kept in journal.** (a) The votes of the members of the state agency, board, commission, or department; or of the governing body, committee, subcommittee, board, department, or commission on an action taken in a meeting required by this section to be open to the public must be recorded in a journal kept for that purpose.

(b) The vote of each member must be recorded on each appropriation of money, except for payments of judgments, claims, and amounts fixed by statute.

Subd. 5. **Public access to journal.** The journal must be open to the public during all normal business hours where records of the public body are kept.

Subd. 6. **Public copy of members' materials.** (a) In any meeting which under subdivisions 1, 2, 4, and 5, and section 13D.02 must be open to the public, at least one copy of any printed materials relating to the agenda items of the meeting prepared or distributed by or at the direction of the governing body or its employees and:

(1) distributed at the meeting to all members of the governing body;

(2) distributed before the meeting to all members; or

(3) available in the meeting room to all members;

shall be available in the meeting room for inspection by the public while the governing body considers their subject matter.

(b) This subdivision does not apply to materials classified by law as other than public as defined in chapter 13, or to materials relating to the agenda items of a closed meeting held in accordance with the procedures in section 13D.03 or other law permitting the closing of meetings.

History: *1957 c 773 s 1; 1967 c 462 s 1; 1973 c 123 art 5 s 7; 1973 c 654 s 15; 1973 c 680 s 1,3; 1975 c 271 s 6; 1981 c 174 s 1; 1983 c 137 s 1; 1983 c 274 s 18; 1984 c 462 s 27; 1987 c 313 s 1; 1990 c 550 s 2,3; 1991 c 292 art 8 s 12; 1991 c 319 s 22; 1994 c 618 art 1 s 39; 1997 c 154 s 2; 1Sp2001 c 10 art 4 s 1; 2010 c 359 art 12 s 3; 1Sp2011 c 8 art 8 s 2,14; 2013 c 111 art 5 s 4,80*

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