

IN THE COURT OF APPEALS FOR THE
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

KEVIN FISHER, et al.)	
)	
Plaintiffs/Appellees)	
)	
v.)	APPELLATE CASE
)	No. M-2012-01397-
)	COA-R3-CV
RUTHERFORD COUNTY REGIONAL)	
PLANNING COMMISSION, et al.)	Rutherford County
)	Chancery Case No. 10CV-1443
Defendants/Appellants.)	
)	
)	

**BRIEF *AMICUS CURIAE* OF
PUBLIC NOTICE RESOURCE CENTER**

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IDENTITY AND INTEREST OF AMICUS

This amicus is a public interest group that supports transparency and open government.

Public Notice Resource Center, Inc. is a 501(c)(3) nonprofit public interest organization based in Arlington, Virginia. Its primary supporters are companies and organizations that believe public notice is most effective when carried out through newspapers. It was founded in 2003 to conduct research and provide public education on public notice trends, legislation and policies. Its website is www.pnrc.net.

This amicus has a strong interest in affirming the important role of newspaper public notice in providing transparency in governmental actions, particularly involving open meetings.

SUMMARY OF ARGUMENT

The controversy in this matter centers on whether the actions of the Rutherford County Regional Planning Commission in granting a site plan permit to the Islamic Center of Murfreesboro occurred without proper notice to the public. The Trial Court ruled that the public notice provided was insufficient, but focused improperly upon the avenues for the notice rather than observing that the Tennessee Open Meetings Act does not require sufficient information to be presented in a notice to inform the public of the issues to be addressed in the meeting

The Tennessee Open Meetings Act requires governmental bodies which holds a meeting previously scheduled by statute, ordinance, or resolution provide “adequate public notice” of such meeting. T.C.A. 8-44-103(a). There is no definition in the Tennessee Open Meetings Act to help clarify “adequate public notice;” therefore, a 1974 State Supreme Court case helps provide guidance by setting a “totality of the circumstances” standard. Memphis Publishing Co. v. City of Memphis, 513 S.W.2d 511, 513 (Tenn. 1974) Following the Supreme Court’s rule, the past practice of the Rutherford County Regional Planning Commission in providing public

notice through newspapers is justified and the Trial Court's criticism of the practice is unwarranted.

The wisdom of using local newspapers to reach the public is followed under other Tennessee laws. For example, under Tennessee election law, election commissions and boards are required to publish notice of meetings in a newspaper of general circulation. T.C.A. 2-1-110. Consolidated governments and local governmental functions and entities are required to publish notice of meetings in newspapers when considering improvements by special assessments. T.C.A. 7-32-101(d)(2)(B). In limited zoning matters, regional planning commissions are required to publish notice in a newspaper of general circulation in the county when a public hearing is scheduled. T.C.A. 13-7-105. With so many other government bodies fulfilling their notice requirements by publishing public notice in a newspaper, the Rutherford County Regional Planning Commission should not be criticized for following this practice. Indeed, as this amicus brief purports to show, the use of local newspapers is widely practiced in other states when the public interest is served by inviting citizen participation in land use policies.

The trial court's opinion, to the extent that it found newspaper publication to be inadequate, was in error. The fault in carrying out the mission of government transparency was not in the use of a newspaper publication but rather in the statute itself. While requiring notification of a pending meeting, it does not require sufficient information on matters to be considered at an open meeting to enable citizens to evaluate their interest and concerns with those matters. If a transgression occurred against the expectation of transparency that Chancellor Corlew articulated in the Trial Court opinion, it was in the failure of the statute to require publication of a sufficiently detailed agenda. Without such a requirement, no choice of

communications avenues could be fully successful in achieving the goals of government transparency that the trial court set out.

But the legislature has not mandated publication of an agenda in its Open Meetings Act, so the public notice provided by the Planning Commission must be found legally sufficient, whether it was in fact sufficiently informative to the public or not. To the extent the trial court found that unarticulated qualities of controversy in the underlying matter dictated greater use of governmental communications channels, the court is looking to the wrong solution. Broader broadcasting of the information included in the Murfreesboro Post would have achieved little to inform the public if the content of the notice itself was uninformative. Thus, while the Court should overturn the lower court's decision, it would be useful for this court to point out the large gap in the public notice statute to encourage the legislature to repair it.

