COPY

CAUSE NO. 19243

MARC SEWELL **Plaintiff**	§	**IN THE DISTRICT COURT**
v.	§	**OF LLANO COUNTY, TEXAS**
CITY OF LLANO **Defendant**	§	**424th JUDICIAL DISTRICT**

JOYCE GILLOW
CLERK DISTRICT COURT, LLANO COUNTY, TEXAS
FILED
JUL 24 2015
AT 3:38 O'CLOCK P M
BY Andrea Rodriguez DEPUTY

PLAINTIFF'S VERIFIED MOTION FOR NEW TRIAL

TO THE HONORABLE EVAN C. STUBBS, PRESIDING:

Plaintiff Marc Sewell respectfully asks the Court to grant a new trial based on errors identified below in the prior summary judgment proceedings. If allowed to stand, the Final Summary Judgment in this case sets a precedent for woefully vague and inadequate notice of future meetings of the City Council of Llano.

INTRODUCTION

1. Plaintiff Marc Sewell (Sewell) sued Defendant City of Llano (the City) pursuant to the Texas Open Meeting Act (TOMA) asserting that a meeting notice was insufficient regarding an agenda item under which the City was applying for a state grant to amend the City of Llano's Comprehensive Plan failed to show that on the meeting notice as the purpose of the grant. No member of the public—or we dare say, even this Court—could have read the meeting notice at issue in this case and discerned what the grant was for. That violates the TOMA. As the Texas Supreme Court has noted, TOMA demands substantial compliance:

> However, less than full disclosure is not substantial compliance. Our prior judgments should have served as notice to all public bodies that the Open Meetings Act requires full disclosure of the subject matter of the meetings. The Act is intended to safeguard the public's interest in knowing the workings of its governmental bodies. A public body's willingness to comply with the Open Meetings Act should be such that the citizens of Texas will not be compelled to resort to the courts to assure that a public body has complied with its statutory duty.

Cox Enterprises, Inc. v. Board of Trustees of the Austin ISD, 706 S.W.2d 956, 960 (Tex. 1986).

2. The City filed an answer and subsequently filed a Motion for Summary Judgment, which the Court granted by a Judgment signed on June 26, 2015. This Motion for New Trial is timely filed.

3. Mr. Sewell represented himself in this lawsuit and retained counsel only after the Final Summary Judgment was signed. In the interest of justice and open government, and because serious errors occurred in granting the summary judgment and awarding attorney fees against Mr. Sewell, Plaintiff respectfully asks the Court to grant a new trial so these errors can be corrected, or, at a minimum, that a proper record for appeal can be made.

BACKGROUND

Sufficiency of the Open Meetings Notice

4. For several years, the issue of amending the Llano Comprehensive Plan—the official document on which zoning and land use is based—has been of particular concern to citizens of the City of Llano, including Mr. Sewell. While attending the City Council meeting on February 2, 2015 because of other issues on the Council agenda, Mr. Sewell was surprised to discover that agenda item H-1 was a grant proposal to get state funds with which to "redo the City's Comprehensive Plan," which was the exact wording used during the meeting as the purpose of the grant. *But there was nothing in the meeting notice about Item H-1 that revealed to the public that the purpose of the grant was to redo the City's Comprehensive Plan.* In fact, it appears that the agenda item was worded deliberately to conceal the real purpose of the grant and the real purpose of the agenda item.

H. REGULAR AGENDA ITEMS

1. Discuss and consider action on the approval of Resolution 2015-02-02-1, authorizing the filing of a Texas Community Development Block Grant program application to the Texas Department of Agriculture; and authorizing the Mayor to act as the City's Executive Officer and authorized representative in all matters pertaining to the City's participation in the Texas Community Development Block Grant Program.

