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IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF LANE

ELEANOR S. DUMDI,
EDWARD M. ANDERSON,

Plaintiffs,

v.

ROB HANDY, PETER SORENSON,
and BILL FLEENOR, individuals, and
LANE COUNTY BOARD OF
COMMISSIONERS, a governing
body of Lane County Oregon,

Defendants.

Case No. 16-10-02760

Findings of Fact and
Conclusions of Law

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The above matter came on for trial on December 8 through 10, 2010. The court heard the sworn testimony of witnesses, received exhibits and considered the arguments of counsel. The court sets out below its findings of fact and conclusions of law on the issues raised in the pleadings and at trial, including its opportunity to evaluate the credibility of the witnesses.

Findings of Fact

Lane County, Oregon, a political subdivision of the State of Oregon, is governed by a five member Board of Commissioners [hereinafter the "Board"]. At all times relevant to this proceeding, the Board was comprised of Rob Handy, Peter Sorenson and Bill Fleenor, all individual defendants in this case, as well as Faye Stewart and Bill Dwyer [hereinafter "Handy", "Sorenson", "Fleenor", "Stewart" and "Dwyer" respectively]. Each of the five individual commissioners are elected from districts, each district representing one part of a five part division of the County. An

27

1 affirmative vote of at least three commissioners is required to take any formal action
2 by the Board. Dwyer testified at trial that commissioners regularly speak to each
3 other about county business.

4 Lane County's administration is generally located in the "CAO", which stands
5 for County Administrative Offices. Each commissioner has an office in that area.
6 Lane County government is managed by an appointed administrator who is
7 accountable to the Board. At all times relevant to this proceeding, Jeff Spartz was
8 the Lane County Administrator [hereinafter "Spartz"]. Lane County also employs
9 attorneys in the County Counsel's office. At all times relevant to this proceeding,
10 that office was managed by Liane Richardson who held the position of County
11 Counsel for Lane County [hereinafter "County Counsel"]. One of County Counsel's
12 responsibilities was to provide legal advice to the Board regarding the conduct of
13 county business.

14 Handy first assumed the office of commissioner in January 2009. At the time
15 of trial, Fleenor was concluding his first four year term as a commissioner. He did not
16 run for re-election his term is set to expire in January 2011. The evidence did not
17 establish when Stewart first assumed the office of commissioner, but his service
18 included all periods relevant to this proceeding. At the time of trial, Dwyer had been
19 a commissioner for approximately 12 years. Sorenson has been a commissioner since
20 1997. During the year 2009 Sorenson acted as the Board Chair. In addition to
21 presiding over the meetings of the Board, he set the agenda. Sorenson has
22 substantial prior governmental experience, including serving in the Oregon Legislature.
23 Sorenson is also an attorney who has worked with the Oregon Public Meetings law,
24 ORS 192.610, *et. seq.*

25 At issue in the present case is the Lane County budget for fiscal year 2009-
26 2010. In particular, plaintiffs challenge the actions of the individual defendants and
27 the Board leading up to the adoption of Fiscal Year 2009-2010 Supplemental Budget

1 #2, adopted on December 9, 2009 [hereinafter "Supplemental Budget #2"].
2 Specifically, plaintiffs are aggrieved by the inclusion in that amended budget of 1.7
3 FTE (full time equivalents) which money was used and/or intended to be used¹ to
4 fund a one-half time assistant for each commissioner.² The particular posture of this
5 case involves plaintiffs' complaint about the events surrounding re-allocation of funds
6 to be used for these particular positions. Supplemental Budget #2 was adopted with
7 Handy, Sorenson and Dwyer voting to adopt and Stewart and Fleenor voting to
8 oppose adoption.

9 The public funds involved in Supplemental Budget #2, which were reallocated
10 to these particular positions, had already been allocated to be spent in Lane County's
11 2009-2010 budget year, albeit for different purposes/positions. That occurred with
12 the adoption of the 2009-2010 Lane County Budget on June 24, 2009. Exhibit 302.

13 The individual plaintiffs are each Oregon electors and taxpayers domiciled in
14 Lane County, Oregon. The individual plaintiffs oppose the expenditures contained in
15 Supplemental Budget #2, and in particular each oppose the decision to expend
16 taxpayer money to hire new office support staff for Lane County Commissioners.
17 The individual plaintiffs believe Lane County is facing a budget crisis and cannot
18 afford basic services, including keeping criminals in jail.

19 The particular positions, which would be funded by the 2.5 FTE, have been
20 called by several titles. The official title for the position is "Constituent Service
21 Aide."³ For all purposes in this case, the position will hereinafter be referred to by

22
23 ¹Not all commissioners have filled or intended to fill the position for their particular assistant.

24 ²A total of 2.5 FTE's was necessary to fully fund the positions (five .5 FTE positions).
25 Because there was already .8 FTE in the budget for an un-filled position, that .8 FTE could be used
26 for this purpose. It was necessary to only create an additional 1.7 FTE to fully fund these positions.

26 ³It is unclear how this could have been the official title of the position before December 9,
27 2009, as neither that title nor any reference to "commissioner aide" or "commissioner assistant"
appears in any Lane County budget document this court has seen or heard about.

1 the court as a "commissioner aide." Commissioner aides, or something similar to the
2 positions created and funded in Supplemental Budget #2, have previously existed as
3 a part of Lane County Government, but those positions were eliminated in previous
4 years' budget processes when they were not funded. When Lane County
5 Commissioners last had commissioner aide positions available was not established by
6 the evidence.

7 Plaintiffs' complaint is focused on the events surrounding the adoption of
8 Supplemental Budget #2. However, their evidence addresses the Lane County budget
9 process for 2009-2010 starting in the early spring of 2009. The general budget
10 process, for the adoption of the annual budget, begins in the spring of each year with
11 the county's Budget Committee. That is a process of several meetings culminated
12 by the approval of a budget that is a recommendation to the Board. The Board then
13 goes through a process wherein they may make adjustments to the approved budget
14 (within limits) culminating in the adoption of the annual budget by the Board by July
15 1 of each year.

16 In Lane County, the Budget Committee is comprised of five county citizens and
17 the five elected commissioners. Each Lane County Commissioner nominates a
18 particular individual for the Budget Committee who is then presented to the Board.
19 The Board, in a formal action, then decides on the appointment of that individual to
20 the annual Budget Committee for that particular year. As part of the 2009-2010 Lane
21 County budget process, the individual defendants appointed: Sorenson - Alice
22 Kaseberg; Fleenor - Cindy Land; and, Handy - Rose Wilde [hereinafter "Kaseberg",
23 "Land" and "Wilde" respectively]. Those appointees were formally appointed to the
24 2009-2010 Lane County Budget Committee by the Board.

25 In the conduct of its business, the Board has adopted a set of rules. Exhibit
26 33. Those rules include provisions relating to the formal conduct of Board business
27 as well as rules concerning individual board members' direction to staff whereby

1 requested staff time would exceed 15 minutes, *i.e.*, the "15-minute Rule." Exhibit
2 33, page 9. As it relates to all time periods relevant to this case and the budget
3 process described in the evidence, that 15 minute rule was uniformly not enforced
4 by either the Board, county administration nor staff.⁴

5 Shortly after taking office as commissioner, Handy believed that the position
6 of commissioner aide was needed. That view was shared by both Sorenson and
7 Fleenor. Spartz was aware Sorenson, Handy and Fleenor were interested in adding
8 commissioner aides to the 2009-2010 budget. Fleenor had the assistance of Diane
9 Burch as his assistant and, except for the fall of 2009, paid for the cost of her
10 services out of his personal funds. After taking office, Handy had the assistance of
11 Phyllis Barkhurst, on a "volunteer" basis [hereinafter "Barkhurst"]. Barkhurst had
12 formerly acted as Handy's campaign chairman when he was elected commissioner.
13 She did many things to assist the new commissioner including very fundamental
14 actions like helping him set up his office, obtaining office furnishings, getting money
15 for office supplies, answering phones and setting up a constituent response system.
16 At no time was Barkhurst an employee of Lane County. Barkhurst helped Handy
17 select the computer he wanted. Barkhurst was Handy's close and trusted aide. She
18 would be in the CAO on a regular basis. Other county employees were confused
19 about her role in county administration/government. Barkhurst had access to Handy's
20 county office and email. Although she maintained her own email account, Barkhurst
21 would send emails in her name using Handy's county email account.⁵ She would

22 _____
23 ⁴It would appear that the lack of enforcement of this Board order goes beyond the issues of
24 this case and includes, at least, budget matters generally. As an example, Christine Moody testified
25 that Fleenor included in 2009-2010 Supplemental Budget # 1, a resident deputy position that was not
approved previously by the Board.

26 ⁵In a rather strange discussion at trial, it was pointed out to Handy that in his deposition he
27 stated that Barkhurst had no permission to use his county email and had not done so. He was shown
an email where she had used his email address, exhibit 34. His testimony concluded, however, with
the statement that his deposition testimony about her use of his email was true. That statement is

1 request, on Handy's behalf, action by the county's employees. At times, she sent
2 emails on Handy's county email account in his name (as if he had written them). Her
3 testimony at trial indicated that the emails she sent in his name were "his words."
4 In addition, using her own email account, Barkhurst would send emails on items she
5 was assisting Handy with. She would also deal with other commissioners on Handy's
6 behalf. At times, Barkhurst shared her thoughts and opinions with other
7 commissioners if she thought her opinions would be helpful to them. Further,
8 Barkhurst would do things at the request of Sorenson. While testifying, she
9 acknowledged the possibility that she also had assisted Fleenor.

10 Barkhurst had a background in politics. She had worked for Oregon Attorney
11 General Hardy Myers, in a political capacity. In addition to never being employed at
12 Lane County, she had never served on a county committee. She had never served
13 on any entities' budget committee and had no experience with county budgeting.
14 Barkhurst had no local budget law experience as of the spring of 2009. She had
15 some "informal" Public Meetings law training. With that background, Barkhurst
16 undertook to help Handy with the 2009-2010 Lane County budget process.
17 Barkhurst testified that process began in February 2009. Barkhurst further testified
18 her primary focus was to look at old budgets in order to get a deeper understanding
19 that would be helpful in developing the next fiscal year's budget.

20 The formal process for considering including the position of five commissioner
21 aides in the 2009-2010 Lane County Budget began on April 1, 2009, when Barkhurst
22 sent an email to county staff using Handy's county email. Exhibit 34. That email
23 stated:

24 "Hi Jenn:

25 _____
26 simply not credible, and his credibility is in question on other issues as well, as discussed below. To
27 the extent that Handy's trial testimony states or suggests that Barkhurst acted independently of
Handy's delegation of authority in any regard as discussed in this decision, such testimony or
suggestion is also not credible.