This amicus take no position on the underlying matter of whether a site permit is required in the application of the Islamic Center of Murfreesboro nor on any of the antecedent constitutional issues that have arisen as a result of the trial court's decision. Nor does it take a position on the choice of newspapers made by the county.

The purpose of this brief is to provide the court with an overview of the manner in which other states use public notice to involve the citizenry in land use matters and to direct the court's attention to the value of providing the proper notice through local newspapers.

ARGUMENT

I. The proper use of public notice in local newspapers affords the citizenry an avenue that is widely accessible, independent of the government, easily archived and legally authenticated.

As shown in Appendix 1, the type of notice criticized by the trial court is almost uniformly used in other states in matters deemed by the legislature to be of sufficient public importance to alert the public of the opportunity to participate and be heard. Statutes in other states do not look to government channels to reach the public for the simple reason that these channels will generally not achieve the goals of transparency.

A. The newspaper is the most accessible medium to the widest audience.

The trial court criticized the notice published by the Planning Commission: "...the advertisement was in relatively small type near the bottom of a page." Then it went on to note that the county operates a cable television station and a website but that the meeting was advertised on neither of them. Even three days after the May 24, 2010 meeting where the Islamic Center's application was considered, the county website offered no hint that a meeting had occurred.

Though most states' public notice statutes were enacted years before digital communications were developed, legislatures across the country more recently have considered whether the onset of the digital revolution indicates that it is time to rely upon government-owned websites to carry out the critical role of public notice. For example, the Connecticut Legislature considered a bill that would have permitted the Secretary of the State to post executive orders concerning the Governor's proclamation of certain emergencies on the secretary's Internet web site and publish such orders in the Connecticut Law Journal rather than publish them in a newspaper. S.B. 38, 2012 Gen. Assem. Reg. Sess. (CT). The Hawaii

Legislature considered a bill that would have authorized government agencies to publish notices electronically or online on the state or county official government websites in lieu of publication in a newspaper or other written publication. S.B. 2219, 2012 Leg., Reg. Sess. (HI). The New Jersey Legislature considered a bill that would have permitted publication of legal notices by governments and individuals on official government website instead of newspaper. A. 1618, 2012 Leg., Reg. Sess. (NJ). But none of these state governments, in the end, concluded that government-owned media were superior to the independent press in providing official record publication.

Thus, in this modern era, with few exceptions, legislatures have retained the newspaper as the medium of record for public notice. In one case, Utah temporarily abandoned the newspaper notice by passing S.B. 208, 2009 Leg. Reg. Sess. (UT) in favor of a government website, and then reversed course and amended the law two years later to return to use the local newspaper for official record for public notice. S.B. 85, 2011 Leg. Reg. Sess. (UT).

Even where policymakers have deemed it necessary to add a digital notification, the printed newspaper has remained the core public notice vehicle and its associated websites were added to the publication requirement for purposes of extending the reach of the public notice. Fla. Stat. Ann. § 50.0211 (Internet website publication); Ill. Comp. Stat. Ann. ch. 715, para. 5/2.1 (Statewide website, effective December 31, 2012)

Newspapers also are a trusted medium to a wide majority of the public. A recent study conducted by the Pew Research Center's Project for Excellence in Journalism and Internet & American Life Project, finds that nearly three quarters (72%) of adults follow local news and information, and local newspapers are the trusted source they rely on for most of the local

information they need. Pew Research Center's Project for Excellence in Journalism and Internet & American Life Project, and the Knight Foundation (April 2012).

Though government websites may be thought to be published "everywhere," because of the ubiquity of the Internet, practical considerations bar many citizens from using the information on them. Many citizens in rural areas lack access to broadband transmission. National Telecommunications & Information Administration, Exploring the Digital Nation: Home Broadband Internet Adoption in the United States, p. vi (Nov. 2010).

