

**Apr 23, 2010**

**BEFORE THE  
ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING**

**Jim Ruby, Executive Secretary  
Environmental Quality Council**

**IN THE MATER OF THE NOTICE )  
OF VIOLATION ISSUED TO )**

**SALL Enterprises, LLC )**

**DEQ Docket No. 4626-10  
EQC Docket No. 10-3212A**

**TOWN OF ALPINE'S MOTION FOR A PROTECTIVE ORDER QUASHING THE  
SUBPOENA FOR DEPOSITION OF MAYOR DECORA AND PROHIBITING THE  
DEPOSITION OF MAYOR DECORA**

The Town of Alpine, (hereafter "Town"), by and through its undersigned attorney, pursuant to Wyo. R. Civ. Pro. 26(c), hereby moves the Environmental Quality Council (hereafter "EQC") for the entry of a Protective Order Quashing the Deposition of the Town Mayor, Victoria DeCora and further moves the EQC for a Protective Order prohibiting the deposition of Mayor Decora. Lastly, given the time constraints and the importance of the issues at hand, the Town requests the ability to supplement its argument in support of its motions set forth below within one week from this filing and requests a hearing on these matters as soon as is practicable.

**RELEVANT FACTS**

- 1) SALL Enterprise, LLC has filed suit against the Town with regards to a sewer ordinance and the denial of septic tank permits.
- 2) The Town believes that certain past activities regarding unpermitted modifications to the private septic system on SALL property occurred beginning on April 6, 2007 and again on July 25, 2008.
- 3) The Town contends that in April 2007, SALL installed a septic tank without a permit.
- 4) The Town further contends that in July 2008 SALL's leachfield failed and they have not obtained a permit to repair/replace that leachfield.
- 5) In conjunction with the defense of that suit, the Town had consultant, Leon Kjellgren of Nelson Engineering, draft a letter to the Wyoming Department of Environmental Quality (hereafter "DEQ") notifying it of perceived violations of DEQ Rules and Regulations, which letter was dated August 25, 200 (hereafter the "August 25, 2009 letter")
- 6) DEQ subsequently sent SALL a letter dated October 29, 2009 letter, stating, among other things that it needed to file for DEQ permits for its septic system.
- 7) In March 2010, DEQ issued a notice of violation to SALL.
- 8) SALL has petitioned for review/appeal of that notice and has requested a hearing.
- 9) EQC has commenced these proceedings under the above referenced docket number.
- 10) The Town is not a party to these proceedings, yet employees and a consultant of the Town are being deposed.
- 11) The Town cannot rely on the parties to this matter to protect its interests which are or may be opposed to that of the parties and the other individuals being deposed.

- 12) SALL has requested that EQC issue certain subpoenas for depositions to Town Mayor, Victoria DeCora, Town Administrator Deb Wolfley and Leon Kjellgren.
- 13) The Subpoenas for deposition seek information and records related in any way to the August 25, 2008 to DEQ which alleges violations, and records and all such information related to SALL's septic permit applications SP-01-07 and SP-02-08-TEMP.
- 14) Counsel(s) for the Town have conferred orally and via email with Counsel for SALL to inform him of Mr. Rideout's unavailability to attend the depositions in question as well as to object to the deposition of the Mayor.
- 15) Mr. Rideout and SALL's council attempted to come to a resolution of the outstanding issues, but were unable to do so.
- 16) SALL's counsel, in a telephone conversation with Mr. Rideout suggested that his Client's might agree to move the depositions if the Town would agree to not enforce provisions of the ordinance that are at issue in the SALL lawsuit against the Town until July 31, 2010.
- 17) Mr. Rideout informed SALL's counsel, that there was no procedural mechanism for Mr. Rideout to bind the Town and as a result, the Town could not agree to the requests of SALL's counsel.
- 18) Mr. Fodor sent the attached April 21, 2010 email in an effort to meet and confer under W.R.C.P 26(c) asking SALL's Counsel to agree to withdraw the subpoena for the Mayor due to scheduling conflicts and the Town's position that the deposition of the Mayor is improper based on the theory that the decisions of the Town Council are legislative in nature and made as a collegial body. It was further stated by the undersigned, via email, that it is the Town's position that SALL is not allowed to inquire into the individual mental processes (fact investigation), consideration, through processes, analysis, motives and rationale of the Mayor. See Exhibit A.
- 19) SALL's Counsel responded later in the afternoon of April 21, 2010 via email that the noticed depositions would proceed as noticed. See Exhibit A.
- 20) Due to the inability to resolve these matters, the Town is filing these motions.