5. As is explained below, this meeting notice does not disclose the real "subject" being considered by the Llano City Council, *i.e.,* "to obtain a state grant *to redo the City's Comprehensive Plan."* No one in the public would have any idea what the subject of "Resolution 2015-02-02-1" was by reading that meeting notice. The meeting notice masked the purpose of the grant. In its Motion for Summary Judgment, the City practically admitted this to be case:

a. First, in an affidavit attached to the City's motion, City Manager Brenton B. Lewis swore, "I informed Councilmember Ferguson that the grant was to essentially *overhaul the City's comprehensive plan.*" (emphasis added).

b. And the City's attorney argued, on Page 6-7 of the motion, that "A reader of the notice would have known that the City Council was going to consider Resolution 2015-02-02-1 [...]. An interested reader could have obtained a copy of Resolution 2015-02-02-1 at City Hall or on the City's website." No reader of the notice would have any idea that Resolution 2015-02-02-1 or the grant was about, *i.e.,* the true "subject" the Council was considering.

c. There is absolutely nothing in the Open Meetings Act that absolves such an inadequate notice that hides the true purpose of the agenda item (to get a grant to redo the comprehensive plan) by the City claiming that the public could have found out about the true, basic subject of the agenda item by doing more research. The heart and soul of the TOMA meeting notice requirement is that *the notice itself* must "sufficiently alert the general public to the topic to be considered." *Odessa Texas Sheriff's Posse, Inc. v. Ector County,* 215 S.W. 3d 458, 472 (Tex.

App.—Eastland 2006 pet. Denied.).

d. The City's use of a Resolution number to substitute for disclosure of the actual *topic* the Council was considering does not comply with TOMA's notice requirement. Imagine if, as a result of this Court's judgment in this case, the City decides to use this concealing tactic on all of its potentially controversial agenda items.

(1) For example, what if the City was going to apply for a state grant to build low-income housing in an established Llano neighborhood, would the exact same notice (with a different Resolution number) suffice, without disclosing the actual purpose of the grant? If the City was going to adopt an ordinance to increase taxes, would public notice be sufficient if the agenda just said, "Discuss and consider action on the approval of Ordinance 2015-02-02-1" without disclosing, in the notice, what the Ordinance really involved?

(2) That obviously insufficient method of giving public notice meets the standards the City argued in its motion—that the Court approved—would be sufficient even though it conceals the actual topic, the subject, of the Ordinance. Just like the notice in this case, A reader of the notice would have known that the City Council was going to consider Resolution 2015-XX-XX-X [...]. An interested reader could have obtained a copy of Resolution 2015-XX-XX-X at City Hall or on the City's website." These example demonstrate the serious damage that will be done to open government if the Court's final summary judgment stands.

<u>City's Stonewalling on Discovery</u>

6. Mr. Sewell served discovery on the City, including a Request for Disclosure and request for production of certain documents.

a. In its response to the Request for Disclosure, the City did not designate any expert to testify nor provide any of the information about an expert as required by TRCP 194.2(f). *The*

City did not even designate an expert to testify about the reasonableness and necessity of the City's legal fees. Therefore, Mr. Bovey should never have been permitted to testify, even by his affidavit, on that topic because it requires expert testimony.

b. Mr. Sewell sought records related to planning grants by the City, and specifically asked for correspondence that may have occurred between City officials (such as the City Manager) and the City's consultant (Taylor & Associates) that would have related to the grant application to redo the city's comprehensive plan. Mr. Sewell requested, "Any notes, interim documentation, emails, or correspondence from or to Taylor and Associates to anyone regarding TxCDBG Planning Grants or Comprehensive Plans." Such correspondence, particularly between the City Manager and Cindy Gutierrez (with Taylor and Associates), might well have documented not only the fact that the agenda item was to get a grant to redo the City's Comprehensive Plan but led to documentation of why the agenda notice was worded the way it was. The City objected to every one of Mr. Sewell's discovery requests claiming that the discovery did not request information that was "relevant."

c. Mr. Sewell filed a Motion to Compel. The Court orally denied that Motion and proceeded to conduct the hearing on the motion for summary judgment without affording Mr. Sewell an opportunity to complete the discovery he had initiated. Counsel for Mr. Sewell does not have an order signed by the Court denying Mr. Sewell's Motion to Compel.