Many demographic subsets within local populations lack the resources or technical skills to access the internet. Among these are senior citizens, some minority groups and the poor. Also, a substantial portion of the population claims it prefers not to use the Internet. "Government Online," Pew Internet and American Life Project, Pew Research Center, p. 14 (April 27, 2010).

Finally, though public use of the Internet for certain interactions with government shows steady, if slow, increases, the portion of the population that uses it to visit local government websites remains very low. According to the Department of Commerce, of the 60 percent of Americans who are considered Internet users, the percentage of the total population that has visited a local government website is only about 8 percent. Exploring the Digital Nation at 13-14.

B. The newspaper is independent of the body charged with providing notice.

The advent of government websites is not the first in history to enable governments to speak directly to the citizenry. Governments have long had the ability to print and distribute materials through a variety of means, including the US mail. But states uniformly rely upon the newspaper instead to attract citizens to opportunities for participatory democracy. Every state

requires a newspaper notice for some types of local government meetings involving land use and many require far greater specificity than the Tennessee Open Meetings Act requires. See, for example, in Appendix 1, the examples of Alaska, California, Connecticut, Florida, Hawaii, Idaho, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Mississippi, New Hampshire, North Dakota, Pennsylvania, Rhode Island, Utah, Virginia, Wisconsin and Wyoming. These statutes recognize the inherent value in requiring an independent body to provide notice by using the local newspaper and at least generally describing the matters to come before the governing body. In addition to the obvious value of packaging the public information inside a bigger bundle of news, sports, weather and school information, the newspaper itself has provided an incentive to hold governments accountable for public notice because the advertising provides some revenue stream to these local publishing businesses.

Though some government websites are professionally designed and easily navigated, many are not and the public may have little incentive to dig deeply for public notice. In addition, governments may not be heavily motivated to publish their own information, especially when matters are controversial. The trial court noted here that while the county website could have published information about the meeting and usually did provide information about its meetings, the Islamic Center permit meeting was "inadvertently" not posted. The trial court does not attribute "sinister motives" to the county, but it would not need to do so to find sufficient motivation for a local government to omit or delay an Internet posting when the posting might attract unwanted participation. But by providing a private business that already has an intense local interest in the community with an incentive to procure the notice, the legislature has built in additional protection for its mission of transparency.

C. The nature of the newspaper notice provides authentication and easy archiving.

Essential to the principles of public notice is the ability to recover a true copy of the publication at some later date when an interested party, such as the complainants in the trial court, find cause to question whether proper notice was given. In this case, the court had the opportunity to review the printed notice, and did not need to be concerned about whether the facsimile of the notice used in the case was a true copy. Tennessee Rules of Evidence, like the Federal Rules of Evidence, recognize newspaper clippings as self-authenticating. Tenn. R. Evid. 902(6) and Fed. R. Evid. 902(6).

Whether information on a website is equally capable of proof as a true copy depends upon the degree to which authentication tools are used, the court is familiar with their use, screen shots have been timely captured and verified, and witnesses can be procured to attest to the content that may have appeared at any given time. The newspaper notice can generally be readily retrieved from the publisher or from other public sources, such as a public library, whereas information posted on websites can be deleted or lost from website upgrade conversions.

Also, content on a website may not be preserved without considerable public expense because technology is constantly evolving and formats of the information often need converting to conform to new technologies. The Library of Congress for example, specifically admits that “storage is costly in time and in money” when acquiring, cataloging, preserving and serving collection materials of historical importance to Congress and the American people. Library of Congress Collections Policy Statements Supplementary Guidelines (Nov. 2008).

II. Meaningful public notice requires laws prescribing meaningful information.

Every state requires some type of transparency in public meetings. Virtually every state specifically focuses upon land use policies, including zoning, siting, master planning and

taxation, as subject matter benefitting from public participation. Obviously, citizen interest in land use policies runs high across the nation. The appendix provides a list of state statutes mandating public participation in land use policy-making.

Notable in many statutes are specific requirements for publication of an agenda prior to commencement of a public meeting, which enable citizens to determine whether a topic of interest may arise, or at least a statement of the general purpose of a meeting.

