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COURT OF APPEALS, STATE OF COLORADO Case No. 05CA0587	▲ COURT USE ONLY ▲ No. 07 – SC – 1
District Court, Gunnison County THE HONORABLE J. STEVEN PATRICK, CASE NO. 04CV10	
Petitioners: THE TOWN OF MARBLE, COLORADO, a body corporate, THE TOWN COUNCIL OF THE TOWN OF MARBLE, and HAL SIDELINGER, ROBERT PETTIJOHN, and MIKE EVANS, in their official capacities as members of the Town Council; **Respondents:** LARRY DARIEN, DANA DARIEN, TOM WILLIAMS, and DAN BRUMBAUGH.	
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BRIEF OF AMICUS CURIAE COMMON CAUSE IN SUPPORT OF PLAINTIFFS LARRY DARIEN, DANA DARIEN, TOM WILLIAMS, AND DAN BRUMBAUGH

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Pursuant to C.A.R. 29, amicus curiae Common Cause of Colorado, Inc. ("Common Cause") through its undersigned attorneys, respectfully files this Brief in support of the relief sought by plaintiffs Larry Darien, Dana Darien, Tom Williams, and Dan Brumbaugh.

ISSUE PRESENTED

Common Cause joins in plaintiffs' Statement of Issues, but will comment in this brief on the following subset of those issues: whether notice given by a public body that is, on its face, misleading can constitute "fair notice to the public" as required by this Court in *Benson v. McCormick*, 578 P.2d 651 (Colo. 1978) in applying the Colorado Open Meetings Law ("OML"), C.R.S. § 24-6-401 et seq.

STATEMENT OF THE CASE

This case is a simple "misleading notice" case. Stripped to their bare bones, the facts of this case are that the Town of Marble gave notice that it would take one kind of action at a public meeting and then took quite another. It noticed a mere "update" by a wholly advisory committee and instead took final and formal action, as a public body, on an issue that had generated passionate public interest and involvement. The category of action the Town took (a formal and final vote on the use of the Mill Site

itself) was not noticed and cannot be discerned or implied from the actual notice the Town provided.

Therefore, while it involves some unique language under the OML that this Court has yet to consider, this case is not an extraordinary or unusual one. This Court has never approved the dissemination of affirmatively misleading information by the government, and no reason exists to do so now, in particular when construing a statute expressly intended to guarantee fair notice of all public acts. This case can be decided easily and on sure grounds simply by applying the substantial case law of this Court, formulated over a broad range of contexts, to the effect that misleading notice can never constitute fair notice.

For its statement of facts, Common Cause joins in the comprehensive and detailed statement of facts contained in the Answer Brief of the plaintiffs, incorporated herein by reference.

ARGUMENT

I. The Standard to be Applied is Fairness to the Public.

Passage of the Colorado Sunshine Law, including the OML, was accomplished following a 1972 ballot initiative that approved the measure by an overwhelming majority of 61% of Colorado voters. Over the years

since its enactment, this Court has had cause to review and apply the OML on several occasions. Each time, this Court has interpreted the OML "broadly to further the legislative intent that citizens be given a greater opportunity to become fully informed on issues of public importance so that meaningful participation in the decision-making process may be achieved." *Cole v. State*, 673 P.2d 345, 347 (Colo. 1983).

The OML requires "full and timely notice to the public" before any meeting of any public body. C.R.S. § 24-6-402(2)(c). In *Benson v. McCormick*, 578 P.2d 651, 653 (Colo. 1978), this Court acknowledged that this requirement was to apply to a multiplicity of different kinds of public meetings. But regardless of the type of meeting, the "full and timely notice" standard "establishes a flexible standard aimed at providing fair notice to the public." *Id.*

When the OML was amended in 1991 in order to make its requirements expressly applicable to local government bodies, the legislature did not modify the overarching requirement that meetings of every public body must be preceded by "full and timely notice to the public." This language was untouched by the amendment. However, the legislature did provide that, "[i]n addition to any other means of full and timely notice,"

a local public body could comply with the law by posting a notice 24 hours prior to the meeting, which notice "shall contain specific agenda information where possible." C.R.S. § 24-6-402(2)(c).

The structure of this requirement does not lend itself to the interpretation advocated by the trial court, the dissent below, or by Petitioners. The thrust of this interpretation is to suggest that if it is not possible for a local public body to provide "specific agenda information" at the time 24 hours before the hearing when the notice is posted, the local public body is relieved of the obligation to comply with the "full and timely notice" requirement. This is not so. The 24-hour posting provision merely provides one means by which a local government can comply with the law. If it cannot use that method for any reason (for instance, that the specific agenda is not known 24 hours prior to the meeting, as the Town claims in this case) the local public body must find some other way of providing "full and timely notice to the public." The requirement does not just disappear. The "safe harbor" does not freeze the content of required public notice or restrict it to what was known 24 hours prior to the meeting.