1 "Could you please prepare an add package for the BCC Program
Budget/010 account for 2009-2010 that reflects these two items:

2 "1) 2.50 FTE (5 people at .5FTE), level 3 of the administrative Tech
position (benefits for staff, not for family)

3 " * * * *

4 "Please let me know if you have any questions.

5 "Thanks

6 "Phyllis Barkhurst, at the request of Commissioners Sorenson and Handy"

7 That request ultimately made its way into the formal proposed budget to be
8 considered by the Budget Committee. Also in consideration as part of that proposed
9 budget was the position of "Intragovernmental Affairs Coordinator." That position is
10 described in Exhibit 35. The Intragovernmental Affairs Coordinator position survived
11 the Budget Committee and Board budget adoption process and was included in the
12 County's 2009-2010 approved budget at .8 FTE. Despite being approved for 2009-
13 2010, that was the position that went unfilled and in part funded the 2.5 FTE
14 commissioner aide positions approved on December 9, 2009, as part of Supplemental
Budget #2.

15 In addition to her other efforts, Barkhurst assisted Handy with "BIG."⁶ BIG is
16 the acronym for Budget Interest Group. For no apparent reason, it also was referred
17 to as "Book Club." Book Club was a phrase that Sorenson primarily used. This group
18 is hereinafter referred to as "BIG." BIG was a gathering of individuals, which by May
19 2009 might consist at any one time of Handy, Sorenson, or Fleenor and/or their
20 respective Budget Committee appointees, Kaseberg, Land and Wilde, as well as
21 Barkhurst.⁷ There was a conscious effort made to not have more than two
22 commissioners nor any more than five members of the Budget Committee at any BIG
23
24

25 _____
26 ⁶In her testimony at trial, Land described Barkhurst as the "facilitator" of these meetings.

27 ⁷Both Handy and Barkhurst testified at trial that Barkhurst kept Handy informed of what was
occurring at BIG meetings.

1 meeting.⁸ All of the participants knew those numbers were important because to
2 exceed them meant that there was a quorum of either the Board or the Budget
3 Committee, hence a "public meeting."⁹ Spartz was aware a group was meeting
4 outside the regular budget process. Initially, he had seen them meeting in the CAO
5 conference room late in the afternoon. The participants Spartz observed most
6 frequently in the meetings were Kaseberg, Wilde and Land. He also observed
7 Barkhurst in the meetings. He thought he had seen a commissioner sitting in on a
8 meeting. Spartz never saw more than five Budget Committee members in attendance
9 at any meeting he observed.

10 According to Handy's testimony, the concept of BIG developed out of meetings
11 he had with his appointee, Wilde. Handy testified that Kaseberg became involved
12 at Sorenson's request. From there it expanded to include Land, Fleenor's Budget
13 Committee appointee. Barkhurst became the de-facto coordinator of BIG. See
14 Exhibits 74 and 75. Handy testified that he did not want these meetings to be the
15 usual "dog and pony show." He never explained his use of the phrase specifically,
16 but the clear implication is a criticism of what he considered to be the usual Budget
17 Committee presentations. BIG never included Stewart or Dwyer nor their Budget
18 Committee appointees.

19 While BIG was active at the same time as the county's budget process, BIG
20 further evolved. According to a May 5, 2009, email from Barkhurst to Sorenson and
21 Handy, a conflict was already developing in the budget process. Exhibit 48. That
22

23 ⁸Barkhurst testified at trial that she did not understand quorum rules to apply to email
24 communications. Handy's trial testimony as to his ignorance about the Oregon Public Meetings law
25 and an Oregon Attorney General's Handbook does not suggest he was so ignorant of the law that
26 he did not understand the complications that would arise if a quorum of either the Board or the
27 Budget Committee met in this context.

28 ⁹At some point in the BIG meeting process, Kaseberg testified that she tried to even modify
29 her email practices so as to make sure she was sending her messages to a number of participants that
30 would be less than a quorum of the budget committee.

1 conflict included the issue of the funding of additional jail beds. Barkhurst made the
2 following suggestion in her May 5 email:

3 "* * * *

4 "I am suggesting that the BIG be the place where the strategizing occurs
5 along with the budget committee meetings and any meetings where two of you
6 can gather and discuss
7 "* * * *"

8 Exhibit 48, page 1. Handy responded to Barkhurst's message with approval. There
9 is no indication of Sorenson's response to this message, but he continued to
10 participate in BIG. BIG meetings continued to occur after May 5, 2010, up until May
11 19, 2010. May 19 was the date of the 2009-2010 Budget Committee's final meeting
12 where the budget was approved by that group and forwarded to the Board for its
13 consideration.

14 Although BIG was active and meeting regularly during the same time frame as
15 the county's formal Budget Committee process, BIG met with less formality. BIG
16 members did get assignments to work on between meetings, primarily in formulating
17 questions to be asked regarding county budget items. No evidence was presented
18 that BIG or its members ever prepared or kept meeting minutes. Participation was
19 limited to those previously described and, although BIG met in public places, like in
20 the restaurant of the Hilton Hotel, it was never a public process. The public was not
21 invited to participate in BIG. None of the commissioners involved with BIG considered
22 it to be a public meeting within the context of ORS 192.610 *et. seq.* Despite the lack
23 of formality, certain documents developed as part of the BIG process in addition to
24 email messages between members. The preponderance of evidence shows that those
25 documents were prepared by Barkhurst.

26 The BIG documents are variations of a spread sheet containing items under
27 consideration or proposed for consideration by the county's Budget Committee.
28 Exhibits 77, 78, 90 and 93. The spread sheet includes costs associated with each
29 item. Fund numbers and the necessary FTE's are set out. Unusual for a budget type

1 document is a column for "YES" and "NO" which represents a consensus of all of the
2 participants of BIG as to whether there are six votes either in favor of (YES) including
3 them in the final budget or opposed to including them (NO) in the final budget. Like
4 preparing the document, the person tallying the votes was Barkhurst.¹⁰ Barkhurst
5 explained the "YES" "NO" indications on the spread sheet to a county staff person,
6 Christine Moody, and compared it to knowing how a member of the United States
7 Congress would vote before a vote was taken.¹¹ Christine Moody [hereinafter
8 "Moody"] was, until December 2009, a Senior Budget Analyst for the county. In
9 December 2009 she became the county's Budget Manager. In those positions,
10 Moody was intimately familiar with budget documents of the county. These spread
11 sheet documents were circulated to members of BIG up to and including the May 19,
12 2009, Budget Committee meeting where they formed the basis for the motion that
13 modified the approved budget by those additions or deletions.

14 Without regard to what Budget Committee members were doing generally, the
15 time period immediately before May 19, 2009, was a busy time for BIG members and
16 the BIG process.¹² Much of that activity involved communications between BIG
17 members solidifying the understanding as to what was the agreement they had
18

19 ¹⁰Barkhurst's trial testimony equivocated on this issue. She did not deny it was her work, but
20 claimed a lack of recollection of the document. Further testimony generally demonstrated a lack of
21 memory on many actions that her emails demonstrated she took. Despite her memory problem at
22 trial, Barkhurst definitely remembered at trial that she did a head count to see where people stood
23 before the May 19 vote. Her efforts at trial to distance herself from this work product were not
24 credible.

25 ¹¹To the extent that the Fleenor's and Handy's trial testimony disclaimed knowledge of and/or
26 participation in this process of vote counting, that testimony is not credible. Sorenson was not asked
27 that question.

¹²Although there is no evidence that the suggestion ever came to fruition, as of May 11, 2009,
Sorenson was so satisfied with the BIG process that he suggested that the group continue to meet
into June 2009, at the same time that the approved budget would be being considered by the Board.
Exhibit 73. That email was sent to Kaseberg, Wilde, Land, Handy and Barkhurst.

1 reached. On May 12, 2009, at 3:09 a.m., Barkhurst sent an email noting a BIG
2 meeting would occur "Wednesday" at 5:30 p.m. at the Hilton.¹³ Exhibit 75. That
3 email also summarized some of the pending issues. Barkhurst stated:

4 * * * *

5 "The plan for this meeting is to use the CA's budget as a default
6 document for you to bring your lists of additions, deletions, and revisions that
7 you would like to see happen as part of this budget.

8 "Also part of the discussion will be the projected cuts from H & HS and
9 your opinion on the items that you want more info on and/or want to see
10 receive general fund support in lieu of some or all of the cuts that are being
11 projected.

12 * * * *

13 *Id.* The earliest dated spreadsheet of the BIG work is dated May 13, 2009. Exhibits
14 77 and 78.

15 By May 17, 2009, Land was concerned that the "list" she received was not the
16 same as her recollection from Wednesday. Exhibit 88. By May 18, 2009, Land was
17 meeting with Barkhurst at 1:00 p.m.¹⁴ *Id.* On May 18, 2009, Fleenor sent a morning
18 email to Barkhurst and Sorenson expressing a concern about needed additional
19 Budget Committee and BIG meetings to allow the rhetoric to settle down. Exhibit 83.
20 Fleenor proposed in that message holding "two 'mini' BIG meetings (with 5 members
21 per meeting), back to back, this Wednesday to re-position ourselves for the heavy lift
22 on Thursday." *Id.* Also on May 18, 2009, Fleenor sent Handy an evening email
23 summarizing the agreement on the budget issues. Exhibit 91. Fleenor also forwarded
24 that email to Land, who in turn forwarded it to Kaseberg. Land characterized the list
25 as a "compromise." *Id.* That same email, Exhibit 91, was forwarded by Handy on
26 the morning of May 19, 2009, to Barkhurst and Sorenson. By 11:30 a.m. on May
27 19, 2009, the day of the scheduled final meeting of the Budget Committee, Barkhurst
sent an email to Land, Kaseberg and Wilde with the subject "after checking in with

¹³This court takes notice that May 12, 2009, was a Tuesday.

¹⁴Land confirmed in her trial testimony that this meeting took place, but indicated she had no current memory of what was discussed.

