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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

LEO (KWAME) LILLARD, DUANE DOMINY (FORMER METRO COUNCILMAN), NASHVILLE FLEA MARKET VENDORS' ASSN., SAVE OUR FAIRGROUNDS, INC., THE TAXPAYERS AND CITIZENS OF NASHVILLE & DAVIDSON COUNTY,	)	
Plaintiffs/Petitioners,	)	
VS.	)	No. 19-1101-III
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,	)	
Defendant/Respondent.	)	

MEMORANDUM AND FINAL ORDER GRANTING JUDGMENT ON PLAINTIFFS' CLAIM OF A VIOLATION OF THE OPEN MEETINGS ACT

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MEMORANDUM AND FINAL ORDER GRANTING JUDGMENT ON PLAINTIFFS' CLAIM OF A VIOLATION OF THE OPEN MEETINGS ACT

The Tennessee General Assembly has enacted a strict set of laws, the Open Meetings Act, requiring adequate notice of government meetings to provide the public an opportunity to know of and attend the meetings. The Act provides that if adequate notice is not given, the action taken by the government at the meeting is void and of no effect. TENN. CODE ANN. § 8-44-105.

The purpose of these laws is openness and accountability in government. *Johnston v. Metropolitan Government of Nashville and Davidson County*, 320 S.W.3d 299, 310 (Tenn. Ct. App. 2010). "[T]he formation of public policy and decisions is public business and shall not be conducted in secret." TENN. CODE ANN. § 8-44-101(a).

In this lawsuit the Plaintiff citizens and citizens' organization contend that the Metropolitan Government of Nashville and Davidson County ("Metro") has violated these laws by failing to give adequate notice to the public of a November 1, 2018 meeting of the Metro Sports Authority. At that meeting the Sports Authority approved a $192 million contract for the construction of one of Metro's most prominent initiatives, the Major League Soccer ("MLS") stadium development at the Nashville Fairgrounds.

The Plaintiffs' claim of inadequate public notice of the meeting in violation of the law was tried in a three-day bench trial conducted June 15-17, 2020. Most of the proof Metro did not dispute or refute, including that the actions taken by the Metro Sports

Authority at its November 1, 2018 meeting were of significant public importance and interest. The proof showed that,

- the $192 million contract being voted on at the November 1, 2018 meeting is a significant contract for the City of Nashville and is the highest dollar contract to come before the Sports Authority in the past five years;

- the MLS stadium project is a big initiative of public interest inside and outside the Nashville community; and

- at the same time as the events in issue of this case of the Sports Authority holding meetings to approve the contract for construction of the MLS stadium, public interest was heightened by a citizens group filing a lawsuit to stop use of the iconic Fairgrounds as the location to construct the MLS stadium.

The proof also showed that Metro failed to provide the public enough time to be aware of the meeting. Metro admitted and the Court's findings include that,

- only 48 hours notice was given, that is, notice was posted and emailed by Metro on the Tuesday before the meeting on Thursday of the same week;

- the meeting was more difficult to know about because it was a special meeting not scheduled for its regular third Thursday of the month but on the first Thursday of the month, and this irregular scheduling was not definitively announced at prior meetings, and the meeting location always moves around and is never in the same place;

- there was no emergency or urgency which compelled such a short 48-hour notice;

- the customary notice time is 5 days (the Friday before the Thursday meeting of the next week) and that length of notice has been provided 82% of the time for Sports Authority meetings;

- the Executive Director of the Sports Authority admitted the notice was not "ideal";

— Metro's Information Technology Division Manager testified that it appeared that less than 30 subscribers opened the innermost URL link containing the meeting time and agenda description; and

— present at the November 1, 2018 meeting were "strategic partners"—those having a vested interest in the construction—but only one citizen was in attendance.

These foregoing findings of fact from the evidence presented at trial establish under Tennessee law that adequate public notice of the November 1, 2018 special meeting of the Sports Authority was not provided and that Metro violated the Open Meetings Act, Tennessee Code Annotated section 8-44-103(b).

In addition Metro failed to make out a case for its defense. Metro failed to show that any prejudice to Metro, such as wasted costs or defaults or forfeitures on Project agreements, would occur upon imposition of the penalty of the Act of voiding the actions taken by the Sports Authority at the November 1, 2018 meeting. In particular, the Contract in issue will not have to be rebid. Instead, the penalty under the Act in this case is a narrow one: in the vernacular, a "redo." That is, the Sports Authority will have to reschedule a meeting, provide adequate public notice and conduct another vote on the Contract. The witness for the Plaintiff, Duane Dominy, testified that the remedy sought is not to replace the contractor selected or rebid the Contract but to make Metro follow the law on adequate notice to its citizens of governmental meetings.

It is therefore ORDERED that the Plaintiffs prevail on the Count III claim of their December 29, 2019 *Complaint for Declaratory Judgment and/or Injunctive Relief*, and the Court declares that the action taken by the Sports Authority at the November 1, 2018

special meeting of approving the Contract with Mortenson/Messer Construction Company to manage construction for Nashville's Major League Soccer Stadium is, in the words of the statute, "void and of no effect." TENN. CODE ANN. § 8-44-105. All other claims in the lawsuit having been ruled upon by previous orders, the ruling herein disposes of the case. This is a final order. Court costs are taxed to the Defendant. The evidence and law on which this decision is based are as follows.