<u>The City's Request for Attorney Fees</u>

7. In its motion for summary judgment, the City sought an award of attorney fees against Mr. Sewell without ever presenting its attorney-fee invoices, only an affidavit from Mr. Bovey, the City's attorney, but not someone the City had designated as an expert on this issue. Generally, attorney fees must be proved by offering expert testimony that the fees were reasonable and

necessary. *Woodhaven Partners v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 830 (Tex.App.—Dallas 2014, no pet.); *Woollett v. Matyastik*, 23 S.W.3d 48, 52 (Tex.App.—Austin 2000, pet. denied). Since the City failed to designate an expert to testify on the attorney-fee issue, the Court erred in considering Mr. Bovey's affidavit about his own fees. A party's failure to timely designate its expert witness will result in exclusion of the expert's testimony unless the party can show good cause or lack of unfair surprise to the other party. *City of El Paso v. Parsons*, 353 S.W.3d 215, 229 (Tex.App.—El Paso 2011). At the hearing, Mr. Sewell objected to the attorney-fee award and sought a continuance on that issue.

8. In his response to the City's motion, Mr. Sewell requested an "itemization of hours and legal costs" related to the City's claim for attorney fees. This was never provided.

The Summary Judgment Hearing

9. At the beginning of the June 25th hearing, the Court first heard argument about Mr. Sewell's Motion to Compel. According to the Reporter's Record of the hearing, the Court denied Mr. Sewell's motion to compel. Reporter's Record at 41. Thus, Mr. Sewell was not afforded an opportunity to obtain the evidence he could have used for a response to the City's motion for summary judgment, nor was he granted a continuance so that evidence could be obtained.

10. Because Mr. Sewell, a lay person representing himself, did not have sufficient expertise about how to properly present key evidence in a summary judgment proceeding—such as a transcript and video of the City Council meeting at issue in the case—the Court was not able to consider evidence that went to the heart of the legal issue of the sufficiency of the meeting notice. The Court was unable to see the best evidence to compare "the content of the [meeting] notice given and the action taken at the meeting." *See Port Isabel ISD v. Hinojosa,* 797 S.W.2d 176, 180 (Tex. App.—Corpus Christi 1990, writ denied).

a. Had the Court had the opportunity to view the meeting evidence, it would have become obvious that the City personnel and consultant knew full well—in advance of the meeting—that the purpose of the grant mentioned in Item H-1 was to redo the City's Comprehensive Plan—a key fact not mentioned in the meeting notice. And even the City's consultant (Cindy Gutierrez) got confused by the agenda wording when she testified and started talking under agenda Item H-1 about another grant to replace gates on the Town Lake dam (which was similarly worded agenda Item H-2).

b. If the City's own consultant, who was retained to assist the City with the grant applications, could not tell the difference between the two agenda items (H-1 grant to redo the City's Comprehensive Plan, and H-2 grant to replace dam gates), that is strong evidence that the agenda notice was not adequate, specific notice to the general public. The only difference in the wording of the two agenda items was the reference to the City "resolution" numbers ("Resolution 2015-02-02-2" for agenda Item H-1 and "Resolution 2015-02-02-1" for agenda Item H-2).

11. Mr. Sewell asked the court for a continuance, both in his Response to the City's Motion for Summary Judgment (Sewell Response at 12, 13) and during the hearing (Reporter's Record at 44). Mr. Sewell asked for the continuance so he could obtain itemized attorney-fee invoices and be afforded the opportunity to challenge Mr. Bovey's affidavit for attorney fees. The Bovey Affidavit on attorney fees did not even indicate how much total time his law firm had spent on the case, let alone show which of the firm's personnel (paralegals or attorneys) worked on the case, or how much time they spent on the pleadings or discovery. A bald assertion by Mr. Bovey (who did not voluntarily produce his firms attorney-fee invoices) that the fees were reasonable and necessary is not a sufficient basis for the award of any attorney fees. The court, without formally denying Mr. Sewell's request for a continuance, proceeded to grant summary judgment for the

City and award attorney fees.