1 everyone last night." Exhibit 96. That email began "[h]ere is the last list of agreed
2 upon items with six votes for the meeting tonight." *Id.* The last BIG spread sheet is
3 dated May 19, 2009. Exhibits 90 and 93. According to Barkhurst, that list was
4 complete "* * * although the Resource Development Analyst position may be taken
5 off after the commissioners contact me at lunch time." Exhibit 96. Almost
6 immediately, Land responded to Barkhurst with concerns. Exhibit 97. In addition, on
7 May 17, 2009, Fleenor had sent Kaseberg a message encouraging her to stay the
8 course in the face of the "* * * Register Guard's need to exploit controversy to sell
9 advertising." Exhibit 69. In the face of questions she raised about priorities among
10 the various issues the budget process was weighing, Fleenor encouraged her to
11 "[s]tay strong and focused on staying true to basic principles versus political
12 expediency." *Id.* Those words of encouragement were echoed by Barkhurst in an
13 email to Land, Kaseberg and Wilde on May 19, 2009:

14 "* * * *"
15 "I am working on talking points for those who want a few bullet points
16 on specific items. I will share those with you too.
17 "On the rumor front, the room will most likely be packed tonight with
18 angry jail bed voices - - as I keep reminding Rob - - this is ***sound and fury*** time!
19 And then it will be over.
20 "Thanks!
21 "Phyllis"

22 Exhibit 96 [bold and italics in original] .

23 Without regard to all of the issues that were agreed upon modifications to the
24 county's budget by BIG, commissioner aide funding was always part of the package
25 that BIG agreed would be included in the changes. That package, including
26 commissioner aides, became a part of the approved budget at the Budget Committee
27 meeting on May 19, 2009. Exhibit 1. The motion as set out in the BIG spread sheet
was approved. *Id.*, at page 11. The vote was six in favor and four opposed. All six
BIG members voted in favor. Stewart, Dwyer and their respective Budget Committee
appointees voted against. Land voted in favor of the motion despite continuing to

1 express concerns into the afternoon of May 19, 2009. Exhibit 100.

2 The manner of the conduct of the vote and motion on May 19, 2009, is
3 important to plaintiffs. The motion that included commissioner aides in the budget
4 was clearly scripted from the spread sheet developed at BIG. Exhibit 2.¹⁵ The order
5 of items, their being added or removed from the budget as listed on the May 19 BIG
6 spread sheet, Exhibit 93, tracks identically with the motion made by Fleenor and
7 seconded by Wilde at the Budget Committee's final meeting. Exhibit 1, page 10.
8 However, BIG's achievement of enacting the budget changes it agreed on, including
9 the commissioner aide positions, was not without controversy. Essentially, it became
10 a political discussion of sacrificing jail beds in favor of commissioner aides.¹⁶

11 Both the manner of how the adjustments became a part of the budget as well
12 as the specific inclusion of the commissioner aide positions in the budget approved
13 by the budget committee continued to be the subject of some controversy. By May
14 27, 2009, Fleenor had a change of heart and expressed his position on the budget
15 issues and community discussion in an editorial opinion piece published in the Eugene
16 Register Guard. Exhibit 300. In that op-ed piece, regarding the issue of the
17 commissioner aide positions, Fleenor stated:

18 * * * *

19 "Why add part-time assistants for commissioners? I pay for my assistant
20 (more than \$50,000 out of my own pocket) so I can provide a high level of
21 constituent services. Some commissioners are struggling with the workload
22 of assisting their constituents through this very difficult period - that is why I
23 voted for modest staffing. But I hear the outcry - the symbolism is like CEOs
24 flying in private jets. I apologize for being insensitive and will vote to reallocate
25 these funds.

26 * * * *

27 ¹⁵This exhibit is comprised of several video files. Although the entire (five plus hours) May
19 meeting is available to watch and listen to, the issues that this court found important were set out
in a sub-file entitled "May 19, 2009 Clips." Those include the events surrounding the motion to
approve the budget amendments, the vote and the comments of committee members.

¹⁶Although this references the tenor of one part of the continuing political discussion, the
financial impact of the two choices was clearly not a dollar trade-off.

1 *Id.*, page 1.¹⁷ In fact, by the time the budget was adopted by the commissioners on
2 June 24, 2009, the commissioner aide positions were not included. Those positions
3 were removed from the budget in a five to zero vote taken at a meeting of the Board
4 on June 17, 2009. Exhibit 3, page 5. Fleenor made the motion. Although Fleenor's
5 public position was to remove the commissioner aides from the 2009-2010 budget,
6 his private position continued to recognize their importance. In an email to Barkhurst
7 on May 31, 2009, he advocated:

8 ** * * *
9 "I would also support trying to add back commissioner assistants for the
10 FY 2010-11 budget year, when there is less heat."

11 Exhibit 104, page 2.

12 At the same time that the Board was finalizing the 2009-2010 budget, there
13 was another issue they were dealing with as a result of the conduct of the May 19,
14 2009, Budget Committee meeting. That was a public records request from the
15 Eugene Register Guard newspaper concerning the activities and communications of
16 the commissioners leading up to the budget approval. The compilation of those
17 documents produced, Exhibit 143, resulted in a cautionary email being sent from
18 County Counsel to her clients, the Board, and Spartz on June 4, 2009.¹⁸ That email
19 stated (in its entirety):

20 "I've mostly completed the public records request from Matt Cooper

21 ¹⁷The evidence does not show how much Fleenor paid for Diane Burch's services (Fleenor's
22 assistant) except as claimed in the op-ed piece. However, for August, October and November 2009,
23 the evidence shows that Fleenor was receiving reimbursement from the county for at least \$1,800 per
24 month for the monthly cost of Burch's assistant services as a claimed "constituent services" expense.
25 Exhibit 115. There was no explanation provided at trial as to how this expense was paid during a
period when the commissioner aide positions (formally "constituent service aide") were not a part of
the 2009-2010 adopted budget.

26 ¹⁸It is important to note that, in general, a string of email communications or the messages and
27 responses is read from back to front or bottom to top. The earliest messages will appear at the end
of the string or on the last page and the last or latest message will appear first in multiple
communications or where there are multiple pages.

1 regarding Commissioner Sorenson's, Fleenor's and Handy's emails from
2 January until May. I have provided Matt Cooper one packet of documents and
I've told him that I'll have the rest done by this afternoon or tomorrow.

3 "This is difficult for me to say, as being the bearer of bad news is never
4 appreciated, but I need to let you know that there are emails that I think will
5 look very badly for the county, and for the three Commissioners if Matt decides
6 to pursue them. There may not have been technical violations of the quorum
laws, but the spirit of the rules appears to have been violated on several
occasions. I'm copying all five Commissioners on this email, as well as County
Administrator Spartz, because Mr. Cooper may contact commissioners outside
of the three whose emails he requested."

7 Exhibit 105, page 3. County Counsel's perceived criticism was not well received by
8 Fleenor nor Sorenson.

9 Responding to County Counsel, Fleenor suggested "[t]hanks - I'm sure if
10 somebody wanted to look hard enough they can find a 'violation of the spirit' of just
11 about anything." Exhibit 105, page 3. The next morning Fleenor further responded
12 and said "I can state no deliberations toward a conclusion ever occurred. If I'm not
13 mistaken, fact gathering and exchanging ideas would be considered a prudent form
14 of governing." Exhibit 105, page 2. He dismissed the Register Guard's efforts as "*
15 * * a witch hunt driven by political motives." *Id.* For her part, County Counsel took
16 a much more direct approach to Fleenor and his two responses to her original email.
17 On June 5, 2009, she wrote:

18 "Commissioner - I am [sic] not a stupid person. * * * *
19 "I've reviewed the emails, and I believe the RG's attorneys will see
20 enough evidence there to allow reporters to state that the three of you were
21 deliberating; not necessarily via email, but via a combination of meetings and
22 emails. Whether all three of you were in the room at the same time is
23 irrelevant to whether or not the spirit of rules was being violated. I believe
they will come to the determination that you were using Phyllis as a conduit to
try and avoid the public meetings law. The same arguments can be made in
regards to a quorum of the budget committee. From County Counsel's
perspective, these actions will be difficult to defend * * * *
" * * * * My advice is this: do not try and circumvent the rules."

24 Exhibit 105, page 1.

25 Sorenson also responded negatively to County Counsel's initial warning about
26 the disclosure of records pursuant to the request. Exhibit 106. He suggested she
27 had the wrong perspective. Sorenson wrote:

1 "[Addressing County Counsel's perceived failure to provide
2 commissioners copies of what was produced] i [sic] would like you to look at
this from your client's point of view.

3 "here [sic] you provide information to the news media, thereby
4 blindsighting [sic] the elected officials of the county you represent. this [sic]
engenders the view that you really don't look at it from the county's view, only
the view of the media making the inquiry."

5 Exhibit 106, page 1 and 2. County Counsel was equally more direct in her response
6 to Sorenson's message. She wrote:

7 "Commissioner, your email feels like retaliation for my compliance with
8 a public records request. I take that very seriously. Not only did I previously
9 offer to give copies to the commissioners, I kept you up to date on the request.
10 I never heard from you personally regarding this request. The only
communications I received were some from Commissioner Fleenor and Joe
regarding how time-consuming dealing with this request would be. If a client
does not respond to my communications, I cannot help them."

11 Exhibit 106, page 1. As of the effective date of the fiscal year 2009-2010 budget
12 on July 1, 2009, it was clear to Sorenson, Fleenor and Handy that County Counsel
13 viewed their conduct in the activities leading up to the adoption of that budget as
14 potentially violating the Public Meetings law.

15 Without regard to his role in the May 2009 consideration of the commissioner
16 aide positions, Handy took the lead in securing those positions as part of
17 Supplemental Budget #2. On August 18, 2009, Handy reached out to Barkhurst in
18 an email seeking her further help on budget issues. Exhibit 108, page 1. Stating
19 "Fleenor is pushing - to spend more LC \$ on things," Handy wanted Barkhurst's
20 view "* * * on a general timeline you may feel ready to implement the Constituent
21 Service staff for commissioners." *Id.* Concerning Fleenor's proposed spending,
22 Handy stated "I'd like to tell him no more adds until he helps us get the staff put in
23 the budget." *Id.*

24 Responding to Handy's request for assistance (after clarifying which budget
25 item the money was being spent from) Barkhurst stated "I'll be ready to present info
26 to you and Pete by the middle of next week - how do you want me to do this?"
27 Exhibit 108, page 1. Handy responded "[y]ou tell us how you want to do it, let's get

1 it scheduled, thank you. Fleenor has lots of ideas that require dough and he is looking
2 everywhere for it. Nothing is safe from him." *Id.*

3 On September 14, 2009, Moody responded to Handy's request for information
4 about the costs associated with "Office Support Assistant" positions including a
5 comparison of the cost of full time positions and one-half time positions. Exhibit 109.
6 Apparently, there would be a cost savings associated with a full time person working
7 part time for two commissioners because it would not duplicate the costs of benefits
8 and supply/work space. *Id.* It was Moody's work that included the commissioner
9 aide positions in the proposed Supplemental Budget #2 at the request of Handy.¹⁹
10 In the lead up to the process of commissioner aides being considered by the board
11 as part of Supplemental Budget #2, Moody had personal conversations with Handy,
12 Sorenson and Fleenor about those positions. The manner in which commissioner
13 aides were presented for consideration in Supplemental Budget #2 was identical to
14 how they had been presented in May 2009, *i.e.*, five .5 FTEs, one for each
15 commissioner, even though a lower cost alternative had been discussed.