June 15-17, 2020 Bench Trial

The bench trial of this case was conducted from June 15-17, 2020. Five witnesses testified,

- Ms. Fawknotson, the Executive Director of the Sports Authority,
- Mr. Dominy, a former Metro Council member, opponent of the construction of the stadium at the Fairgrounds, and a Plaintiff in this case,
- Ms. Montesrin, the assistant to the Executive Director and Administrative Officer,
- Mr. Williams, Division Manager of Web-Based Services for Metro's Information Technology Department, and
- Mr. Gobbell, founder of Gobbell, Hayes Partners, and the Project Manager of the stadium development at the Fairgrounds, employed by the Sports Authority.

As authorized by the COVID-19 Plan of the Twentieth Judicial District, approved by the Tennessee Supreme Court, and good cause shown in the compelling circumstances

of a worldwide pandemic, the trial was conducted by video conferencing pursuant to Tennessee Civil Procedure Rule 43.01.

At the time of the June 15, 2020 bench trial all of the six counts of the December 29, 2019 *Complaint for Declaratory Judgment and/or Injunctive Relief* had been withdrawn or ruled upon by dispositive motions except for the Court III Open Meetings Act claim. It presented one issue for determination at trial: whether the 48-hour notice given by the Metro Sports Authority, for its November 1, 2018 meeting on approving the stadium construction Contract, provided "adequate public notice," as is required by the Open Meetings Act, Tennessee Code Annotated section 8-44-103(b).

From that trial the Court makes the following findings of fact.

Background Findings of Fact

One of the top initiatives of the Metropolitan Government of Nashville and Davidson County in the last several years is the construction of a Major League Soccer stadium at the Nashville Fairgrounds as the home field of the Nashville MLS expansion club (the "Team"). This Project is presently near completion of the first phase of demolition, site work and issuance of bonds preparatory to construction of the stadium anticipated to commence August 2020.

Pursuant to an Agreement executed March 6, 2019, a Joint Venture comprised of M.A. Mortenson Company and Messer Construction Company ("Mortenson/Messer") was selected by Metro to construct the Project (the "Contract"). The selection of Mortenson/

Messer and the award of that Contract came about from prior events when, on August 15, 2018, the Metro Procurement Department issued an Intent to Award letter to Mortenson/ Messer to manage construction for the MLS stadium. The Contract amount was $192 million.

The award by the Metro Procurement Department was not, however, the final say. The award was contingent on approval by the Sports Authority and successful negotiations of the Contract. Ms. Fawknotson, the Executive Director of the Sports Authority, testified that it was one of the largest contracts ever considered by the Sports Authority during her 5-year tenure.

The testimony of Ms. Fawknotson established that the Sports Authority first discussed the Mortenson/Messer construction management Contract at its August 16, 2018 meeting. The Sports Authority voted to defer a decision on approving the Contract to allow Metro Purchasing to resolve a bid challenge made by Barton Malow to the selection of Mortenson/Messer.

The Sports Authority next considered the Mortenson/Messer Contract on September 20, 2018. Ms. Lane of Metro Purchasing appeared before the Sports Authority and explained that the protest by Barton Mallow had been resolved. The Sports Authority then voted to approve the engagement of Mortenson/Messer and to first begin "contract negotiations" with Mortenson/Messer as the construction manager for the stadium project. The Board's minutes (Trial Exhibit 1) include the Executive Director's Report, which states "once the engagement(s) are approved, contract negotiation will begin." (underline

added). The September 20th minutes further state "[t]he Intent to Award letter from Metro Purchasing is contingent upon the Authority's approval and successful contract negotiations." (underline added). Contract negotiations commenced upon the Board's approval on September 20, 2018.

At the end of the September 20 Sports Authority meeting, the Chair announced that the next full Board meeting would be held on October 25 or November 1. The uncertainty of the meeting date was because of Fall break. The Chairperson requested Board Members to notify her as to their availability. Thereafter, no Sports Authority Board meeting was scheduled for October 2018.

On October 24, 2018, a Sports Authority Finance Subcommittee meeting was conducted. The Finance Subcommittee considered and voted to recommend that at the next Sports Authority meeting the Sports Authority approve the Contract with Mortenson/Messer to construct the stadium. Although Ms. Montesrin, the Assistant and Administrative Officer to the Sports Authority Executive Director, had been able to coordinate scheduling so that she knew the next Sports Authority meeting would be held November 1, 2018, no announcement of this was made at the conclusion of the Finance Subcommittee's October 24, 2018 meeting.

At the same time that the foregoing events of the Sports Authority voting to engage Mortenson/Messer to construct the stadium and working on negotiating the Contract were going on, a citizens' group filed, on September 4, 2018, a lawsuit asserting that construction of the stadium on the Fairgrounds property violated the Metro Charter. This

was not the first lawsuit filed by the group. A prior lawsuit had been filed on November 29, 2017 by the same group but was dismissed due to lack of ripeness. At that time development of a stadium on the Fairgrounds property was just in the proposal phase. The subsequent September 4, 2018 filing of the lawsuit by these citizens occurred after the Metro Council had more formally approved the stadium development. Thus, at the time the Sports Authority was conducting meetings on the Mortenson/Messer contract in September and October of 2018, Metro knew that this was a matter of public importance and, at least in some quarters of the public, there was controversy (two lawsuits) about the construction of the MLS stadium.