TOWN'S ARGUMENT IN SUPPORT OF MOTION FOR PROTECTIVE ORDER  
PROHIBITING SALL FROM TAKING THE DEPOSITION OF MAYOR DECORA AND  
QUASHING THE PRESENT SUBPOENA ISSUED FOR THE DEPOSITION OF MAYOR  
DECORA

The Town identifies several reasons in support of its Motion for Protective Order. Initially, the law is well established that Plaintiff's do not have the right to inquire, either through deposition or discovery, or at trial about the Town Mayor's mental processes (fact investigation, thought processes, analysis, motives, or rationale) related to the issues in the above captioned matter.

The thought processes, motives or rationale of the decision makers is irrelevant. Any and all decisions, related to the requirements of sewer permit applications and the denial and/or conditioning of sewer permits were made in public meetings, most with representatives of SALL present. Minutes and recordings of those minutes and **decision** of the Town Council are

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<sup>1</sup> Stefan Fodor is the Alpine Town Attorney, Richard Rideout is the Local Government Liability Pool Attorney assigned to defend the Town in the SALL lawsuit against the Town.

available to SALL. Since the thought processes motives and rationale of the Mayor and Council members are irrelevant, inquiry of individual decision makers like the Mayor and other Town Council members about their mental or thought processes (act investigation, thought processes, analysis, motives, or rational) related to the decision to require septic permits and the denial and/or conditioning of septic tanks is inappropriate, irrelevant and not likely to lead to the discovery of admissible evidence.

Decisions taken by a governing body concerning litigation to which a governing body is a party, such as whether to notify regulatory authorities of alleged violations in defense of a lawsuit the Town is involved in, may be held in executive session not open to the Public. W.S. § 16-4-405(a)(iii) Moreover, the minutes of those executive sessions shall be kept confidential and produced only in response to a valid court order. W.S. § 16-4-405(b). The deliberations of a governing body regarding matters covered under W.S. § 16-4-405 are privileged and SALL should not be entitled to enquire as to subject matter of those decision or the thought processes of the Mayor and Town Council members are irrelevant.

Moreover, the decisions taken in relation to matters concerning litigation to which the governing body is party are protected and privileged, especially when taken in Executive Session pursuant to W.S. 16-4-405.

The law is also well established that the Town Council and Mayor, in making decisions on the requirements of sewer permits applications and the denial and/or conditions of sewer permits and the decision to have the August 25, 2009 letter to DEQ sent were all acts taken as a collegial body. The Council takes actions as a collective body, not an assembly of individuals. They take action as a collective group, at a public hearing, and it is only the action of the collegial body that is relevant to the decision made. The law is also clear, given that the Town Council can only act as a collegial body, that the facts considered, analysis conducted, factors considered, thoughts, motives, rational and intent of individual council members and the Mayor are irrelevant, privileged and otherwise inappropriate for discovery related to these matters and the decisions of the collegial body still pass legal muster so long as a reviewing court determines that the actual decision of the collegial body is fairly debatable (whether the *decision* is arbitrary, capricious, whimsical and bears no substantial relationship to the public health safety or welfare, or it is reasonably debatable that it is in the interests of the general welfare). See Wait v. City of Scottsdale, 618 P.2d 601 (Ariz. 1980), The Elijah Group, Inc., v. City of Leon Valley, 2009 U.S. Dist. LEXIS 29689, \*3 (W.D. Tex. 2009).