16 The 2009-2010 Budget Committee's role in the budget process ended on May
17 19, 2009, with the approval of the proposed 2009-2010 budget. In addition, despite
18 Sorenson's suggestion that BIG may have a role after the 2009-2010 budget was
19 approved by the Budget Committee, there was no evidence presented that BIG ever
20 met after May 19, 2009. After May 19, Land continued to provide volunteer
21 assistance and advice to Fleenor, however, her role after that date was as a volunteer
22 in his initial campaign effort to seek re-election to the position of commissioner.
23 Barkhurst's post May 19 role as a volunteer assistant to Handy as commissioner was
24

25 ¹⁹Although Moody testified she informed Handy that a Board order would be necessary to
26 include the commissioner aide positions in the supplemental budget, there was no evidence presented
27 at trial that such an order was ever made or even discussed by the Board. That fact did not go un-
noticed when Supplemental Budget #2 was enacted, as it was mentioned in a comment by Stewart
after the vote.

1 not directly addressed by the evidence. However, it is a reasonable inference that her
2 role in that capacity was significantly reduced. Barkhurst however, continued to
3 provide assistance as described above as well as assistance to Handy in his dealing
4 with the politics of including assistants in Supplemental Budget #2.

5 On October 19, 2009, Barkhurst sent Handy a memo on "Talking Points"
6 related to the politics of funding assistants for the commissioners. Exhibit 110. In
7 general terms, those talking points would point out the benefit to commissioners as
8 well as county residents if the commissioner aide positions were available. It appears
9 those talking points were part of a forwarded message string sent from Handy to
10 Fleenor. *Id.*, page 2. Moody testified that she entered the commissioner aide
11 positions in Supplemental Budget #2 documents on November 25, 2009.

12 On December 4, 2009, the Eugene Register Guard published the Notice of
13 Supplemental Budget Hearing. Exhibit 308. On December 9, 2009, the Board met
14 for the required public hearing on Supplemental Budget #2. No member of the public
15 appeared to speak on the subject of any proposed changes in the budget. Exhibit 6,
16 page 1. Handy moved and Dwyer seconded a motion to approve Supplemental
17 Budget #2, which contained the commissioner aide positions. The budget
18 amendment was adopted on a vote of three to two. Sorenson, Handy and Dwyer
19 voted to approve and Fleenor and Stewart voted no.

20 On December 11, 2009, Handy sent a message to Barkhurst describing the
21 events leading up to the vote on December 9 as well as the vote itself. Handy wrote:

22 * * * * *

23 "I tossed and turned all night before, getting up a few times to review
24 my moves and conversations come morning. When I woke up to the RG
25 demagoguing [sic] on the front page and in the editorial, I was breathless for
26 a moment, then thoroughly determined to kick ass and get after it. When I got
27 to CAO, I could see Dwyer was there. So, for the second time this year, I
came in and knocked everyone over with my booming voice ragging the RG for
trying to intimidate some Commissioners about how they should make their
budget decisions. Zimmer was in Dwyers [sic] doorframe chatting with him,
my voice almost knocked her over and she shrunk off somewhere. After
strongarming him the afternoon before after the Management Team at PW (and

1 sharing your work for him and Janet - he liked it!), I put it to him bluntly. I
2 needed his support, was he still with me. He said yes. I told him I would
3 make the motion, would he second. he [sic] said yes. I said not just for
'discussion' but for support, yes? he [sic] said yes. Faye could hear the whole
4 conversation in the next room - doors were open.

5 "Then, I dipped into Faye's office, told him I knew he was not
6 supporting this, but I set this up, so that he could direct his funds toward Jeff
7 if he wants. He seemed appreciative. Dwyer poked his head in Faye's, told
8 me, and he wanted me to come back into his office. he [sic] said, just vote -
9 don't say anything. He said when you have the votes lined up, just vote, don't
10 give the press any further fodder, by getting into debates and arguments. I
11 told him that knowing you were with me, I would do that.

12 "Wrapped around with Pete, he is still amazed I am working with Dwyer
13 successfully. He's still telling me Dwyer is going to screw me, then fuck me.
14 I told him turn to me first after Christine's intro, so I could make the motion
15 immediately. Despite having spent an hour with Pete the afternoon before
16 (including ½ hour with Christine and I), he asked how I planned to insert this
17 into the budget. I said PETE-IT'S ALREADY IN THERE YOU FOOLI-THEY
18 HAVE TO TAKE IT OUT!

19 "It was all relatively quick and painless. Faye complained and asked
20 Christine how this got stuck in the supplemental, which commissioner did it.
21 She handled it adroitly, without naming names. FS said he would not hire
22 assistants. Mia's work with Fleenor was effective. He made his speech,
23 emphasis on returning his share to the general fund, mentioned that he funded
24 constituent aides out of his pocket because they were important, but that the
25 timing of this was wrong. Went to Pete 'let's go to a vote.' No one showed
26 up for the public hearing.

27 "Pete is on cloud nine. I don't think it has set in yet for me. Press
crawled over it, Pete did all of the media requests, he is on message. Sue
Palmer filling in for Matt Cooper this week-yea! You should read her piece in
Thursday's paper-how refreshing!

"* * * *"

Exhibit 112, pages 1-2 [capital letters in original].

In his trial testimony, Handy addressed his comments in Exhibit 112. Handy
claimed in his testimony that Exhibit 112 was intended to be humorous; some attempt
at private humor. Handy's trial testimony admitted these "meetings" took place, but
he also took issue with how he had characterized the discussions in his email. In his
trial testimony, Handy also claimed a lack of memory as to who made the motion on
December 9, 2009, for approval of supplemental budget #2. Regarding specific
statements he made in Exhibit 112, Handy repeatedly described them at trial as an
embellishment or embellishments of the facts. Handy specifically denied, in his trial
testimony, that he orchestrated the vote for the approval of Supplemental Budget #2.
When confronted at trial, Handy did admit that the events surrounding the vote to

1 approve Supplemental Budget #2 played out exactly as he had described them in
2 Exhibit 112. Handy denied speaking to Fleenor before the December 9 vote.

3 Having had the opportunity to carefully review all of the evidence presented in
4 this matter, this court accepts that the manner of presenting the description of
5 activities by Handy in Exhibit 112 could be characterized as an effort at self-
6 grandiosity. After all that occurred, he obviously had reason to boast as the matter
7 was now a *fait accompli*. The salty language suggests it was a message meant for
8 a close and trusted friend. He may have had reason to share his success with his
9 friend, but nothing suggests that the events portrayed as occurring were made up.
10 Any claim by Handy that the actual events he described as occurring in Exhibit 112
11 are somehow made-up or exaggerations is not credible.

12 The Supplemental Budget #2 calendar, Exhibit 400, indicates that by November
13 25, 2009, the proposed supplemental budget needed to be sent to the Register Guard
14 for publication. For some unexplained reason, that notice for publication was faxed
15 to the newspaper on December 1, 2009, for publication on December 4. Exhibit 307.
16 That December 4 publication date conforms with the calendar's schedule. Exhibit
17 400.

18 Handy, Sorenson and Fleenor were aware that Supplemental Budget #2 would
19 re-allocate funds to allow the employment of commissioner aides.²⁰ Although the
20 exact date Sorenson and Fleenor became aware of that fact is unclear, it was
21 certainly several weeks in advance of the scheduled meeting on December 9. Handy
22 was aware Fleenor would not be supporting the proposed enactment in the vote on
23
24

25
26 ²⁰Fleenor's trial testimony to the effect that he first learned of the inclusion of commissioner
27 aide positions in Supplemental Budget #2 on December 9 is not credible. It is directly refuted by the
fact that his campaign workers were communicating about his position on the matter on December
8. It is further refuted by Moody's testimony about a conversation she had with him. Exhibit 111.

1 wanted Dwyer to not only make the motion, but to vote in favor of enactment.²⁵
2 Dwyer agreed. Dwyer wanted the enactment voted on with the least amount of
3 public discussion. Also on the morning of December 9, Handy was aware that
4 Stewart would not support the enactment, but Handy informed Stewart in his office
5 that the budget was structured in a way so as to allow Stewart's use of the money
6 in a manner other than the hiring of an assistant.²⁶

7 The conclusion of Handy's December 9 pre-public meeting efforts included a
8 final meeting with Sorenson, in Sorenson's office. Handy made sure Sorenson knew
9 that Dwyer had agreed to support the enactment of Supplemental Budget #2. Handy
10 made sure Sorenson knew to get to him immediately after Moody's presentation so
11 that the motion could be made immediately. Sorenson may not have shared Handy's
12 belief that Dwyer would actually vote in favor of enacting Supplemental Budget #2
13 when it came time to vote. The conduct of the Board meeting on December 9, so far
14 as it concerns the presentation and enactment of Supplemental Budget #2, went
15 exactly as Handy had orchestrated it in the few days before. Exhibit 7²⁷. Handy was
16 pleased that Moody did not give his name for the public meeting record as the person
17 who had requested that the commissioner aide positions be included in the

18
19 ²⁵Although the specifics of what was overheard did not corroborate exactly what was said,
20 Mellissa Zimmer's testimony was sufficiently specific to indicate she overheard at least a part of this
21 conversation. Ms. Zimmer is the Board's Secretary.

22 ²⁶Stewart's trial testimony indicated that Handy actually asked Stewart if he would support
23 the positions and that Stewart said no. Perhaps Handy was looking for more support than he
24 described in his email. It is also possible that Stewart interpreted Handy's approach and the
25 suggestion of an alternate use for the money by Stewart as a request for support. This court believes
26 Stewart was credible when he testified to his understanding of Handy's approach as a request for
27 support that morning, as that could be a matter of interpretation from a particular point of view.

28 ²⁷This exhibit received at trial, a USB thumb drive, is corrupted according to the court's
29 technical staff. Staff reported the data, if recoverable, could not be recovered with the tools on hand.
30 Upon notice of the defect, plaintiffs' attorney provided a replacement DVD disk containing the
31 excerpted portions of video from the December 9, 2009, Board meeting. The DVD has been viewed
32 by the court. Both items have been kept and are part of the court's exhibits.

1 December 9.²¹ On December 8, Handy and Sorenson met to discuss the issue of
2 enacting Supplemental Budget #2. A portion of that discussion included the
3 participation of Moody, who explained the budgetary issues as they related to
4 including the positions of commissioner aides as 2.5 FTE²². Handy knew Sorenson
5 was supporting the enactment of Supplemental Budget #2 including the commissioner
6 aide positions. Handy knew that he needed three votes for the enactment. As of
7 December 8, his December 11 missive, Exhibit 112, suggests he only had two, his
8 and Sorenson's.²³ On the morning of December 9, Handy approached Dwyer in his
9 office confirming his support for the enactment of Supplemental Budget #2.²⁴ That
10 was a follow-up to a conversation the two had the day before on the subject of
11 including commissioner aides in the supplemental budget. On December 9, Handy

12
13 ²¹There was no evidence that Fleenor's position was ever a surprise or even a secret. Handy's
14 August 18, 2009, email makes it clear that Fleenor's Fall 2009 spending priorities did not include the
15 commissioner aide positions and Handy needed to take action. Moody testified Fleenor told her,
16 shortly before the December 9 meeting, that he was concerned about how Handy and Sorenson felt
17 about the fact that he wasn't planning on supporting the commissioner aide positions in the
18 supplemental budget. Handy admitted in trial testimony that both he and Barkhurst knew Fleenor's
19 position.