With respect to noticing the Sports Authority's November 1, 2018 special meeting, the testimony of Ms. Montesrin established that she sent the meeting date, time, location and agenda of issues to the Metro Information Technology Department on October 29, 2018. At the same time she sent this information to the IT Department, she sent it directly to the Shane Smiley, Chairman of the Plaintiff organization Nashville Flea Market Vendors Association and member of the Plaintiff organization Save Our Fairgrounds. She knew that Mr. Smiley actively followed items that were on the Sports Authority agenda—he had made several public records requests and often texted her with questions about Sports Authority matters. As a result of one of these public records requests, Ms. Montesrin routinely prepared a packet of information for him that was identical to the packet given to Board members at meetings.

The testimony of Randall Williams, Division Manager of Web-Based Services for Metro's Information Technology Department established that the November 1, 2018 meeting date, time, location and agenda for the November 1 board meeting were posted on Metro's website by 6:45 a.m. on October 30, 2018—48 hours/two days in advance of the meeting.

The posting on the Sports Authority's website was the customary location for such board meeting notices. The agenda listed "Consideration of Construction Management Agreement between the Sports Authority and Mortenson/Messer Construction Co." as one of the items to be taken up at the meeting.

By 12:47 p.m. on October 30—48 hours before the Sports Authority special meeting on November 1, 2018—the meeting date, time, location and agenda for the board meeting were also sent directly to the email inboxes of 1,336 subscribers interested in receiving notices of Sports Authority events and agendas. Among the subscribers to the emails sent by the IT Department was Shane Smiley.

Ms. Montesrin testified that the 48 hour notice of the meeting was less than the 5 day notice regularly given for Sports Authority meetings. She testified that it was her practice to time the posting of the meeting notice the Friday before the next week's Thursday meeting but this practice was not followed with the November 1, 2018 meeting of the Sports Authority. The evidence also established that the November 1, 2018 meeting time was irregular. The regularly scheduled meeting of the Sport Authority is the

third Thursday of the month. Ms. Fawknotson testified the notice given for the November 1, 2018 Sports Authority meeting was "not ideal."

The testimony of Ms. Fawknotson established that at the November 1, 2018 meeting the Sports Authority voted to approve the award of the $192 million construction contract to Mortenson/Messer.

In December 2018 no Sports Authority Board meeting was scheduled.

On January 10, 2019, the Sports Authority Board met and approved the November 1, 2018 meeting minutes.

Duane Dominy, one of the Plaintiffs, testified that it was around the first of the year 2019 that he learned of the November 1, 2018 Sports Authority meeting that approved the award of the $192 million construction Contract to Mortenson/Messer. He reported this to Shane Smiley, the President of the Flea Market Vendors Association, also a Plaintiff in this case and opponent of the Fairgrounds stadium location.

The proof established that the Mortenson/Messer Contract was signed and fully executed on March 6, 2019.

Six months after that, on September 2, 2019, this lawsuit was filed challenging the validity of the November 1, 2018 special meeting of the Sports Authority.

Law on Tennessee Open Meetings Act

The Act

This case is governed by the 1974 enactment by the Tennessee General Assembly of the Open Meetings Act. Its purpose and policy is that:

> the formation of public policy and decisions is public business and shall not be conducted in secret.

TENN. CODE ANN. § 8-44-101(a). The Act is to be "interpreted to promote openness and accountability in government." *Johnston v. Metropolitan Government of Nashville and Davidson County*, 320 S.W.3d 299, 310 (Tenn. Ct. App. 2010). *See also Souder v. Health Partners, Inc.*, 997 S.W.2d 140, 145 (Tenn. Ct. App. 1998) ("Public knowledge of the manner in which government decisions are made by public officials is an essential element of a democratic government); *Metropolitan Air Research Testing Auth., Inc. (MARTA) v. Metropolitan Gov't,* 842 S.W.2d 611, 616 (Tenn. App. 1992) ("In order to provide openness in government, the legislature passed the Open Meetings Act.").

With respect to special meetings[1] of governmental bodies, the Act requires that "adequate public notice" must be given. TENN. CODE ANN. § 8-44-103(b). Although the Act is no more explicit than its statement of "adequate public notice," Tennessee's appellate courts have filled in the details.

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[1] Counsel agreed that the meeting in issue in this case is a "special" meeting defined under Tennessee Code Annotated section 8-44-104(b) as, "a meeting not previously scheduled by statute, ordinance, or resolution, or for which notice is already not provided by law."

Case Law

The Tennessee Supreme Court established the test that trial courts use, holding that "adequate public notice," provided for in Tennessee Code Annotated section 8-44-103, means "such notice as based on the totality of the circumstances **as would fairly inform the public**" [emphasis added]. *Memphis Publ'g Co. v. City of Memphis*, 513 S.W.2d 511, 513 (Tenn. 1974).

Additional case law holdings provide the following law for trial courts to apply.

— There is a three prong test that governmental bodies must satisfy to fulfill the adequate notice requirement for special governmental meetings[2] under Tennessee law. The test requires that the location, content, and timing of the notice posting be sufficient to give citizens both an opportunity to become aware of and to attend the meeting, quoting as follows, "In order to qualify as adequate public notice under T.C.A. 8-44-103(b), this Court finds that the notice given by the Town of Englewood must satisfy a three-prong test. First, the notice must be posted in a location where a member of the community could become aware of such notice. Second, the contents of the notice must reasonably describe the purpose of the meeting or the action proposed to be taken. And, third, the notice must be posted at a time sufficiently in advance of the actual meeting in order to give citizens both an opportunity to become aware of and to attend the meeting." *Englewood Citizens for Alternative B v. Town of Englewood*, No. 03A01-9803-CH-0098, 1999 WL 419710, at *2 (Tenn. Ct. App. 1999).