Tennessee, however, does not require the publication of an agenda or even a hint of the subjects under consideration. The trial court found that the county's practice had been to publish agendas on its website, but none appeared for the meeting in question. No agenda appeared in the newspaper public notice, nor on the county cable television station. The trial court found that nothing in the notices would have prompted citizens to be aware that a matter of controversy might arise.

However, from that finding, the court proceeds to elucidate on the county's obligation to foresee that controversy might arise and to take extra steps to publicize its intentions, regardless of the lack of statutory mandate to do so. The trial court drew no boundaries around the quality or nature of such possible controversy and gave the county no guidance on how it might predict whether a matter requires heightened public notice. It left the public body in a quandary , in future matters, as to whetherto engage in extra expense and effort to publicize possible actions or to take the normal course of providing simply a meeting notice without anything further to indicate its purpose. The quandary, likely perplexing to the governing body, has the dual disadvantage of unnecessarily requiring additional expense to avoid risk and of putting the government in charge of deciding whether the public might be interested in its actions.

A better path would be to require publication in the local newspaper of an agenda, and leave the determination of the nature and scope of controversy to the reader. Such a policy would be "content-neutral" as it applies to the types of deliberations the county might undertake, would remove the burden of ambiguity from county officials and would put the tools of democratic participation in the proper hands: the public. (Nothing in the law prohibits a county from also utilizing its own website or cable television station or, indeed, publishing its notice in more than one newspaper if it is in fact motivated to distribute its information widely.)

But Tennessee law does not require much enlightenment for the taxpayers, and whether the court agrees with this amicus that such a requirement would constitute sound public policy, this court may be reaching beyond the bounds of proper jurisprudence to require one. The need for action is in the legislature, which determines the policies of public notice.

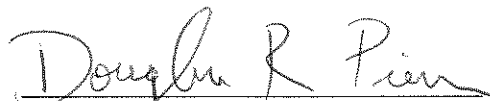
CONCLUSION

The purpose of this brief is to call the court's attention to the wide use around the nation of newspaper public notice to alert the public to meetings of government bodies, particularly when land use matters and policies are involved. It also is to point out that the trial court erred in focusing unduly upon the avenue chosen by Rutherford County for its notice of the meeting to review a site plan for the Islamic Center. Because the notice provided no hint of the intent to review the plan, even massive distribution could have no further enlightened the public that a matter of possible interest was on the docket.

The traditional Tennessee public policy of using newspapers as the primary vehicle for official record notice is the correct one, and one customarily used in other states. But true public notice requires information sufficient to enable an informed citizenry to determine whether it wishes to become involved. This court's attention is directed more productively to the content of

the notice itself. Tennessee law does not prescribe publication of an agenda for regularly-scheduled meetings. This amicus believes Tennessee citizens would be better served if it did, however, that is a matter for the legislature. This court should apply the law as it is written.

Respectfully Submitted,



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CERTIFICATE OF SERVICE


I do hereby certify that a copy of the foregoing document has been mailed first class, U.S. Mail, postage prepaid, to the forgoing individuals on this the 31st day of January, 2013.

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APPENDIX

1. State by State Survey of Public Notice Requirements
2. Connecticut Senate Bill No. 38 (2013)
3. Hawaii Senate Bill 2219 (2012)
4. New Jersey Assembly Bill No. 1618 (2012)
5. Utah Senate Bill 208 (2009)
6. Utah Senate Bill 85 (2011)
7. Pew Research Center's Project for Excellence in Journalism and Internet & American Life Project, and the Knight Foundation (April, 2012)
8. National Telecommunication & Information Administration, Exploring the Digital Nation: Home Broadband Internet Adoption in the United States (Nov., 2010)
9. "Government Online," Pew Internet and American Life Project, Pew Research Center (April 27, 2010)
10. Library of Congress Collections Policy Statements Supplementary Guidelines (Nov. 2008)
11. Fla. Stat. Ann. § 50.0211
12. Ill. Comp. Stat. Ann. ch. 715, para 5/2.1