



State panel rules Sully Co. violated state open meetings laws

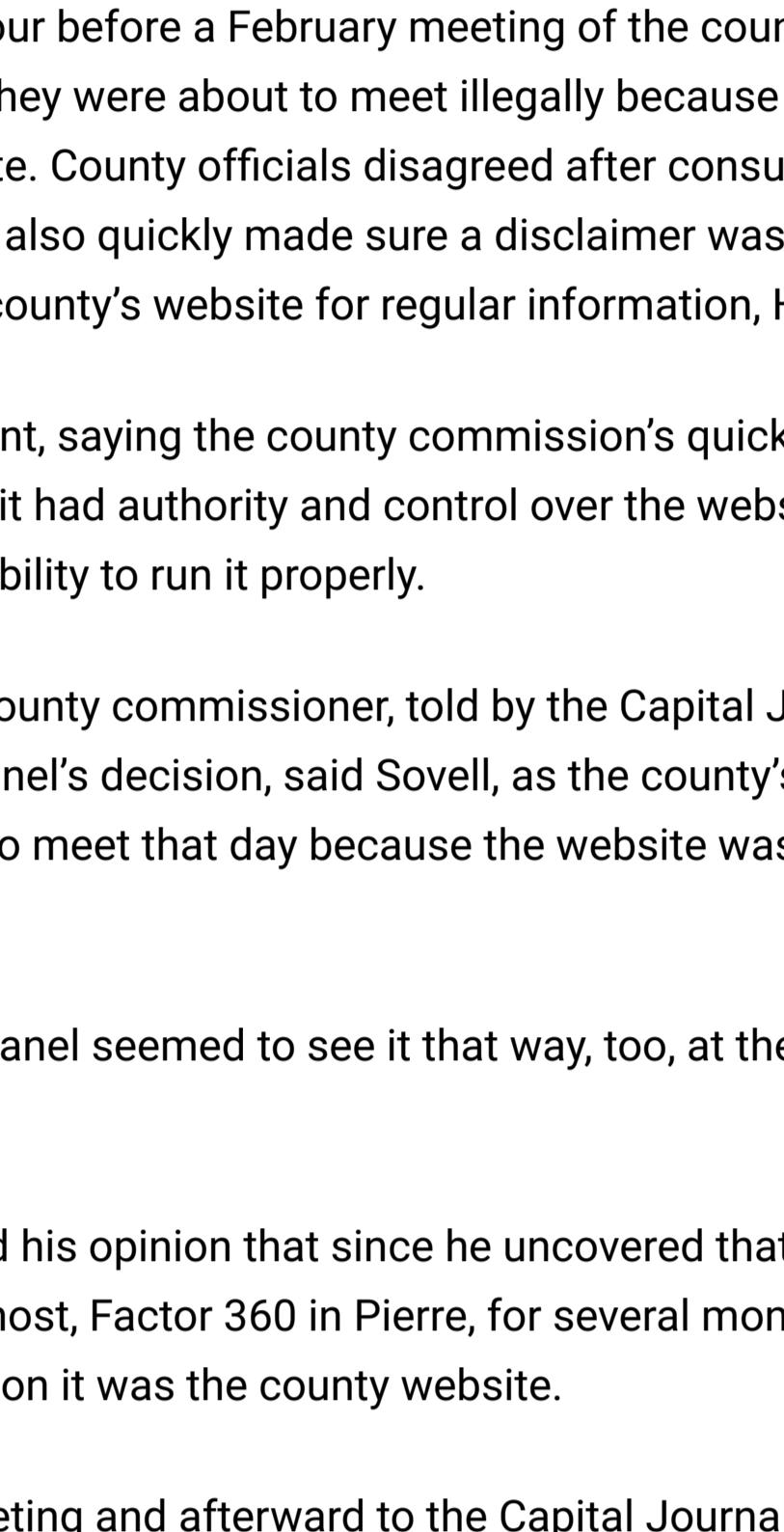
By Stephen Lee Stephen.lee@capjournal.com Dec 16, 2015 0

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The state's Open Meeting Commission voted 3-1 Wednesday in a decision saying that Sully County violated state law by not posting public notice on the county's website about four meetings at which zoning decisions were made allowing a proposed ethanol plant to be sited next to Onida.