To reason otherwise would permit this "safe harbor" provision to swallow the rule, and render the requirement to provide full and timely

notice a nullity whenever a local public body changes its mind as to its agenda any time that happens to be less than 24 hours prior to a meeting. Stated another way, it is not sufficient under the OML that the local public body simply provide whatever information is available 24 hours prior to the meeting and call it good. Such a reading of the statute would quickly render it of almost no value, since local public bodies would quickly learn to wait until less than 24 hours prior to their meetings to formulate their true agenda.

This simple point undermines the principal argumentation by the dissent below, which incorrectly focused on the state of mind of the members of the public body giving notice, rather than the overarching requirement that full and timely notice to the public must be accomplished before a public meeting can comply with the OML. If the Town really was not sure of what its agenda would be at the particular meeting at issue in this case (as it claims), it could not rely on the 24-hour "safe harbor." That does not mean it was precluded from taking action or from complying with the OML. It means simply that in those circumstances the OML required the Town to take other action, using another kind of notice or possibly postponing its ultimate action concerning the Mill Site. In light of the non-

emergency circumstances presented by this case, that is no unreasonable or onerous burden. Public bodies across the state manage that burden perfectly well every day.

Thus, even though the Court is confronted in this case with language in a specific provision of the OML that it has never construed before, this 24-hour posting provision does not change the fundamental analysis under the OML. The question remains, was fair notice provided to the public, and a simple three-step analysis is sufficient: (1) what notice was given; (2) what action was taken by the public body; and (3) was the former "fair" in light of the latter. As *Benson* emphasized, the OML as initially drafted was meant to encompass a broad variety of public meetings, and over the years the statute has functioned well in ensuring transparency and openness in Colorado public deliberations. The 1991 amendments therefore should not be seen as altering the fundamental standard of fairness applicable to the giving of public notice under the OML.

The dissent below was led into error by parsing myopically the statutory language "shall," "agenda information," "specific" and even the word "where" in "where possible." *Darien v. Town of Marble*, No. 05CA0587 (November 16, 2006, Casebolt, J., dissenting), slip op. at 19-20.

The Town of Marble invites similar error in its Opening Brief. See, Opening Brief at 14 – 18. These analyses, while admirable in their attention to detail, are erroneous because they do not even address the fairness standard or the goal of the statute to ensure public notice. The most that can be determined by these analyses is whether or not the 24-hour safe harbor provision is available to a local public body, a question better addressed by the public body prior to the meeting, and not by a court after the meeting. This question is not the important question, which is whether or not full and timely notice to the public was actually provided.

This question ultimately boils down to a question of fairness. As discussed below, the notice provided in this case, compared with the action taken by the Town, reveals that the requisite "full" or "fair" notice to the public was not provided. The Court of Appeals therefore correctly decided this case and should be upheld.

II. Notice that is Misleading on its Face Cannot be Fair Notice.

A. The Notice was Misleading, to the Extent Any Was Provided.

If "meaningful participation" (*Cole*) through "fair notice to the public" (*Benson*) is the policy goal of the OML, the actions by the Town of Marble frustrated that goal. As has been rehearsed in several of the briefs before

the Court, the notice the Town provided contained three agenda items: (1) "Mill Site Committee Update"; (2) "Authorization for Mill Site Committee survey expenditures; and (3) "Endorse replacement of MSC member."

Notably, the particular project that had excited so much public interest and contention – the so-called Tomb of the Unknowns project – was not even mentioned in this notice. The notice also gave no indication that the Town intended to vote on any of these issues – perhaps the most important information a public notice should contain.

Turning to the particulars of the notice given, the argumentation and the proceedings below have focused on item (1) of this agenda, seemingly missing the point that this item includes no action whatsoever *by the Town*, whether action specifically concerning the Tomb of the Unknowns or any other use of the Mill Site. The Mill Site Committee, as is undisputed in this case, was merely an advisory committee with no decision making authority. Notice of the fact that this purely advisory board was going to give an update did not provide notice of either a general or specific nature that the Town was going to do anything in response, much less vote on an issue directly affecting the use of the Mill Site itself in general or the Tomb of the Unknowns project in particular. Thus, as far as actions by the Town are

concerned, the only actions for which notice was provided were the authorization for the Mill Site Committee to expend funds for a survey and the replacement of one MSC member. No action by the Town directly concerning the use of the Mill Site or the Tomb of the Unknowns project was ever noticed.

The dissent below and the Town have suggested that it would have been possible to anticipate that a vote on the issue might follow an "update." This suggestion misses the mark. "Full" notice is not the same thing as inquiry notice, and does not mean the giving of enough information that would lead one to suspect or to guess that a vote might take place. If the Town Council votes or takes other final action on a matter, "full" notice says so explicitly.

When measured against the language of the OML, this failure to notice any direct action concerning the use of the Mill Site leads inexorably to the conclusion that the Town's notice fails. The Town took "formal action" on the Tomb of the Unknowns project without giving any notice that it was going to take any action of any nature concerning either the site in general or the project in particular (as opposed to the membership or the

activities of the advisory committee the Town had set up). The notice was therefore neither full nor fair.