18 ²²There is additional evidence of these events, confirming Handy's narrative in Exhibit 112.
19 The testimony of Moody confirms that this Handy-Sorenson-Moody meeting took place and lasted
20 20 minutes in her estimation. A part of that discussion involved the choice between temporary
21 compared to permanent positions for the commissioner aides. The significance of that discussion,
22 according to Moody, was that the temporary positions had no "FTE", but would be limited to
23 working 1040 hours per year.

22 ²³At least through Fleenor's inner circle, it appears there was more confidence that Handy had
23 the three votes at least as early as December 8. In an email on that December 8 date, Land, now a
24 Fleenor campaign volunteer wrote to the campaign general message board "I understand that Rob
25 & Pete want assistants and the political cover to do it, and with Dwyer they'll have the three votes
26 necessary." Exhibit 111, page 1. Dwyer's earlier commitment is also described by Handy in Exhibit
27 112, when Handy says he asked Dwyer when he first arrived on December 9 "was he [Dwyer] still
with me" clearly indicating a prior commitment. *Id.*

26 ²⁴Handy's trial testimony that he did not ask for Dwyer's support is not credible. Handy
27 needed to confirm that support on December 9 - to make sure that Dwyer was not intimidated by the
Register Guard article Handy had read.

1 supplemental budget. To the extent that Handy has denied in trial testimony that he
2 "orchestrated" the December 9 vote on the enactment of Supplemental Budget #2,
3 that denial is not credible. That is exactly what he did.

4 Neither the Budget Committee nor BIG played any part in the processes leading
5 up to or included in the enactment of Supplemental Budget #2. Although Fleenor did
6 not vote to support adoption of Supplemental Budget #2, he took advantage of the
7 opportunity it afforded him and hired an assistant. His efforts in doing so created
8 some consternation among county administrative staff because he was not following
9 county procedures for "fair and open competition" for the position. Exhibit 126.
10 Although not clearly stated in the trial testimony, a reasonable inference from Melissa
11 Zimmer's testimony, that Fleenor has had the same assistant for four years, is that
12 Diane Burch got the job. She was the person Fleenor privately funded - expensed to
13 the county - as his aide.

14 The present case was filed on February 5, 2010, within 60 days of the
15 enactment of Supplemental Budget #2. Plaintiffs' First Request for Production of
16 Documents Directed to Defendant Bill Fleenor was dated February 19, 2010. Exhibit
17 138. Fleenor was aware of that request. This request was disputed and various
18 other requests for documents from defendants, including Fleenor, were made. In his
19 deposition on September 20, 2010, because of a personal computer hard drive failure
20 in July or August 2009, Fleenor testified that had been unable to produce requested
21 documents from his personal computer. He testified, however, that the failed hard
22 drive was still available. On October 21, 2010, within 30 days of his deposition as
23 provided in ORCP 39F(2), Fleenor corrected his deposition and then wrote that the
24 hard drive failed on April 19, 2010, had been replaced and the failed drive had been
25 discarded. Exhibit 130. Several of the emails in the time frame of this case reflect
26 that Fleenor used a non-county email address. See Exhibit 74. That email address
27 was info@kimillia.com. Fleenor's campaign "whiteboard" communication system and

1 its stored messages were apparently also not available, according to Fleenor.

2 In addition to Fleenor's problem with his personal computer hard drive, issues
3 arose with respect to his "Outlook" calendar after this case was filed. Before this
4 case was filed, his calendar was maintained on the county system and accessible to
5 several individuals, including Zoanne Gilstrap, Lane County Administrative Services
6 Supervisor [hereinafter "Gilstrap"]. Gilstrap testified that she had seen entries related
7 to Book Club in various calendars, including Fleenor's. After this case was filed,
8 Gilstrap observed that references to Book Club had been removed from Fleenor's
9 calendar and then she no longer had access to that calendar. Gilstrap also observed
10 Book Club meetings in the CAO conference room. One of Gilstrap's responsibilities
11 was to supervise the employees who work in the CAO, including the persons who
12 worked at the front desk. One of the front desk people she supervised in the period
13 after the case was filed was Rudy Chavarria [hereinafter "Chavarria"].

14 An incident occurred on June 30, 2010, between Chavarria and Fleenor. A
15 portion of the incident was observed by Gilstrap. She could see Fleenor and
16 Chavarria in the CAO conference room, where they had gone at Fleenor's request and
17 Fleenor had closed the door. Chavarria interpreted Fleenor's approach and comments
18 as suggesting Chavarria was now somehow involved in the present case. The incident
19 confused Chavarria and was very upsetting to him. In addition, the incident was
20 upsetting to Gilstrap. The next day, based on what she had seen and that Chavarria
21 had reported to her, she made notes of the incident. Those notes are Exhibit 120.
22 Chavarria felt he was being pressured by Fleenor after Fleenor received some
23 information that Chavarria was going to be a witness in the case. As he was leaving
24 the contact, Fleenor said to Chavarria that he should remember that he "hadn't seen
25 anything." In their conversation, Fleenor poked Chavarria in the chest as he spoke
26 to him. Gilstrap got involved because she was worried about what effect the
27 conversation was having on Chavarria. The next day, Fleenor approached Chavarria

1 to apologize to him. Fleenor told Chavarria that he didn't mean to scare him and
2 shook Chavarria's hand. At that point Fleenor reminded Chavarria to tell the truth.
3 Although the incident obviously upset and disturbed Chavarria, he testified at trial
4 that it did not affect his trial testimony, which was truthful.

5 Several county employees testified that they had observed Fleenor, Handy and
6 Sorenson in a county office or conference room together at various times.²⁸ In one
7 particular occasion, the testimony indicated that the three of them met with Eugene
8 Mayor Kitty Piercy in a commissioner's office.²⁹ Fleenor, Handy and Sorenson each
9 testified that the three of them had never been together in any one room/office in the
10 CAO and that the three of them did not meet with Mayor Piercy in the CAO. Mayor
11 Piercy was not a witness. Regarding any of the observed "meetings" between the
12 three individual defendants or any two of them as observed by any county employee,
13 none of the witnesses to those meetings were aware of any subject that the
14 commissioners were discussing beyond the hearing of a single word or two. In
15 particular, other than discussed above, no witness testified they were aware of a
16 commissioners' discussion(s) including the subject of commissioner aide positions in
17 the general county budget in the spring of 2009 nor the supplemental budget in
18 December 2009.

19: **Conclusions of Law**

20 Oregon Public Meetings law is set out in ORS 192.610 *et.seq.* The policy of
21 these provisions is set out in ORS 192.620 which states:

22 "The Oregon form of government requires an informed public aware of
23 the deliberations and decisions of governing bodies and the information upon

24 _____
25 ²⁸No witness who testified that they participated in any BIG meeting nor any witness who
26 testified that they observed any BIG/Book Club meeting occurring indicated that they observed any
27 three of the participating commissioners in the same meeting at the same time.

²⁹The witnesses' testimony differed as to which commissioner's office the meeting took place
in.

1 which such decisions were made. It is the intent of ORS 192.610 to 192.690
2 that decisions of governing bodies be arrived at openly."

3 Plaintiffs alleged in their Second Amended Complaint that "[b]etween April of 2009
4 and December 9, 2009, defendants Sorenson, Handy and Fleenor met privately on
5 multiple occasions to deliberate toward decisions ultimately contained in *FY 2009-*
6 *2010 Supplemental Budget #2.*" *Id.*, page 5, paragraph 17 [italics in original].

7 Oregon Public Meetings law further provides in ORS 192.630(1) that "[a]ll
8 meetings of the governing body of a public body shall be open to the public and all
9 persons shall be permitted to attend any meeting except as otherwise provided by
10 ORS 192.610 to 192.690." As used in Oregon Public Meetings law, "meeting" is
11 defined to mean:

12 "* * * the convening of a governing body of a public body for which a
13 quorum is required in order to make a decision or to deliberate toward a
14 decision on any matter. 'Meeting' does not include any on-site inspection of
15 any project or program. 'Meeting' also does not include the attendance of
16 members of a governing body at any national, regional or state association to
17 which the public body or the members belong."

18 ORS 192.610(5). As to the actual vote and decision process on December 9, 2009,
19 as depicted in Exhibit 7, the parties agree that process was a lawful public meeting.
20 The disputes in this case surround the events leading up to that vote, *i.e.*, a claim of
21 improper deliberations and pre-public meeting decision making. Oregon Public
22 Meetings law does not define deliberate or deliberations. Merriam-Webster's
23 Collegiate Dictionary, 10th Ed. [hereinafter "Webster's"], defines "deliberate" as "to
24 think about and discuss issues carefully" and "to think about deliberately and often
25 with formal discussion before reaching a decision." It also provides a definition of
26 "deliberation" as "a discussion and consideration by a group or persons of the
27 reasons for and against a measure." *Id.*

28 Defendants raise two legal issues related to the events presented in the
29 evidence concerning the 2009-2010 budget process. The first of those issues is the

1 statute of limitations applicable to these proceedings set out ORS 192.680(5) and
2 raised as an affirmative defense by all defendants. That statute provides "[a]ny suit
3 brought under subsection (2) of this section must be commenced within 60 days
4 following the date that the decision becomes public record." *Id.* ORS 192.680(2)
5 provides:

6 "Any person affected by a decision made by a governing body of a
7 public body may commence a suit in the circuit court for the county in which
8 the governing body ordinarily meets, for the purpose of requiring compliance
9 with, or the prevention of violations of ORS 192.610 to 192.690, by members
10 of the governing body, or to determine the applicability of ORS 192.610 to
11 192.690 to matters or decisions of the governing body."

12 The statute of limitations defense attacks plaintiffs evidence surrounding the events
13 leading up to and including the May 19, 2009, Budget Committee approval and the
14 Board's June 24, 2009, adoption of the 2009-2010 Lane County budget. That legal
15 theory also was the basis for defendants' trial objections to that evidence.

16 As to any claim by plaintiffs that the deliberations occurring by BIG and/or the
17 Budget Committee in relation to approval of the proposed budget and/or any claim
18 that deliberations by the Board in relation to adoption of the 2009-2010 budget
19 constitute a continuing process culminating in the adoption of Supplemental Budget
20 #2, this court agrees with defendants.³⁰ This court rejects any such continuing
21 process argument. This court has previously stated and re-affirms here that plaintiffs'
22 evidence, to the extent it only proves that there were improper deliberations toward
23 the Budget Committee's approval of the budget in May 2009 and/or the Board's
24 adoption of the Budget in June 2009, would not be sufficient to establish improper
25 deliberations in the adoption of Supplemental Budget #2. This court is satisfied that
26 the earlier two actions by the public bodies were separate decisions under ORS
27 192.610(1) and that the statute of limitations on those two actions expired some time

³⁰This is the argument that plaintiffs make on page 11 of Plaintiffs Trial Memorandum.