In the Alternative, the Mayor, has absolute legislative immunity from deposition and other discovery inquiry, as well as testimony at trial about any actions taken related to requirements of sewer permits applications and the denial and/or conditions of sewer permits and the decision to have August 25, 2009 sent were all acts in which Town Council considered and acted in its legislative capacity.

The Town has authority to divide Alpine into suitable districts for establishing a system of drainage including surface water drainage, sanitary sewers and water mains and to provide and regulate the construction, repair, and use of sewers and drains and to provide penalties for violations of regulations. W.S. 15-1-103(xxx). Moreover, the State of Wyoming, pursuant to

W.S. 35-11-304(a), acting through the Administrator of the Water Quality Division and the Director of the Department of Environmental Quality has delegated to the Town of Alpine, the authority to enforce and administer the provisions of W.S. 35-11-301(a)(iii). The Town has entered into a Delegation Agreement with the Wyoming Department of Environmental Quality which delegates the enforcement, and administration of permitting and inspection of small wastewater facilities. Such Agreement is attached hereto as Exhibit B. The agreement provides the delegation of authority to develop necessary rules, regulations, standards, and permit systems, to review and approve construction plans, conduct inspections, issue permits, and to enforce violations. See Delegation Agreement, section 6. That agreement provides that the Mayor is the Delegated Local Official who is authorized to enforce and administer the permitting program delegated in that agreement.

The authority delegated by the State Legislature to regulate the use of sewers as well as the authority delegated to the Town by the Delegation Agreement, namely, the ability to enforce, administer, permit and inspect wastewater facilities is purely legislative in function. See Town of Worland v. Odell & Johnson, 329 P.2d 797, 800 (Wyo. 1958) (The authorization of an extension of a sewer system is not an administrative power, but a power which is legislative.)

A legislative decision like the Town's, to require sewer permit applications and the denial and/or conditions of sewer permits in a certain area of the Town are presumed valid under the law. One challenging such action bears an extraordinary burden to overcome the presumption of validity. See Village of Euclid v. Amber Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed 303 (1926).

Critical to this discovery dispute is that what is considered, stated or intended at the public hearings on the decision is not what is relevant in determining whether a decision fails to comply with the requirements of the law when considering decisions regarding septic tank permits and conditions placed thereon. What is relevant, by contrast, and is to be considered, is whether the *decision itself* is arbitrary, capricious, and bears no substantial relationship to the public health safety, morals or general welfare. In Hernandez v. City of Lafayette, 399 So.2d 1179, 1182 (La. Ct. App. 3<sup>rd</sup> Cir. 1981), when summarizing the standard of review for a court's consideration of a challenge to the sufficiency of another legislative action similar to those actions requiring septic tank permits, in that instance a zoning decision, the court opined it is not what is said or considered at the public hearing on the matter that is critical, but whether the decision itself is arbitrary, unreasonable or discriminatory. Hernandez 399 So. 2d at 1182.

The subjective knowledge, mental processes, motives, or rationale of the individual decision makers in making a legislative decision is also irrelevant. See, The Elijah Group, Inc. v. City of Leon Valley, LEXIS 29689, \*3 (W.D Tex 2009); Sosa v. City of Corpus Christi, 739 S.W. 2d 397, 404 (Tex. Ct. App. 1987) ("Judicial review of legislative action should be restricted to examination of the language of the law in question and official legislative records. Individual legislators may not be questioned to determine the evidence upon which they relied or their reasons for voting a particular way."). Moreover, "In the context of judicial review of an administrative agency decision, the mental process rule is further supported by the fact that the court's function is to review the decision, not the reasoning underlying it; therefore *inquiry into the mental process of the decision-maker is irrelevant, inefficient and prohibited*" Gilpin v. County Board of Equalization v. Russell, 941 P.2d 257, 264 (Colo. 1997) (emphasis added).