Open Meeting Commission Chairman Emily Sovell recused herself from the hearing because of her involvement in the case as Sully County state's attorney.

The Open Meeting Commission is made up of five county state's attorneys appointed by the state attorney general. They met via telephone conference because of the snow storm.



The decision could have ramifications for the future of the plant, although that's not entirely clear.

The complaint came from Adam Altman, an Aberdeen attorney representing several Onida residents opposing the siting of a planned ethanol plant to be built by Ringneck Energy. Much of the money to start the plant has been raised and owners have moved dirt and plan to start construction in the spring.

But Wednesday's administrative decision, as well as a separate appeal planned by Altman to the state supreme court, might pose problems.

Altman's complaints about the county commission and the planning and zoning board not properly posting notice of meetings were rejected earlier this fall by state Judge John Brown in a separate action after a hearing in Onida on the opponents' lawsuit.

Altman filed a complaint with the state Open Meetings Commission focusing on whether www.sullycounty.net was the county's official website.

The decision Wednesday came after an hour-long discussion during which commissioners acknowledged they changed their minds on the issue. The key turning point seemed to be when Commissioner Mark Reedstrom said it seemed clear from the postings on sullycounty.net meeting minutes, that the county had for several months paid a Pierre company for "hosting" the website on the internet.

"That's news to me," Jack Hieb, the Aberdeen attorney representing Sully County, said during the meeting.

One of Hieb's key arguments, before Judge Brown and Wednesday, too, was that the website was far from an official county website.

It simply was one built and run by a deputy sheriff who did it on his own initiative and his own time, to help the county but mostly to learn how to administer a website. County commissioners didn't authorize it and paid little attention to it, Hieb said.

He said Altman was way off in describing it as the official county website requiring regular notices of county meetings.

Back in February, just an hour before a February meeting of the county commission, Altman told Sully County officials that they were about to meet illegally because notice of the meeting had not appeared on the website. County officials disagreed after consulting with the state's attorney, and met. But they also quickly made sure a disclaimer was posted on the website making clear it wasn't the county's website for regular information, Hieb said.

Altman turned that argument, saying the county commission's quick decision to get the disclaimer posted showed it had authority and control over the website and that it simply was trying to evade its responsibility to run it properly.

Beverly Zebroski, a Sully County commissioner, told by the Capital Journal on Wednesday about the Open Meeting panel's decision, said Sovell, as the county's legal counsel, told county commissioners it was OK to meet that day because the website wasn't the county's official website.

The state Open Meetings panel seemed to see it that way, too, at the beginning of the hearing Wednesday.

But once Reedstrom voiced his opinion that since he uncovered that fact that the county had been paying the website's host, Factor 360 in Pierre, for several months in 2013 and 2014, it seemed a de facto admission it was the county website.

Altman said during the meeting and afterward to the Capital Journal, that the Sully County auditor also posted meeting agendas and minutes on the website at times.

Open Meeting commissioners said they were persuaded Wednesday by Reedstrom's comments that the county was evading responsibility for maintaining properly the website for which it had been paying.

The larger underlying issue is Altman's clients' ongoing opposition to the ethanol plant's siting.

The four meetings in question involved county decisions about siting the proposed plant just south of Onida. Several residents who live right across the street from the site have opposed that location, saying it would be too harmful and dangerous to them and their properties. The group, which hired Altman, says they support the plant and just think it needs to be farther from town.

In a separate action, the opponents had sued the county commission in state court. This fall state Judge John Brown had rejected Altman's same arguments about the failure by the county to post public notice of meetings on the sullycounty.net website.