— As to the first prong of posting location, the *Englewood* Court found that the three locations of the city hall, the post office, and Valley Bank were adequate under the totality of the circumstances because 'they afforded the members of the community an opportunity to see the notice. *Id.* at *3. In so finding the *Englewood* Court explained that a governmental body "can provide adequate notice simply by

[2] The *Englewood* Court made clear in footnote 1 of its decision that the three prong test applies only to special meetings of a governmental body which Counsel have agreed is the kind of meeting in issue in this case.

choosing reasonable public locations and posting notices at those public locations on a consistent basis [emphasis added]." *Id.* "It would be illogical to find that city hall and the post office were not proper locations to post notice regarding town business." *Id.*

— As to timing, the *Englewood* Court held that 2-days notice was not adequate. The Court determined that the timing of notice must be "sufficiently in advance of the actual meeting" so as to "give citizens both an opportunity to become aware of and attend the meeting." The Court stated that, "Notice which is not posted sufficiently in advance of a special meeting is nothing more than a mere gesture. Notice that is a mere gesture is no notice at all." *Id.* at *4. The Court held that, "We fail to see how two days notice is sufficient enough to fairly inform the public under these circumstances." *Id.*

— As to content, the *Englewood* Court found the notice in that case inadequate. The Court explained that the standard is that "the general public must be made aware of the issues to be deliberated at the special meeting" in such a way that is "designed to inform the public about those issues." *Id.* at *4. The Court held that the notice given by the Town was inadequate because it did not "reasonably describe the purpose of the meeting or the action to be taken." The context of the ruling was that the Town Commissioners convened a special meeting and agreed at the meeting to endorse Alternate A in a letter that would be sent by them to the State Department of Transportation. By endorsing Alternate A, the Commissioners choose the existing route through the Town for a construction project to widen U.S. 411 from a two lane road to a four lane road. They rejected Alternate B, a route that would bypass the Town. This was the alternative the Plaintiff citizens group supported. The meeting in issue was to choose one of the alternatives and respond with that choice in a letter to the State. The content of the posted meeting notice was "1. Letter to State concerning HWY 411." *Id.* at *3. In finding this content inadequate, the appellate court characterized it as "cryptic" and "bereft of any explanation of what that letter would consist of or the fact that the town commissioners had decided to reconsider the issue of Highway 411's path." *Id.*

— Like *Town of Englewood*, also providing guidance to trial courts on applying the totality of the circumstances criteria established by the Tennessee Supreme Court is the appellate decision of *Neese v. Paris Special School Dist.*, 813 S.W.2d 432, 435 (Tenn. Ct. App. 1990). In

> that case the appellate court identified the circumstances of the "pervasive importance" of the special meeting in issue as "arguably the most important action taken by the Board in many years" and that the matter "was a very emotional issue" for the citizens of the town. Those circumstances were factors in the *Neese* Court concluding that the content of the notice was inadequate and that the meeting did not comply with the Open Meetings Act.

Application of the Law and Findings of Fact on Metro's Violation of the Act

Important Meeting

Applying the foregoing case law to the evidence adduced at trial the Court finds that like the meeting in issue in the *Neese* and *Town of Englewood* cases, the November 1, 2018 meeting of the Sports Authority was an important action taken by that Board with interest and some emotions about the issue in the community. Importance and public interest are shown by the fact established at trial that the $192 million Mortenson/Messer Contract was one of the highest dollar amount contracts voted on by the Sports Authority. Public interest in the actions of the Sports Authority taken at the November 1, 2018 meeting is also established by the evidence that the vote approving the Contract was taken within two months subsequent to a lawsuit filed by a citizens group to halt construction of the stadium at the Fairgrounds. Guided by the *Neese* Court, this Court has factored into its analysis of the adequacy of the notice given the "pervasive importance," *Neese*, 813 S.W.2d at 435, to the Nashville community of the action taken by the Sports Authority at its November 1, 2018 meeting.

Timing of Notice

Having found in this case that the November 1, 2018 Sports Authority meeting was an important one, this Court further applies the Tennessee case law from the *Englewood* case that two days notice was determined to be insufficient in that case under its circumstances. In *Englewood* the Court determined that the notice must be "sufficiently in advance of the actual meeting" so as to "give citizens both an opportunity to become aware of and attend the meeting." *Town of Englewood*, 1999 WL 419710 at *4.

From the testimony in this case of Ms. Montesrin, the Assistant to the Executive Director of the Sports Authority responsible for noticing the meetings, and Randall Williams, Division Manager of Web-Based Services for Metro's Information Technology Department, the proof at trial established that posting of the meeting on Metro's calendar and the Sports Authority website occurred on 6:45 a.m., October 30, 2018—only 48 hours in advance of the November 1 meeting. Six hours later on that same day, at 12:47 p.m. the meeting posting was sent to 1,336 subscribers on a list maintained by Ms. Montesrin. These subscribers included Shane Smiley, the president of one of the Plaintiffs in this case, the Nashville Flea Market Vendors Association, and media such as *The Tennessean,* and local news channels. Mr. Smiley also received notice of the meeting by a separate packet Ms. Montesrin sent to him. Detracting from the number of subscribers on the list and thus its outreach was the testimony of Mr. Williams that the 1,336 number of subscribers could not be verified as of the date of the November 1, 2018 meeting because 253 of that number had signed up after the meeting.