1 in July and August 2009 pursuant to ORS 192.680(5), as defendants' claim.

2 As is more specifically discussed below, a plaintiff's right of action derived
3 from ORS 192.680(2) includes the right to require compliance with the statutory
4 scheme, prevent violations of it or seek a determination that is applicable to matters
5 or decisions of the governing body. A "meeting" of the governing body requires at
6 least a quorum of the governing body making or deliberating toward a decision. A
7 decision is:

8 " * * * any determination, action, vote or final disposition upon a
9 motion, proposal, resolution, order, ordinance or measure on which a vote of
a governing body is required, at meeting at which a quorum is present."

10 ORS 192.610(1). While this court agrees with defendants' claims regarding the
11 statute of limitations on those earlier events, as this court has previously ruled, that
12 does not mean the evidence surrounding those events should not have been
13 presented in this trial. As stated on multiple occasions, that evidence was within the
14 scope of the pleadings. Further, as is more fully explained below, that evidence has
15 direct relevance on at least two issues in this case.

16 The second legal issue defendants pled as an affirmative defense is a lack of
17 standing on the part of plaintiffs to challenge the decision to include the commissioner
18 aide positions in Supplemental Budget #2. Standing to make a claim under Oregon
19 Public Meetings law is derived from ORS 192.680(2). In the context of that
20 argument, defendants were careful to not stipulate that plaintiffs, or either of them,
21 would testify that, because they were opposed to expenditures in Supplemental
22 Budget #2, *i.e.*, commissioner aide positions, they were thereby "adversely affected"
23 by the Board's decision to adopt that supplemental budget. *See* Plaintiffs' Second
24 Amended Complaint, page 2, paragraph 8.

25 Initially, while recognizing the sparsity of appellate interpretation by Oregon
26 courts concerning the Oregon Public Meetings law, the Oregon Court of Appeals
27 decided *Harris v. Nordquist*, 96 Or App 19, 771 P2d 637 (1989), and included in a

1 discussion of the case the issue of "standing" in the context of a claim under ORS
2 192.610 to 192.690. Although an earlier version of the statute examined in *Harris*
3 was organized differently, the verbiage concerning standing is virtually identical. In
4 *Harris*, plaintiffs were a labor organization which included as members employees and
5 residents of the Phoenix-Talent School District. Defendants were the district, its
6 board of directors, the superintendent and the board clerk. The issue was alleged
7 secret meetings of a quorum of the board in various restaurants where it was alleged
8 they discussed and decided district issues. In *Harris*, those defendants contended
9 "that it is necessary for a plaintiff to allege specifically that he has been affected by
10 a decision of the governing body in order to have standing and that the plaintiffs have
11 no such allegation." *Id.*, 96 Or App at 22. In resolving the question of plaintiffs'
12 standing to bring the complaint, the court in *Harris* stated:

13 "Although a literal reading of the first phrase of the statute might support
14 defendants' contention, that interpretation would run counter to the clear
15 policy of the statutory scheme to keep the public informed of the deliberations
16 and decisions of governing bodies and of the information on which decisions
17 are made. ORS 192.620. That is not to say that ORS 192.080(1) permits just
18 anyone to bring an action. To have standing, one must be affected by a
19 decision, if one is made, and, if that is the case, the statute, read as a whole,
20 authorizes the commencement of an action. If, for example, it were necessary
21 to allege that a specific decision had been made that affected the plaintiff, it
22 would be too late to bring an action 'for the purpose of requiring compliance
23 with' the law; the decision would have been made. Although a decision may
24 be voided, the statute provides that the court 'shall not' void it, if other
25 equitable relief is available, and it is difficult to perceive what other effective
26 relief would be available, if the decision is an accomplished fact.

27 "The same is true with respect to an action brought 'for the prevention
of violations' of the law. That cannot be accomplished with respect to a
decision that has already been made, unless the court voids that decision; yet,
the courts are told not to do that, except as a last resort. Furthermore, an
action may be commenced to determine the applicability of the law to
'decisions of the public body;' it seems clear that, to maintain an action for
that purpose, there need not have been a decision affecting the plaintiff.
Considering the statute as a whole, we conclude that the statute contemplates,
at least, that any person who might be affected by a decision that might be
made has standing to see that the decision is made in compliance with the
Open Meetings Law.

"Plaintiffs allege that they are residents of the district, that some
members of OSEA are its employees and that at least some of them are
taxpayers in the district; they also allege that all of them are 'vitaly interested
in all manner of decisions made by Defendants and the input, comments and

1 deliberations incident to such decisions by school board members,
2 administrators and advisers whose counsel members seek preparatory to make
3 decisions.' They also allege that defendants are not complying with the Open
4 Meetings Law, referring to specific instances of 'secret' meetings attended by
a quorum of the board. That is enough to show that plaintiffs are affected by
defendants' decisions and to permit them to maintain this action seeking
compliance with the law. * * * *"

5 *Id.*, 96 Or App at 22-23. As stated in *Harris*, standing is a threshold issue for the
6 court.

7 Defendants in the present case take a slightly different approach to the
8 standing question as it relates to plaintiffs claims here. Essentially, they argue: (1)
9 the decision to expend the funds included in Supplemental Budget #2 was a decision
10 made in the adoption of the 2009-2010 budget in June 2009; (2) there is no new
11 consideration of money expenditures in relation to the commissioner aide positions
12 as that money was actually available to be expended as of July 1, 2009, albeit for
13 a different position and different purposes - It was still part of the budget for the
14 board; (3) therefore, defendants' conclude that because the money was previously
15 authorized to be expended and there was no new money nor increased total
16 expenditures involved, plaintiffs could not have been affected by the enactment of
17 Supplemental Budget #2.

18 In plaintiffs' Second Amended Complaint, they initially sought: (1) a judgment
19 declaring that defendants made the decision to adopt Supplemental Budget #2 in
20 violation of the Public Meetings law making that decision in private meetings; (2)
21 invalidating the enactment of Supplemental Budget #2; (3) an injunction restraining
22 defendants from future violations of the Public Meetings law; (4) a judgment for their
23 costs and attorney fees; and (5) a judgment for personal joint/several liability by the
24 individual commissioner defendants for attorney fees based on the claim that their
25 actions were willful violations of the Public Meetings law. The previous sentence
26 refers to the past tense because this court, in ruling on Defendants' Motion for Partial
27 Summary Judgment, entered partial summary judgment in favor of defendants on

1 plaintiffs' request for this court to invalidate the enactment. This court determined
2 that question was moot as of July 1, 2010, and signed an order on November 23,
3 2010, allowing the motion for partial summary judgment. *Also see* this court's letter
4 opinion dated October 25, 2010, page 3. Plaintiffs' remaining claims are what this
5 court is obligated to decide. It is in the context of those remaining questions that this
6 court examines plaintiffs' standing.

7 In resolving this issue, this court looks again at the policy for this statute that
8 the court recognized in *Harris*. That court stated "* * * that interpretation would run
9 counter to the clear policy of the statutory scheme to keep the public informed of the
10 deliberations and decisions of governing bodies and of the information on which
11 decisions are made." *Id.*, 96 Or App at 22. At its essence, defendants argument
12 would mean that no person could be "affected," as used in ORS 192.680(2), by a
13 decision of the Board related to any future decision on the budget after its adoption,
14 so long as the decision did not include new money being expended. In defendants'
15 view, apparently no person could be affected by the decision to adopt Supplemental
16 Budget #2. This court concludes that is too narrow a reading of the meaning of
17 "affected."

18 Returning to *Harris*, the kernel this court derives from that decision as to the
19 meaning of "affected" is "the statute contemplates, at least, that any person who
20 might be affected by a decision that might be made has standing to see that the
21 decision is made in compliance with the Open Meetings Law." *Id.*, 96 Or App at 22.
22 To have an affect, or be affected, "implies the action of a stimulus that can produce
23 a response or reaction." Webster's. The dispute in this case now surrounds the
24 actions of the Board members leading up to what was adopted as Supplemental
25 Budget #2. Defendants produced no evidence to refute plaintiffs' claims that they
26 opposed those expenditures, and particularly the inclusion of commissioner aide
27 positions in the budget. They have a reason they oppose those expenditures, that

Standing

1 being a belief that the money should be spent on other county priorities.

* 2 The important part of the statutory policy in the context of this case is the
3 obligation to allow the public to be informed of the decisions and deliberations of the
4 governing body. Defendants' position would exempt a huge portion of decision
5 making from that policy. In *Harris*, the claim the court rejected was the claim that the
6 lack of an allegation of a specific decision meant that plaintiffs could not have been
7 "affected." Here, by plaintiffs' alleging specific actions leading up to the decision to
8 adopt Supplemental Budget #2, defendants somehow translate the "affect" of the
9 decision on plaintiffs to be well beyond the right plaintiffs shared under the statute
10 with other Lane County citizens to simply be informed of the decisions and
11 deliberations.³¹

12 In Supplemental Budget #2, the Board's action was a decision to eliminate a
13 position created in June 2009 at .8 FTE. An additional expenditure of \$20,000 from
14 another previously approved source was combined with the .8 FTE added to 1.7 FTE
15 to create the total 2.5 FTE necessary to fund five one-half time commissioner aide
16 positions. Simply because the expenditure of funds is authorized for a particular
17 purpose in the budget does not mean they must be expended for that or any other
18 purpose. The Board could have not used those funds or could have allocated them
19 in the 2009-2010 budget year for a purpose plaintiffs supported. Because the matter
20 was properly before the board as a "decision," that being the question of whether or
21 not to adopt a proposed supplemental budget, the Public Meetings law required that
22

23 ³¹It is hard to understand how this court could find no standing for plaintiffs to challenge a
24 specifically identified decision and seek to enforce the statutory obligations of the Public Meetings
25 law surrounding that decision when the court in *Harris* found standing by similarly situated plaintiffs
26 to enforce compliance with Public Meetings law without regard to any particular decision being
27 identified. That may be a particular way defendants in the present case view *Harris* as wrongly
decided, as they stated. In fact, that ultimately was the downfall of the plaintiffs in *Harris*. They did
not prevail because they could not produce any evidence that the quorum of defendants' board was
deliberating as opposed to information gathering as a group. *Id.*, 96 Or App 25.

1 the actions of the governing body on the question presented were required to be
2 taken in compliance with those laws. Plaintiffs have produced sufficient facts to
3 demonstrate they have standing to challenge the actions of the Board and the
4 individual defendants in the decision that ultimately was the adoption of Supplemental
5 Budget #2.