Altman says he plans to file today, Dec. 17, an appeal of Brown's decision with the state supreme court.

According to state law, violating the state's open meeting laws by failing to properly post notice of a meeting is a Class 2 misdemeanor with a top penalty of 30 days in jail and a \$500 fine.

The local prosecutor can file such a charge; or, alternatively, pass it on to the state's Open Meeting Commission, said Sara Rabern, spokeswoman for Attorney General Marty Jackley.

The only penalty the Commission can hand down is a reprimand. Once the local prosecutor refers the case to the Commission, the attorney general or state's attorney cannot prosecute local government officials over a violation.

Sovell recused herself as state's attorney on the case earlier this year because of her dual roles on the open meetings questions. She asked a neighboring state's attorney to handle it and he made the decision to send Altman's complaint to the Open Meetings Commission.

"She handled it right," Altman said of Sovell's double recusals in the case.

Although no criminal prosecution can come from the Open Meeting Commission's action Wednesday, its finding of a violation in the case of four county meetings this year could bring into question the decisions made at those four meetings, according to state law.

According to information on the attorney general's website about the state's open meetings laws, "action taken during any meeting that is not open or has not been properly noticed could, if challenged, be declared null and void. It could even result in personal liability for members of the governing body involved, depending upon the action taken."

Altman said he's not sure where that leaves his clients' case in the administrative track of their fight.

Some states rather automatically void any decisions made at meetings deemed to have been held in violation of open meetings laws, he said. "But in South Dakota the situation is not explicit."

The fact that Judge Brown ruled against him on the issue stands in that court, while the Open Meetings Commission is an administrative body acting on a separate, if parallel, track, Altman said. He thinks it could help his appeal to the state supreme court, which still isn't bound by the Open Meeting panel's decision.

Altman said he wasn't surprised by Wednesday's decision, although he, too, saw the Commissioners seem to change their minds during the meeting.

"It's pretty obvious to anyone who goes online that this is the county's website," Altman told the Capital Journal Wednesday. "Sully County tried to obfuscate and pretend it wasn't theirs and it was just some rogue employee. But they had to admit the auditor was posting her minutes."

As part of the appeal he plans to file Thursday with the state supreme court, he will ask for Brown's order issued last month – on several issues raised by Altman at the October hearing, including that the plant's conditional use permit is valid - to be stayed.

Altman doesn't expect work at the site to change because of Wednesday's decision. But that and his appeal could mean that any money spent by Ringneck in preparing the site for construction it expects to begin next spring, "would be at their own risk if we are successful."

When told of the Open Meeting Commission's decision Wednesday which could include a reprimand for county officials, Zebroski, who has been on the Sully County Commission for 11 years, said, "Oh, gosh. Our state's attorney thought that we were OK."

She is a retired farmer who lives in Onida.

"I'm just heart-broken, I really am," she said of news of Wednesday's decision possibly harming the chances for the ethanol plant. "I just felt this whole thing was a gift from God. We really need it in the community."

One of the Open Meeting Commission members said during deliberations that "maybe this is a lesson to us all," that county websites need more attention from county and state officials, including perhaps "cleaning up the language" of the state's laws on public notice on websites of local government bodies.

"I don't use websites," Zebroski said. "Altman just showed up at our meeting (in February) and told us we couldn't have the meeting because it wasn't on the website. Our state's attorney said 'Go ahead and have it.' Which we did, several times."

She can't understand why the dozen opponents, including four couples, keep fighting the proposed plant's location, Zebroski said. "I don't know what they are trying to prove."

Their efforts earlier this year forced a county-wide vote on the issue, she said.

"The vote was close to 90 percent for the plant and that didn't stop them. I guess we will just have to take it from here."

Just short of 80 percent of the voters in the county-wide vote last summer were for the ethanol plant being located just south of town.

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