12. The award of attorney fees to the party who prevails in a lawsuit under the TOMA is not automatic. The Court has discretion pursuant to TOMA section 551.142(b) to assess costs and reasonable attorney. But that section of TOMA states, ".... In exercising its discretion, the court *shall* consider whether the action was brought in good faith and whether the conduct by the governmental body had a reasonable basis in law." Tex. Gov't Code section 551.041(b) (emphasis added).

a. Neither the Final Summary Judgment signed by court nor anything else in the record (including the Reporter's Record) indicates that the Court considered these statutory factors nor was any evidence presented in the summary judgment hearing regarding those factors.

b. There is no evidence that this lawsuit was not brought in "good faith" by Mr. Sewell considering the woeful inadequacy of the agenda notice to get a state grant to redo the City's Comprehensive Plan, a matter of public concern and legitimate concern by Mr. Sewell. The actions by the City, in wrongfully withholding discovery responses unnecessarily added to the cost of this lawsuit. And all along, the City had an option to simply repost the agenda item with a meeting notice that the Council would consider approving a state grant for the purpose of "overhauling the City's Comprehensive Plan." That would have mooted this lawsuit. The City should not be rewarded for its inadequate notice to begin with, its tactics that drove up attorney fees unreasonably, and its stubborn refusal to simply re-post the agenda item and give clear and specific notice of what they were up to with the application for state money.

ARGUMENT AND AUTHORITIES

13. The Court should grant a new trial because it erred by granting the motion for summary judgment under the circumstances of this case.

14. The Court erred by granting summary judgment on the merits of whether the Item H-1 meeting notice was sufficient under TOMA section 551.041 as to the "subject" the Council was going to consider. Merely giving the public notice that the Council was going to consider approval of a state grant—without identifying in any meaningful way the purpose of that grant—is not adequate notice under TOMA. As one court explained:

> As clearly mandated by the *Cox Enterprises* decision of the Texas Supreme Court, such advance notice should *specifically and fully disclose the subjects to be considered at the upcoming meeting.* The Committee notices [*e.g.*, "Deliberation Regarding real property"] are woefully inadequate. They merely parrot the statute, failing to disclose the specific subject matter or the outside participants invited to a particular meeting. *The Court considers this notice to be no notice at all.*

Finlan v. City of Dallas, 888 F. Supp. 779, 790 (N. D. Texas 1995) (emphasis added).

a. The evidence shows that the City Manager, at least, knew in advance of the meeting that the grant mentioned in Item H-1 was for the purpose of overhauling the City's Comprehensive Plan. The evidence shows that amending the City's Comprehensive Plan is a matter of significant concern to some members of the public in City of Llano.

b. The linkage between the grant and overhauling the Comprehensive Plan was not, as Counsel for the City argued, something that just came up during the Council meeting. The fact that actual amendments to the Comprehensive Plan were not discussed at the Council meeting was not the issue; the issue in this case is whether it was necessary, to comply with TOMA section 551.041, for the meeting notice indicate that the purpose of the grant being approved was to overhaul the Comprehensive Plan, instead of omitting any purpose or characterization of what the real purpose of the grant was for, other than making reference to "Resolution 2015-02-02-1," a reference that gives the public no useful information at all.

c. The City mischaracterized the central issue to the Court. Amending the

Comprehensive Plan was not, as the City argued, a "consequence which may flow from consideration of the topic" (see City MSJ at 6, paragraph 16)—the very purpose of the grant was to get funds to pay for amending the Comprehensive Plan. The voters in Llano had every right, under TOMA, to prior notice that the City was seeking money so it could amend the Comprehensive Plan. The meeting notice gave them not a hint that that was what the Council was going to consider.