6 Defendants raise the issue of how a meeting occurs in the context of the
7 evidence presented. ORS 192.670 recognizes that a "meeting" occurs outside of a
8 quorum of the governing body in the same room, face to face. It states:

9 "(1) Any meeting, including an executive session, of a governing body
10 of a public body which is held through the use of a telephone or other
11 electronic communication shall be conducted in accordance with ORS 192.610
12 to 192.690.

13 "(2) When telephone or other electronic means of communication is used
14 and the meeting is not an executive session, the governing body shall make
15 available to the public at least one place where the public can listen to the
16 communications at the time it occurs by means of speakers or other devices.
17 The place provided may be a place where no member of the governing body
18 of the public body is present."

19 *Id.* Defendants argue that it is not clear that Oregon Public Meetings law applies to
20 email communication. In distinguishing an email communication, they argued "[t]he
21 statute gives no indication that a 'meeting' occurs when members of the governing
22 body send one another written letters - there is no principled reason why a 'meeting'
23 should arise when members send a copy of the same letter electronically."
24 Defendants Rob Handy, Peter Sorenson and Bill Fleenor's Trial Memorandum
25 [hereinafter "Individual Defendants' Trial Memorandum"], Page 5. The last
26 amendment to ORS 192.670 occurred in 1979. 1979 Oregon Laws, Chapter 361,
27 section 1. There was no evidence presented when the concept of email was created
or when it became common knowledge what an email was, but this court concedes
that it seems unlikely that the legislature conceived of email in its present form in
1979. That being said, it does not mean the law as written is not broad enough to
encompass email communication as a possible manner of deliberation by the

email
↓

1 governing body of a public body at this time.³² According to Webster's, published
2 in 1999, "electronic" means "relating to or utilizing devices constructed or working
3 by the methods or principles of electronics; implemented on or by means of a
4 computer." Without regard to defendants' argument as to how the email
5 communication is used, *i.e.*, in lieu of a written letter or like a short telephone
6 message, this court concludes that email is a means of communication and is an
7 "electronic communication" as that term is used in ORS 192.670(1). With regard to
8 this court's decision about the events surrounding the December 9, 2009, adoption
9 of Supplemental Budget #2, that conclusion is probably of no consequence to this
10 court's decision.

11 The question now posed for this court is whether the evidence shows that it
12 is more likely true than not true that the defendants, including at least a quorum of
13 the Board, conducted a meeting or meetings in violation of Oregon Public Meetings
14 law in either deliberating on or deciding on the adoption of Supplemental Budget #2.³³
15 Broken down, that question determines: (1) did at least three members of the Board;
16 (2) make a decision or deliberate toward deciding Supplemental Budget #2; (3) in any
17 setting that was private and was not open to the public.

18 In addressing the above question, this court has struggled with the view that
19 there ought to be some bright line rule that can be identified by the court for the
20 benefit of these defendants as well as others that may be concerned about this
21 question. In the context of the case before this court, this court is satisfied that a
22 continued search for a bright line rule is a fool's errand. Further, and more

23 _____
24 ³²Based on the evidence presented in the present case, this court rejects defendants' analogy
25 to email as the equivalent of a letter. As the various emails show, they are far more like the normal
26 back and forth in conversation than correspondence in letter form. There is the opportunity for
immediate viewing and response. That in fact occurred in several emails in this case.

27 ³³This definition of "preponderance" of evidence is derived from the 2009 version of UCJI
14.02.

1 importantly, it is unnecessary in order to answer the questions raised in this case.
2 In the present case, it is this court's conclusion that it is certainly more likely true that
3 defendants engaged in a process that involved at least a quorum of the board
4 deliberating toward and deciding on the adoption of Supplemental Budget #2 in
5 private and in meetings that were not open to the public. In answering this basic
6 question, this court looks only to the evidence of the actions of defendants after June
7 24, 2009.

8 From about August 2009, the evidence is clear that Handy was almost single-
9 minded in his determination to pursue inclusion of commissioner aides in the Lane
10 County budget, including the 2009-2010 budget year. He had the support of
11 Sorenson, who shared his view that commissioner aides were needed. No matter
12 who else participated in the process individually, this issue was obviously owned by
13 Handy. He brought in his trusted aide, Barkhurst, to assist and together they put the
14 package together for Moody. Moody, as a county staff member, included it in the
15 supplemental budget proposal.³⁴ If that were all of the evidence plaintiffs' presented,
16 they could not prevail as there is nothing wrong up until that point.³⁵ As *Harris*
17 makes clear, the fact that multiple commissioners constituting a quorum of the Board
18 may be together in one place, discuss county business while together, have personal
19 agendas on matters they consider important, and are even pursuing those issues by
20 seeking the support of fellow commissioners is not, of itself, a violation of Oregon
21 Public Meetings law.

22
23
24 ³⁴Moody's motives here are not really in question and her actions are certainly not a part of
25 any decision making, but this court is troubled as to why she felt obligated to essentially cover for
26 Handy when she was asked specifically by Stewart at the public meeting on December 9, 2009, for
the name of the commissioner who inserted the commissioner aide positions back in the supplemental
budget. It is clear that, on December 9, Moody was protecting Handy.

27 ³⁵This court sees no connection between any violation of unenforced Board rules, Exhibit 33,
and a Public Meetings law violation.

1 There comes a point however, when these issues rise to the level of a matter
2 that is pending for decision by the board. In the present case, that date can be
3 specifically identified and is certainly no later than December 1, 2009. That is the
4 date that the issue of proposed Supplemental Budget #2 was sent to the Eugene
5 Register Guard for publication. At that point, it was clear or should have been clear
6 to all involved, that what was proposed as Supplemental Budget #2 was going to be
7 decided by the Board on December 9, 2009. The county even publishes a calendar
8 so everyone involved in the process knows when a final action is expected to take
9 place. Exhibit 400. As of December 1, there is no question that there was a
10 "proposal" pending before the Board on the question of adoption of Supplemental
11 Budget #2 within the meaning of ORS 192.610(1). Even looking at December 1,
12 there is no evidence this court saw that would indicate that a Public Meetings law
13 violation had taken place as of that date in relation to Supplemental Budget #2.

14 Whether it was Handy alone, and he was clearly the one out front pushing this
15 matter, or Handy working with Sorenson, the matter couldn't just be allowed to run
16 its course at the public meeting on December 9. It is obvious that it was extremely
17 important that the matter be resolved as Handy envisioned the outcome for that date.

18 The evidence is clear that between December 1 and December 9, the fate of
19 Supplemental Budget #2 was decided outside the public meeting context. Handy, in
20 the lead, made sure that he had the votes lined up. That process was wrapped up
21 during the afternoon of December 8 and was confirmed by Handy on the morning of
22 December 9, just prior to the "public meeting." That occurred in a series of
23 discussions among Handy, Sorenson, Dwyer and Stewart. The primary participants
24 were Handy and Sorenson, but Dwyer and even Stewart participated in the process
25 in violation of the Public Meetings law. The evidence did not show that any three
26 commissioners were ever in the same room at the same time talking about this
27 matter. That does not mean that the continuing multiple conversations were not a

1 deliberation. All involved knew that a quorum of the board was working toward a
2 final decision outside of the public meeting context. Just like in May 2009 when the
3 votes of a quorum were being tracked, Handy was counting them in December. In
4 effect, the public meeting vote on December 9 was a sham. It was orchestrated
5 down to the timing and manner of the vote so as to avoid any public discussion. The
6 defendants' purpose in that regard was clear - to avoid adverse public comment or
7 criticism as that appears to be how a quorum of the Board viewed the Register
8 Guard's reporting on the subject. Stewart may not have been working toward the
9 same goal as Handy, but it is obvious he knew what was happening at least as late
10 as in the office on the morning of December 9, before the public meeting. Why
11 Dwyer chose to involve himself in the non-public deliberations process is not at all
12 clear, but he clearly did involve himself.

13 This court concludes that plaintiffs have proven their case that defendants
14 violated the Public Meetings law in relation to the adoption of Supplemental Budget
15 #2. The question now presented is whether the conduct of any of the three
16 individual defendants, Handy, Sorenson or Fleenor constituted "willful misconduct"
17 in relation to the violation(s) that occurred. ORS 192.680(4). If that conduct was
18 willful misconduct, they are jointly and severally liable individually for attorney fees
19 and costs ordered to be paid by the public body. *Id.*

20 The parties do not agree on what constitutes "willful misconduct." Oregon
21 Public Meetings law does not define that phrase. Neither party suggests the
22 legislative history of the statute offers any guidance. In an attorney disciplinary
23 proceeding, the Oregon Supreme Court has examined the meaning of "willfully" in the
24 context a contempt finding under ORS 33.015(2) compared to the mental state of
25 "intent" as used by the American Bar Association's *Standards for Imposing Lawyer*
26 *Sanctions*. In *In re Chase*, 339 Or 452, 121 P3d 1160 (2005), the court stated "*
27 * *the two definitions do not equate: 'willfulness' under ORS 33.015(2) does not

1 require the conscious purpose that describes 'intent' in the ABA Standards." *Id.*, 339
2 Or at 457. The ABA Standards defined "intent" as "the conscious objective or
3 purpose to accomplish a particular result."³⁶ *Id.*

4 In *Chase*, the court further directed its attention to *State ex rel Mikkelsen v.*
5 *Hill*, 315 Or 452, 847 P2d 402 (1993) and the application of the willfulness standard
6 in a Chapter 33 contempt proceeding. *Mikkelsen* was a criminal contempt proceeding
7 for failure to pay child support.³⁷ The underlying issue in that case was whether
8 inability to pay was a burden the state must overcome in proving willfulness or an
9 affirmative defense. The court in *Mikkelsen* decided inability to pay was not an
10 element of the offense. Characterizing the meaning of willfulness from *Mikkelsen*, the
11 court in *Chase* stated "proof that a party had knowledge of a valid court order and
12 failed to comply with that order' establishes a finding of 'willfulness' under ORS
13 33.015(2)." *Chase*, 339 Or at 457.

14 Defendants did submit authority on this issue. They argue "willful" is "* * *
15 synonymous with 'intentional.'" Individual Defendants Trial Memorandum, page 8.
16 Defendants cite another attorney discipline case in support of their assertion, *In re*
17 *Gatti*, 330 Or 517, 8 P3d 996 (2000). In the context of the court's decision to

18
19 ³⁶This court would note that the ABA Standards definition of "intent" is virtually identical to
20 the Oregon criminal law definition of that term in ORS 161.085(7) "* * * a person acts with a
conscious objective to cause the result or to engage in the conduct * * *."