In addition, Metro's emphasis on the number of subscribers the email notice was sent to to show the extent of Ms. Montesrin's outreach does not alleviate the deficiency of the timing. Regardless of the extent of the outreach, if the timing of the meeting is not, in the words of the *Englewood* Court, sufficiently in advance of the meeting "so as to give citizens both an opportunity to become aware of and attend the meeting," 1999 WL 419710 at *4, it is inadequate notice. The standard and norm, Ms. Montesrin testified, for providing notice of Sports Authority meetings was the Friday before a Thursday meeting—five days notice, and that only two to five times in the last five years had the notice not been provided by the preceding Friday. Ms. Fawknotson testified that the notice for the November 1, 2018 meeting was not "ideal." This testimony on the standard notice of five business days is weighty proof that the 48-hour notice given in this case for a meeting, on approval of a $192 million Contract—one of the largest dollar contracts ever considered by the Sports Authority—on a matter of public interest, was not adequate as found by the appellate courts in the *Neese* and *Town of Englewood* cases also involving matters of public interest.

Adding to the inadequacy of the timing of the notice are the Court's findings of fact from the evidence that the November 1, 2018 meeting was unusual. It was not held at the Sports Authority's regular meeting time. The Sports Authority Executive Director, Ms. Fawknotson, testified that there is a regularly scheduled meeting for the Sports Authority of the third Thursday of each month, and that this was followed 82% of the time. It was

unusual, she testified, to have the meeting on the first Thursday of the month as occurred with the November 1, 2018 meeting in issue.

More facts of the inadequacy of the 48-hour notice are that the evidence established that the location of the meeting is always conducted at different sports venues and is held at a different one each time so, as Ms. Montesrin testified, the location of the meeting is not known by the public until the notice is posted.

In this case, the irregularity of the date of the November 1, 2018 meeting and that its location made it harder for the public to have, as stated in the *Town of Englewood* case, "an opportunity to become aware of and attend the meeting," heightened the need for sufficient advance notice. This is a factor in the Court's conclusion that the 48-hour notice was inadequate under the circumstances of this case. That is, the Court does not draw from the *Town of Englewood* case that a 48-hour notice is a *per se* violation of the Act.[3] But when considered in the totality of the circumstances of this case regarding the important public interest in issue and the significant dollar amount of the Contract, the 48-hour timing of the notice is inadequate.

Content of Notice

Further detracting from the adequacy of the notice of the meeting was the content of the notice. Although the testimony of Ms. Montesrin established that 1,336 subscribers were sent an email notice of the meeting from her list two days in advance of the meeting,

[3] Although the Court and Counsel reviewed the law of other states on the adequacy of two-days notice, the Court has not applied any of that law for two reasons: (1) *Town of Englewood* is Tennessee law on point and (2) the statutes of other states use a more explicit model of stating specific times and content regulations so as not to be analogous to the flexible totality of the circumstances test used in Tennessee.

the testimony of Mr. Williams, the Metro IT witness, explained that the meeting time, place and agenda did not appear on the face of the email and that several URLs had to be opened to obtain this content. The number of subscribers Mr. Williams could account for who opened all the URLs to find the content was less than 30.

Additionally as to content, there is the evidence that the agenda item description contained in the notice was "Consideration of Construction Management Agreement between the Sports Authority and Mortenson/Messer Construction Co." (Trial Exhibit 24).[4] Although this content is not as "cryptic" as the content in the *Town of Englewood* case, it is somewhat, like in the words of the *Englewood* Court, "bereft of any explanation of" the issue to be considered. 1999 WL 419710 at *3.

The evidence of the trial of this case established that the November 1, 2018 meeting was not just "consideration" of the Mortenson/Messer $192 million Contract. It was the final step of a consideration process that was now complete. To be determined at the November 1, 2018 meeting was whether to approve the Contract for Metro to enter into it as recommended by the Finance Subcommittee. In this regard the evidence was that in August of 2018 the Metro Purchasing Agent had issued an Intent to Award Letter (Trial Exhibit 4) on the Contract but that the Sports Authority had to approve and negotiate the Contract. Trial Exhibits 1 and 22 establish that the Sports Authority at its August 2018 meeting first discussed the Contract but deferred approving the Contract to

[4] *See Fisher v. Rutherford Cty. Reg'l Planning Comm'n*, No. M2012-01397-COA-R3CV, 2013 WL 2382300, at *6, FN 3 (Tenn. Ct. App. May 29, 2013) ("A requirement of notice of the agenda of special meetings makes sense because one can assume items requiring a special meeting are of particular importance and, therefore, deserving of more extensive notice.").

Mortenson/Messer due to a bid challenge. By the time of its September 20, 2018 meeting, the bid challenge was resolved, and the Sports Authority Board voted to approve engagement of Mortenson/Messer but still had to negotiate the Contract. In October of 2018 (Trial Exhibit 22) a finance subcommittee of the Sports Authority Board considered and voted to recommend to the Board that it approve the Contract.