This becomes even more apparent in light of the standards this Court has enunciated for notices relating to other kinds of land use approvals by local government. In zoning cases, it is settled law that "a notice should set forth the information reasonably necessary to provide adequate warning to all persons whose rights may be affected by the proposed action." *Hallmark Builders & Realty v. Gunnison*, 650 P.2d 556, 560 (Colo. 1982) (see also cases cited therein). Among other things, the notice must "apprise the public of the subject matter of the hearing and the nature of the proposed zoning change." *Id.* (citing cases). Such notice "must be interpreted in light of the knowledge of the ordinary layman to whom it is directed." *Id.*

In *Hallmark Realty*, the local public body gave two notices of a public meeting, one of which stated that a particular zoning ordinance containing a rezoning had been rejected, and the other of which noticed the same rezoning for consideration and a vote. 650 P.2d at 558. Acknowledging that an ordinary layman could have "determined that the issue of concern to him had already been resolved, and that it would not be fruitful to attend

the Commission hearing concerning some other matter," this Court found that notice inadequate. *Id.* at 556. The Court emphasized that the defect in the notice that was given "does not arise merely from the failure to include all possible information of interest to an affected person, but from the affirmatively misleading impression created by the notices." *Id.* This Court eschewed "an unduly formalistic approach" in favor of "a realistic assessment of the actual information imparted by a notice under the facts of a particular case." *Id.*

Though Common Cause does not suggest that the full panoply of requirements applicable to zoning cases should be imported into the OML analysis, the conclusion seems inescapable that the OML prohibits the giving of affirmatively misleading notice by public bodies. Indeed, cases of this Court from a variety of contexts have consistently held that misleading governmental notices are generally ineffective. *See, e.g., Lobato v. Indus. Claim Appeals Office of Colorado*, 105 P.3d 220 (Colo. 2005) (administrative notice that did not specify deadline for response was ineffective to terminate rights of injured worker); *Duran v. Housing Authority of the City and County of Denver*, 761 P.2d 180 (Colo. 1988) (misleading lease termination notice ineffective to terminate lease); *City and County of*

Denver v. Eggert, 647 P.2d 216, 223 (Colo. 1982) (notice that public meeting concerning landfill would "allow information regarding the landfill operations to be made public" not sufficient to notice landfill operator as to potential issuance of cease and desist order).

In the instant case, the Town noticed a series of minor administrative items, while failing to provide any notice of formal action by the Town as a local public body on the central question of how the Mill Site would be ultimately used and developed. This not only failed to provide the required full and timely notice, but is also affirmatively misleading on its face, since it contained no mention that the Town would take formal action of any sort. The OML cannot be used as a vehicle to sanction this activity.

In light of these precedents, the approach taken by the majority in the Court of Appeals was eminently reasonable. The Court below evaluated the meaning of the notice provided in light of what had previously been disseminated to the public, and made "a realistic assessment of the actual information imparted by [the] notice under the facts of [this] particular case." See, *Hallmark Realty*, 650 P. 2d at 556. The Court then made a simple comparison of the notice provided and the type of action ultimately taken,

and found that one could not be reconciled with the other. That is exactly the analysis that the OML calls for, and it should be upheld.

B. This Court Should Not Endorse a Scienter Requirement.

The Town and the dissent below suggest that the state of mind of the members of the public body is the key test to determine the adequacy of notice provided under the OML. This suggestion is pernicious and should be rejected.

First, even though the OML provides an independent statutory cause of action to any citizen of Colorado under C.R.S. § 24-6-402(9), trial courts frequently review actions under the OML using an "abuse of discretion" standard. Though this is error, there is little that OML plaintiffs can usually do about that, since the effect of applying this standard of review is to deprive plaintiffs of discovery, as the plaintiffs were deprived below in the instant case. Having been barred from conducting discovery, it then becomes an impossible burden for plaintiffs to demonstrate the state of mind that the Town contends is essential to establish a violation of the OML. The Town's argument is therefore an attempt to set the bar higher than any person can jump.

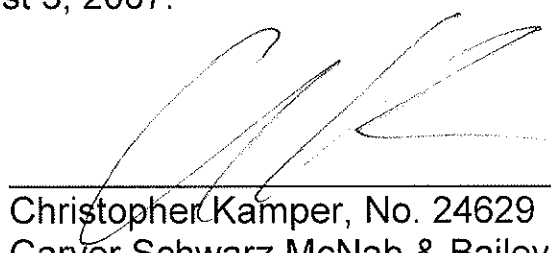
Approaching the issue from a less technical perspective, the OML guarantees citizens a right to notice and a right to participate in public meetings. It would unduly burden these rights if citizens were forced to prove an actual conspiracy in order to vindicate the mere right to notice and to be heard.

If anyone's state of mind is relevant under the OML, it is perhaps the state of mind of the members of the public receiving the information. However, in the zoning cases cited above, the Court's approach has traditionally been simply to evaluate the meaning of the notice. Evidence as to how it is understood is of course relevant, but the main focus is on the meaning of the notice as it would be interpreted by an ordinary person receiving it. Based on that standard, the notice given in this case was inadequate.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted August 3, 2007.



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CERTIFICATE OF SERVICE

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