21 ³⁷Although plaintiffs in the present case did not submit any authority for the definition of
22 "willful" they felt was applicable to this proceeding, they did argue that it should be the standard
23 courts in Oregon have applied in the remedial context, not in a punitive setting. This court has not
24 found that Oregon courts have applied a different definition to willful conduct or different standard
25 of "willfulness" in the remedial as compared to punitive contempt context. Rather, in the context of
26 punitive contempt as well as remedial contempt where a jail sanction is sought, the law imposes on
27 the state the burden of proof of "beyond a reasonable doubt." ORS 33.065(9) and 33.055(11).
Remedial contempt without a jail sanction requires proof by a "clear and convincing evidence"
standard. ORS 33.055(11). In fact, a defendant in a punitive contempt case is afforded all of the
constitutional protections available to a criminal defendant, except the right to a jury trial. ORS
33.065(6). As the discussion continues above, however, depending on the context, Oregon courts
have applied different standards to "willful."

1 discipline a lawyer for "* * * willful deceit or misconduct * * *" pursuant to ORS
2 9.527(4), the court in *Gatti* stated "[w]illful deceit or misconduct is synonymous with
3 intentional deceit or misconduct. It is conduct that is intended to cause a particular
4 result." *Id.*, 330 Or 529. The Supreme Court relied in *Gatti* on its earlier decision in
5 *In re Morris*, 326 Or 493, 953 P2d 387 (1998), on this issue. *Morris* was also cited
6 in support of defendants' position. This definition of willful is consistent with the
7 Oregon Supreme Court's interpretation of "willful" in the context of a violation of the
8 Oregon Code of Judicial Conduct. *In re Gallagher*, 326 Or 267, 951 P2d 705 (1998).
9 In *Gallagher*, the court stated "[i]n this context, the court has defined a 'willful' act
10 to mean an act done with a conscious objective of causing the result or acting in the
11 manner contrary to the applicable rule." *Id.*, 326 Or at 269.

12 In the context of Unlawful Trade Practices, ORS 646.605 *et seq.*, subsection
13 (1) of that section includes the following definition:

14 "A willful violation occurs when the person committing the violation
15 knew or should have known that the conduct of the person was a violation."

16 That statutory definition is more in line with the court's interpretation of "willful" in
17 the context of ORS Chapter 33 contempt.

18 Willful misconduct in the context of a Public Meetings law violation could
19 require that it be proven that the person acted with a conscious objective to violate
20 those particular statutory provisions. That is defendants' position. The burden this
21 court assumes plaintiffs' would support is that they are required to prove that the
22 person had knowledge of the law's requirements and thereafter failed to follow those
23 requirements. In the context of this court's conclusions, it will be left to a higher
24 court to decide which burden must be met if that court believes that decision needs
25 to be made. Under either standard, this court is convinced that the question is clearly
26 answered as to each individual defendant, albeit differently.

27 With regard to Fleenor, there is a conspicuous absence of evidence that he

1 participated in any way (not simply--not in any meaningful way) in the efforts to avoid
2 the requirements of the Public Meetings law in the adoption of Supplemental Budget
3 #2. His position - that he would not vote to include commissioner aides in the
4 supplemental budget - was well known and known early on. In fact, according to
5 Handy's own words, Fleenor's efforts to look for other uses for unspent money was
6 one of the precipitating factors encouraging Handy to act. Essentially, the only
7 testimony or evidence as to further actions by Fleenor was Moody's conversation
8 with him about the supplemental budget before it was enacted. In addition, he
9 showed up at the meeting and voted no.

10 On this issue, it becomes clear why plaintiffs would like to bootstrap Fleenor's
11 conduct from the events of April and May 2009 so as to view them as a continuing
12 deliberation on Supplemental Budget #2. Plaintiffs' argue "* * * the same
13 deliberations that led the Defendants to initially fund the assistants in the proposed
14 budget in May informed their decision to finalize funding for the assistants in the
15 supplemental budget in December." Plaintiffs' Trial Memorandum, page 11. As
16 stated above, this court simply disagrees that the events are somehow a continuing
17 deliberation.

18 There can be no question Fleenor knew exactly what was happening on
19 December 9, 2009. That is established through Land's December 8, 2009, email.
20 This court notes with interest that, while criticizing the enactment of the supplemental
21 budget on December 9, stating the timing was wrong (Exhibit 6, page 2), by
22 December 23, 2009, Fleenor was causing consternation among county staff with his
23 pronouncements about already having decided who he was hiring to fill the position.
24 That may be seen as hypocritical, but it is not evidence of participation in the scheme
25 to avoid the Public Meetings law under either standard set out above.³⁸ The evidence
26

27 ³⁸Although not specifically raised, in the context of this case, this court would not accept that simply showing up and voting in the public meeting as a member of the Board is a willful violation

1 is insufficient to establish that Fleenor acted wilfully in violating the Public Meetings
2 law in the events surrounding the adoption of Supplemental Budget #2. Fleenor is
3 entitled to a judgment dismissing him as an individual defendant in this case.

4 With regard to Handy, there is equally no question that his organization of the
5 scheme to enact Supplemental Budget #2 was willful under either standard discussed
6 above. Although this court may have felt that plaintiffs could have produced the
7 evidence in lesser detail, as it relates to Handy, the evidence from the earlier Spring
8 2009 budget process weighs directly on his mental state in the events surrounding
9 the enactment of Supplemental Budget #2. As stated previously, this court rejects
10 his efforts to suggest his ignorance of the Public Meetings law's requirements.
11 Warranting particular emphasis here is County Counsel's written reaction to the Board
12 and then to Handy personally about her opinion of the activities she was aware of
13 from the emails produced in response to the Register Guard's public records
14 request.³⁹ Even ignoring County Counsel's very pointedly critical commentary to him
15 personally in her second email, her first email to the Board and Spartz made it clear
16 there was a problem. It was clear County Counsel viewed with great concern the
17 conduct of the group Handy was working with. In addition, she expressed her view
18 that others were likely to view that conduct as a violation of the statute. Judging
19 from Handy's response, he is not a person who tolerates being criticized. At that
20 point, whether he agreed or disagreed, Handy clearly understood that the county's
21 attorney believed there was a problem that needed to be avoided.

22 Except for the meeting process, Handy's efforts in the adoption of
23 _____
24 of the statute, even with prior knowledge of a scheme of this nature, if the member has voted no. A
25 much closer question is raised if the person would vote in favor of the question, *i.e.*, consistent with
the scheme, and the willfulness standard is consistent with its application in ORS Chapter 33.

26 ³⁹This court would note that Handy had to know, at the time of County Counsel's emails in
27 June 2009, that County Counsel did not even know of the full extent of the activities of Handy
himself, Fleenor, Sorenson, Barkhurst nor even BIG.

*

Sorenson

1 Supplemental Budget #2 followed the blueprint from the Spring of 2009. There is
2 simply no question that the evidence establishes that Handy's conduct was willful as
3 that term is used in ORS 192.680(4).

4 Although Sorenson was not the person out front on the issue of including
5 commissioner aide positions in Supplemental Budget #2, this court concludes that the
6 evidence shows, under either definition of willfulness set out above, he did willfully
7 violate the Public Meetings law as well. Like Handy, Sorenson's early support of
8 some proposal to include the commissioner aide positions in the supplemental budget
9 is not in any way a violation of the Public Meetings law. However, the evidence
10 shows that Sorenson's conduct was fully supportive and participatory in Handy's
11 scheme. Not only was he the third and a necessary vote, his vote was organized and
12 decided in the private discussions that took place. He needed to go along with the
13 scheme in order to get the issue addressed and the vote taken with the least amount
14 of public discussion. As the Chair of the Board, he was able to accomplish that task -
15 and he did so.

16 Like Handy, he didn't heed the message from County Counsel either. He knew
17 what had gone on in the Spring of 2009 and he knew County Counsel's opinion
18 about that conduct in relations to the Public Meetings law.⁴⁰ Further, he is a lawyer
19 who had worked with the law. Sorenson acted in concert with Handy and someone
20 he really didn't trust, Dwyer, to make the decisions about Supplemental Budget #2
21 outside of the public meeting and to conduct the meeting so as to simply confirm
22 what had been agreed to, in the exact manner it was agreed it would take place.
23 Sorenson's conduct was willful as that term is used in ORS 192.680(4).

24 Based on the findings of fact and conclusions of law set out above this court
25

26 ⁴⁰There is a strong implication that his use of "Book Club" was a purposeful attempt to
27 disguise the true nature of BIG's activities, which he knew were within the scope of the Public
Meetings law.

1 makes the following determinations in this case. Plaintiffs are entitled to a judgment
2 containing a declaration: (1) that defendant Board made the decision to adopt
3 Supplemental Budget #2 in violation of ORS 192.610 to 192.690; and, (2) that
4 defendant Board violated ORS 192.630(2) and ORS 192.670 by conducting private
5 meetings. Plaintiffs are entitled to request their attorney fees and costs pursuant to
6 ORCP 68. Plaintiffs are likewise entitled to a judgment against Handy and Sorenson
7 individually, awarding any attorney fees and costs jointly and severally against them
8 individually pursuant to ORS 192.680(4). Defendant Fleenor is entitled to a judgment
9 of dismissal as an individual defendant.

10 Under plaintiffs second claim for relief they seek an "injunction restraining each
11 defendant named herein from violating ORS 192.610 to 192.690." Second Amended
12 Complaint, page 12. In support of their claim, plaintiffs allege:

13 "Defendants' violations of Oregon public meeting laws have been
14 regular, sustained and are ongoing. The violations alleged herein are the result
15 of intentional disregard of the law or willful misconduct by a quorum of the
16 members of the governing body, including specifically Handy, Sorenson and
17 Fleenor. Defendants will continue to violate Oregon Public Meeting laws in the
18 absence of injunctive relief."

19 Second Amended Complaint, Paragraph 43, page 10.

20 Plaintiffs have proven those allegations, except as described above concerning
21 intentional or willful misconduct by Fleenor in December 2009. This is the second
22 issue plaintiffs raised where the evidence concerning defendants' conduct in the
23 Spring of 2009 is relevant and bears directly on this court's decision. While it does
24 not weigh in the decision on whether defendants violated the Public Meetings law in
25 the events leading to adoption of Supplemental Budget #2, it is clear that it is more
26 likely true than not true that the scheme involved in the approval of the 2009-2010
27 Lane County Budget on May 19, 2009, also violated Oregon Public Meetings law.
It is so obvious that it is more true that this court won't set out its analysis of the
facts on that conclusion. This court concludes that that conduct was willful as well,

Sustained & argued

1 under either standard described above.

2 This court is unable, based on the evidence received, to formulate terms of an
3 injunction and will conduct an additional hearing, with briefing and argument on the
4 terms of an injunction plaintiffs will be obligated to initially propose. That injunction
5 would not include Fleenor, based both on his dismissal as an individual defendant as
6 well as on the fact that he is no longer a member of the Board.

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8 Dated the 14th day of January, 2011.

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Michael J. Gillespie
Circuit Court Judge

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