With this background, the characterization in the notice of the November 1, 2018 meeting as "Consideration of Construction Management Agreement" is not misleading as in *Neese*, 813 S.W.2d at 436, but is somewhat "cryptic" and "bereft of any explanation," as found in *Town of Englewood,* when the action slated for the meeting in this case was a vote on approval a Contract of substantial and somewhat unprecedented cost and public importance. Although not as weighty and dispositive, nevertheless the cryptic content of the notice of the November 1, 2018 meeting, when added to the weighty facts of the inadequacy of the 48-hour timing of the notice, establish that the totality of the circumstances is that the notice provided of the November 1, 2018 meeting did not "fairly inform the public." *See Memphis Publ'g Co. v. City of Memphis*, 513 S.W.2d 511, 513 (Tenn. 1974).

Location of Notice

With respect to the location of the notice, that it was posted on the Metro calendar, Sports Authority website, and sent out on the subscribers list, is adequate under the case law because these are public postings and this was the consistent, routine practice by the Sports Authority. As held in *Town of Englewood*, 1999 WL 419710 at *3, posting

consistently in the same public places is adequate. But the location of the posting in this case is not enough to salvage and overcome the inadequacy of the timing and content.

Attendance

The sign in sheet for the November 1, 2018 meeting shows only one member of the public attended. All the other attendees had a vested interest in the Project. This is some circumstantial evidence that the notice to the public of the meeting was ineffective and therefore inadequate under the law.

Totality of the Circumstances

Thus, based upon the foregoing totality of the circumstances of the notice of the November 1, 2018 meeting of the Sports Authority, the evidence established in this case a violation of the Open Meetings Act, section 8-44-103(b).

Violation of the Act and Voiding of Approval of Construction Contract

The consequence provided in the Act for a violation is that the action taken at the November 1, 2018 Sports Authority meeting approving the $192 million stadium construction Contract with Mortenson/Messer is void and of no effect. The law in this area is clear and unequivocal: "Any action taken at a meeting in violation of this part shall be void and of no effect." TENN. CODE ANN. § 8-44-105.

Application of the Law and Findings of Fact on Metro's Defenses

No Bad Intent Defense

Metro's defense is that the inadequacy of its notice was not done to intentionally mislead. Ms. Montesrin testified that the timing of the notice was delayed because she was waiting for the agenda to be finalized. Ms. Fawknotson testified that the unusual timing of the first Thursday of the month was due to the October Fall break. The testimony was that nothing was being done in secret or to hide. Yet, according to Tennessee case law, intent is irrelevant.

> Under Tennessee's Act, however, we do not believe that such an intent to circumvent the Act is necessary to find a violation. *See, e.g., State ex rel. Akin,* 1993 WL 339305, at *4. In *State ex rel. Akin,* the court considered a possible violation of Tennessee's Sunshine Law, the predecessor to the Open Meetings Act:
>
> > We find no evidence that the city commissioners in this case contrived to use their work sessions to circumvent the Sunshine law. Rather than acting in bad faith, they were simply following their customary way of doing business that had developed over time as a matter of convenience. The public officials' motives and intentions, however, are not controlling.

Johnston v. Metro. Gov't of Nashville & Davidson Cty., 320 S.W.3d 299, 311 (Tenn. Ct. App. 2009) (citation omitted). Even an unintentional violation of the Act renders the action taken at an inadequately noticed meeting to be void and of no effect. So, for example, in *Neese v. Paris Special School Dist.*, 813 S.W.2d 432, 436 (Tenn. Ct. App. 1990), even though the Court found that the governmental body had not "intentionally misled the public" with regard to notice, because of the inadequacy of the notice, the actions taken at that meeting would have been void had it not been for a subsequent ratification.

Laches Defense

There is, however, a safety valve to the application of the Act. There is the doctrine of laches, and it has been asserted as a defense in this case by Metro. Under this doctrine, an unreasonable delay by the party asserting violation of the Open Meetings Act coupled with prejudice to the governmental body provide grounds for dismissal of the claim of a violation of the Open Meetings Act.[5]

For example, in *Hampton v. Macon County Bd. Of Educ.*, M2013-00864-COA-R3-CV, 2014 WL 107971 (Tenn. Ct. App. 2014), the appellate court dismissed the Open Meetings Act claim of a terminated Director of Schools who waited to file his claim until his contract expired. The appellate court found his delay in asserting a violation of the Act to be strategic on his part and prejudicial to the governmental body because it had hired an Interim Director after the Plaintiff's termination for the remainder of the contract resulting in the payment of two salaries. "If Mr. Hampton had promptly brought his suit and had successfully obtained reinstatement for the duration of his contract, the School Board would not have been required to pay both salaries." *Id.* at *6. Quoting 30A C.J.S. *Equity* § 147 (2013), the *Hampton* Court stated that one form of prejudice occurs when "money or valuable services will be wasted as a result of the delay." *Id.* On this basis the Open Meetings Act claim was dismissed on the ground of laches as to the Plaintiff's return to duty claim.

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[5] "It is undisputed that the Open Meetings Act contains no express statute of limitations. *See* Tenn.Code Ann. § 8–44–101, *et. seq.*" *Hampton v. Macon Cty. Bd. of Educ.*, No. M2013-00864-COA-R3CV, 2014 WL 107971, at *4, FN 1 (Tenn. Ct. App. Jan. 10, 2014).