Consequently, in the present action, the key question surrounding the review of the legislative action of regulating the use of sewers, enforcing, administering, permitting and inspecting sewerage facilities revolves around the decision itself— and whether it meets the "fairly debatable" rule — whether the decision is arbitrary, capricious, or whimsical, and bears no substantial relationship to the public health, safety, or welfare, or it is reasonably debatable that it is in the interest of the general welfare.

Therefore, inquiry of individual decision makers like Mayor DeCora about her individual mental processes (fact investigation, thought processes, analysis, motives, or rationale) related to the collegial decision made by the Town Council to regulate the use of sewers and enforce, administer, permit and inspect sewerage facilities, requiring sewer permits, applications and the denial and/or conditions of sewer permits is inappropriate, irrelevant, and not likely to lead to the discovery of admissible or relevant evidence.

The fact is, in this action, the Mayor and other council members, could legitimately consider varying facts, conduct varying analysis, have different thoughts, motives, or rationales in coming to a final decision on regulating the use of sewers and enforcing, administering, permitting and inspecting sewerage facilities, requiring sewer permits, applications and the denial and/or conditions of sewer permits. It does not matter and is irrelevant to the issues before the EQC. The issue before EQC is not what the individual mental processes of the decision makers was when they made their decision. Rather, the issue is whether the ACTUAL DECISION of the Town Council (acting as a collegial body) in requiring sewer permits and denying them when applicants fail to meet the criteria and notifying regulatory authorities such as DEQ, when involved in a lawsuit, is "fairly debatable."

SALL is entitled to rely on staff reports, the public record of the proceedings, and opinion of other experts to demonstrate that the decision to require and deny sewerage permits does not meet the "fairly debatable" rule, they are not entitled to rely on the individual mental processes (fact investigation, thought processes, analysis, motives, or rationale) of the Mayor or any other member of the Council.

As a matter of law, Plaintiffs efforts to depose Mayor DeCora, to inquire into the mental processes of the Town Council's decisions regulating the use of sewers and enforcing, administering, permitting and inspecting sewerage facilities, requiring sewer permit, applications and denying and/or conditioning sewer permits as well as the decision to notify regulatory authorities such as DEQ, at issue in this Petition for Review/Appeal through deposition of the Mayor is irrelevant, inappropriate, and a waste of Town and Plaintiffs' resources. Accordingly, Town Intervener's Motion for a Protective Order should be granted.

WHEREFORE, for the foregoing reasons, the Town requests the EQC to enter a Protective Order:

1 Quashing the subpoena issued to the Mayor and prohibiting SALL and DEQ from taking the deposition of Mayor Victoria DeCora in the above captioned action as it relates to her mental processes (fact investigation, considerations, thought processes, analysis, motives or rationale,

related to: the Town's regulation of the use of sewers and the enforcement, administration, permitting and inspection of sewerage facilities and its decisions to notify regulatory authorities of perceived violations.

2 In the Alternative, the Town, by and through undersigned counsel, move the EQC for the entry of a Protective Order prohibiting Plaintiffs from deposing Mayor Decora in the above captioned action, based on legislative immunity.

3 The Town requests that if the EQC determines the deposition of Mayor Decora is required, that it be deferred until a minimum of thirty (30) days after the EQC's decision on these motions, or other such time as the Mayor can be made available by the Town.

4 The Town hereby requests a hearing on these matters as soon as is practicable.

#### CERTIFICATION AND REQUESTS FOR COSTS

The undersigned counsel certifies pursuant to Rule 26(c) that he has, in good faith, conferred with SALL's counsel, in writing, concerning the matters in dispute, as set forth above and on the attachments to this Motion, and the parties could not reach a resolution on the issue.

The undersigned counsel also requests that the EQC order SALL to pay to the Town reasonable expenses incurred in making this motion, including reasonable attorney's fees.

Dated this 22<sup>nd</sup> day of April 2010



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#### Certificate of Service

I hereby certify that the foregoing Motion for Protective Order was served upon the following via the method indicated below.


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