d. The "particular topic" was approving application for state funds to be used to "overhaul" (in the words of the City Manager's affidavit) or "redo" (in the words of the City's consultant at the Council meeting) the City of Llano Comprehensive Plan, but that was not listed in the meeting notice. As expected public interest in a particular subject increases, the public meeting notice must become more specific. *See Port Isabel ISD v. Hinojosa,* 797 S.W.2d 176 (Tex. App.—Corpus Christi 1990, writ denied).

15. The Court erred in orally denying Mr. Sewell's Motion to Compel and proceeding to grant the summary judgment without requiring the City to respond to Mr. Sewell's discovery requests that were within the scope of discovery and might very well have produced a "smoking gun" about what the agenda item was really about and why the agenda notice was worded the way it was.

16. The Court erred in ignoring or tacitly denying Mr. Sewell's requests for continuance of the summary judgment hearing. At a minimum, the Court should have entered a signed order denying the requests for continuance so that the trial record adequately provided a fair basis for appeal on this point.

17. The Court erred in granting the City any attorney fee award considering that the City never designated a testifying expert in its response to Mr. Sewell's request for disclosure and attorney fees can only be proven up by expert testimony.

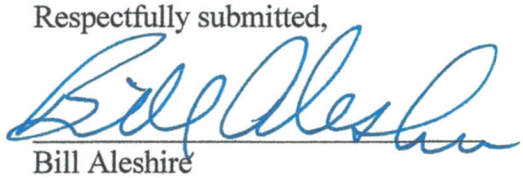
18. The Court erred by proceeding to award attorney fees to the City before permitting Mr. Sewell to see the time and fee records he requested from the City's attorney, affording an opportunity to demonstrate errors in Mr. Bovey's affidavit.

19. The Court erred by not indicating anywhere in the record that the Court considered the statutorily required factors in whether to award attorney fees, pursuant to TOMA section 552.142(b).

PRAYER

For these reasons, Plaintiff respectfully asks the Court to set a hearing on this Motion for New Trial, and thereupon to grant this Motion for New Trial as to all matters at issue in the case, including the adequacy of the TOMA meeting notice, or, at least, to reconsider and withdraw the award of attorney fees to the Defendant. In the interest of justice and fairness, Plaintiff asks the Court to grant a new trial.

Respectfully submitted,



Bill Aleshire
Texas Bar No. 24031810
AleshireLAW, P.C.
700 Lavaca, Suite 1400
Austin, Texas 78701
Telephone: (512) 320-9155
Facsimile: (512) 320-9156
Bill@AleshireLaw.com

VERIFICATION

STATE OF TEXAS §

TRAVIS COUNTY §

Before me, the undersigned notary, on this day personally appeared Marc Sewell, the affiant, whose identity is known to me. After I administered an oath, affiant testified as follows:

"My name is Marc Sewell. I am capable of making this verification. I have read Plaintiff's Verified Motion for New Trial. In addition to the facts cited from the case record, the facts stated in Paragraphs 4, 6, 8, and 10 are within my personal knowledge and are true and correct."

M- Sewell
Marc Sewell

Sworn to and subscribed before me by Marc Sewell on July 24, 2015.

MICHELE LEE BETKER
Notary Public, State of Texas
My Commission Expires
January 27, 2018

Michelle Lee Betker
Notary Public in and for
the State of Texas
My commission expires: 1-27-18

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of this document on the parties listed below via fax and email on July 24, 2015.

Defendant
Cary L. Bovey
Texas Bar No. 0271770
2251 Double Creek Dr., Suite 204
Round Rock, Texas 78664
(512) 904-9441
(512) 904-9445 (fax)
cary@boveylaw.com

Bill Aleshire
Bill Aleshire