Yet as to the remainder of the Plaintiff's Open Meetings Act claims in *Hampton*, the Court did not find the doctrine of laches applied and allowed those to proceed on remand to the trial court to litigate the Plaintiff's declaratory judgment and injunction claims because the governmental body was not able to show the necessary element of prejudice under its laches defense. *Id.* at *7. In holding that the Plaintiff's claim for declaratory and injunctive relief under the Open Meetings Act was not barred by laches, the *Hampton* Court's analysis of the facts was that the governmental body had not shown that it would be "unable to defend against the remaining claims, that it has been disadvantaged in any way, or that money or valuable services have been wasted as a result of the delay in filing these particular claims." *Id.* The *Hampton* Court concluded that, "Without some showing of prejudice, the application of the doctrine of laches is inappropriate." *Id.*

In these rulings the *Hampton* Court provided trial courts Tennessee law on how to apply laches, particularly with respect to an Open Meetings Act claim. The *Hampton* Court stated that prejudice is present where there is evidence of loss of evidence, the death of a witness, or the loss of memory caused by the delay. *Id.* But the *Hampton* Court was clear that actual prejudice must be shown by the party asserting the defense. Prejudice is not presumed but must be affirmatively demonstrated. *Id.* at *8. The *Hampton* Court stated the principle that not every change in condition constitutes prejudice for the bar of laches to apply. "Where no one has been harmed in any legal sense and the situation has not materially changed, the delay is not fatal." *Id.*

Applying the foregoing Tennessee laches law to the proof adduced at trial, the Court finds that the testimony of Ms. Fawknotson and Mr. Gobbell, the Project Manager, establish that Metro suffers no actual prejudice from voiding the November 1, 2018 approval by the Sports Authority of the Contract.

Rebidding Costs

Both of these witnesses testified that if the effect of a violation of the Act in this case was that the Contract has to be rebid, there will be millions of dollars of costs and valuable services wasted and that would constitute the kind of prejudice required under Tennessee case law to establish the defense of laches. Rebidding, however, is not required and shall not occur.

The Plaintiffs announced in open court in the trial of the case that the remedy they are seeking is not a rebidding of the Contract. As stated by Plaintiffs' Counsel and Plaintiffs' witness, Duane Dominy, in his testimony at trial, the remedy the Plaintiffs seek is for the Sports Authority to have to convene another special meeting to vote on approval of the $192 million Contract with adequate public notice so as to promote and assure openness and accountability in government. As Mr. Dominy testified, his concern is not Mortenson/Messer being the contractor of the stadium. The purpose of the lawsuit and his motivation for testifying is for the government to follow the law and be transparent.

Thus, Metro failed to prove damages related to rebidding because that will not occur.

Costs Incurred Thus Far on the Project

As to costs incurred to date on the Project, the evidence proved there is no prejudice to Metro because it has not paid many of these costs. The evidence established that the Memorandum of Understanding (Trial Exhibit 6) between the Team and the Sports Authority is that the costs incurred thus far on the Project, until the bonds are issued, are paid by the Team. All the pay applications in Trial Exhibit 31 have been paid by the Team. The Sports Authority has paid none of these costs.

With respect to the costs Metro did prove that it has paid, such as the $500,000 fee to the Project Manager (Gobbell Hayes Partners), these costs are not lost and do not constitute waste because there will be no rebidding of the Contract as found above. The Project Manager fees and other costs Metro paid would have been incurred regardless.

Delay Costs Upon Voiding the November 1, 2018 Meeting

In addition, the evidence established that there will be no additional costs as the result of voiding the November 1, 2018 action of the Sports Authority approving the Contract because there are several matters in upcoming months that must occur before construction can even begin. First, there is Section 2.1 of the Contract (Trial Exhibit 29). It contains a provision that reserves the right to Metro to terminate the Contract prior to construction if no Guaranteed Maximum Price ("GMP") is agreed to by the parties. As of now, construction cannot begin because no GMP has been agreed to. Additionally, there are a number of matters of Resolution RS2017-910 (Trial Exhibit 7) pertaining to issuance of bonds and execution of agreements which have not occurred and must occur before

construction can begin. Mr. Gobbell testified that these are slated for completion in the upcoming months. Thus, in response to the Plaintiffs' assertion that at most the delay from violation of the Open Meetings Act would consist of the five days to re-notice the meeting and convene a new Sports Authority meeting, Metro was unable to provide any proof that the delay would be more than other events which must occur before construction can commence.

Defaults, Forfeiture, Liquidated Damages

The Court persistently and thoroughly probed Metro on whether voiding the November 1, 2018 Contract approval would trigger clauses or provisions in other Project agreements of default, forfeiture, liquidated damages, etc. The Court's probing went so far as to issue a June 16, 2020 *Notice* for Metro to be prepared to address this issue. In response, Metro presented no such proof and identified no such damage.

Cure of Violation by Ratification

Another reason Metro has failed to show prejudice is that it has had the means all along to cure its violation of the Act. Under Tennessee law the consequences of the governmental body's action being void when the Act is violated does not have to be permanent. If the governmental body subsequently holds a new meeting with substantial and true reconsideration, it can properly ratify the prior violative decision.

> T.C.A. § 8–44–105 provides that "[a]ny action taken at a meeting in violation of this part shall be void and of no effect...." We do not believe that the legislative intent of this statute was forever to bar a governing body from properly ratifying its decision made in a prior violative manner. However, neither was it the legislative intent to allow such a body to ratify a decision in a subsequent meeting by a perfunctory crystallization of its

> earlier action. We hold that the purpose of the act is satisfied if the ultimate decision is made in accordance with the Public Meetings Act, and if it is a new and substantial reconsideration of the issues involved, in which the public is afforded ample opportunity to know the facts and to be heard with reference to the matters at issue. *See Alaska Comm. Coll. Fed. of Teachers v. University of Alaska*, 677 P.2d 886, 891 (Alaska 1984).

Neese, 813 S.W.2d at 436. *See also Johnston v. Metropolitan Government of Nashville*, 320 S.W.2d 299, 310 (Tenn. Ct. App. 2009). *Allen v. City of Memphis*, Nos. W2003-00695-COA-R3-CV, W2003-00396-COA-R3-CV, 2004 WL 1402553 (Tenn. Ct. App. 2004). The ratification, though, must be a new and substantial reconsideration, not just an in-form only approval.

Applied to this case, the ratification doctrine entails that when Metro learned of the Plaintiffs' claim that the Open Meeting Act had been violated, either when this lawsuit was filed in September of 2019 or before, Metro could have convened a new meeting to ratify the prior decision. In the cases cited above, this was done by the governmental bodies, and this cure is recognized by Tennessee law. In this case Metro did not avail itself of this remedy.

Accordingly, Metro has failed to prove any actual prejudice from imposition of the penalty for violating the Open Meetings Act and therefore has failed to defend against application of the Act based upon laches.

Futility Defense

Metro also argued that it would be a futile act for the Court to void the Contract approval action taken at the November 1, 2018 meeting because the public can only

observe the Sports Authority meetings. There is no public comment or question time.[6] This, however, is not relevant. Even if they have no voice in the meeting proceedings, the public is required by section 8-44-103(b) of the Act to be provided adequate public notice that will fairly inform them of the meeting. That is because the purpose of the notice is not merely public participation at the meeting where that is allowed but more importantly notice so that the public has an opportunity to attend and observe to assure openness and accountability of government. *See Johnston v. Metropolitan Government of Nashville and Davidson County*, 320 S.W.3d 299, 310 (Tenn. Ct. App. 2010).

Conclusion

The evidence is clear: Metro's delayed 48-hour notice of an irregularly scheduled meeting of the Sports Authority to approve a matter of significant public importance of the $192 million construction Contract on the MLS stadium to be located on the iconic Fairgrounds property, when there was no immediate urgency or emergency for such short notice, was inadequate notice to the public. These actions violate the requirement of

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[6] *See, e.g., Souder v. Health Partners, Inc.*, 997 S.W.2d 140, 150 (Tenn. Ct. App. 1998).

> While the Act requires all meetings of entities subject to the Act be open to the public, it does not guarantee all citizens the right to participate in the meetings. *Whittemore v. Brentwood Planning Comm'n,* 835 S.W.2d 11, 18 (Tenn.App.1992).
>
> > [T]he notice required by Tenn.Code Ann. § 8–44–103 is sufficient as long as it gives interested citizens a reasonable opportunity to exercise their right to be present at a governing body's meeting. The notice need not invite public participation in a public meeting in order to satisfy the [Act's] requirements.
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> *State ex rel. Akin v. Town of Kingston Springs,* No. 01–A–01–9209–CH00360, 1993 WL 339305, at *5 (Tenn.App.M.S. Sept. 8, 1993).

section 8-44-103(b) of the Open Meetings Act that "adequate public notice" must be given. To avoid application of the Act, Metro had to show some actual prejudice it will sustain if the penalty under the Act of voiding approval of the Contract is applied. Metro showed no prejudice because there will be no rebidding of the construction contract. As to costs, so far Metro has not paid most of the costs on the stadium development project. The Team has paid those costs, and the costs Metro has paid are not wasted. These are costs that would have to be incurred regardless. In addition other events, besides the outcome of this lawsuit are delaying construction. Finally, the Court's persistent probing of Metro, even to the extent of the Court issuing a June 16, 2020 *Notice* for Metro to specifically analyze the issue of prejudice and provide this to the Court, failed to yield any identification by Metro of drastic or severe prejudice, such as defaults, penalties, liquidated damages, forfeitures, or other domino-effects, from the voiding of the November 1, 2018 approval of the stadium construction Contract that is the consequence of application of the Act. The Court carefully and thoroughly covered this point, but it yielded no evidence from Metro of actual prejudice. Thus, without evidence of such prejudice, the law requires that the November 1, 2018 action of the Sports Authority, approving the $192 million Mortenson/Messer Contract, is void and of no effect, and that is so declared by this Court on the Plaintiffs' Count III claim of its December 29, 2019 *Complaint.*

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

cc: Due to the pandemic, and as authorized by the *Twentieth Judicial District of the State of Tennessee In Re: COVID-19 Pandemic Revised Comprehensive Plan* as approved on May 22, 2020 by the Tennessee Supreme Court, through June 30, 2020, this Court shall send copies solely by means of email to those whose email addresses are on file with the Court. If you fit into this category but nevertheless require a mailed copy, call 615-862-o5719 to request a copy by mail.

For those who do not have an email address on file with the Court, your envelope will be hand-addressed and mailed with the court document enclosed, but if you have an email address it would be very helpful if you would provide that to the Docket Clerk by calling 615-862-5719.

James D. R. Roberts
Lora Barkenbus Fox
Catherine J. Pham
R. Alexander Dickerson
Quantavius Poole

Rule 58 Certification

A copy of this order has been served upon all parties or their Counsel named above.

s/Phyllis D. Hobson June 25, 2020
Deputy Clerk
Chancery Court