IN THE SUPREME COURT
STATE OF GEORGIA

MATTHEW CARDINALE,	*	
	*	
	*	
Appellant,	*	
	*	CASE NO. A11A0217
v.	*	
	*	
CITY OF ATLANTA, et al.,	*	
	*	
Appellees.	*	

BRIEF OF THE ATTORNEY GENERAL AS AMICUS CURAE

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COMES NOW SAMUEL S. OLENS, the Attorney General of the State of Georgia, and pursuant to the Court's request of September 1, 2011, files this brief as *amicus curae* stating the State's position in this appeal.

I. INTEREST OF THE ATTORNEY GENERAL

The Attorney General is the chief legal officer of the State of Georgia and the exclusive legal advisor and representative of the executive branch of State Government. O.C.G.A. §§ 45-15-3, 45-15-34. *See also* Ga. Const. Art. V, Sec. III, Para. IV; *Perdue v. Baker*, 277 Ga. 1, 5 (2003). The Attorney General's interest in the present case is particularly acute given the Attorney General's established role regarding our State's open government laws. Unlike many other laws of general application, the Attorney General has express authority under both

the Open Meetings Act and the Open Records Act to intervene in cases involving those statutes and to bring civil and criminal actions to enforce their terms. O.C.G.A. §§ 50-14-5(a), 50-18-73(a). As is well known, the Attorney General's office maintains a mediation program where it addresses hundreds of open government disputes between citizens and local governments. In this role the Attorney General's Office has developed not only a keen interest in the consistent application of the State's sunshine laws but of recurrent problems in their application.[1]

II. STATEMENT OF THE CASE

The Court directed the parties in this action to address one issue:

> Whether the Court of Appeals erred in interpreting the Open meetings Act to allow the minutes of a public meeting not to record "the names of the persons voting against a proposal or abstaining" where the vote was not taken by roll-call and was not unanimous. See OCGA § 50-14-1(e)(2).

Order of July 11, 2011 (granting certiorari); letter of September 1, 2011 (requesting amicus brief).

The Attorney General accepts for the purpose of addressing this question its factual predicates: (1) that a roll call vote was not taken by the Atlanta City Counsel at a meeting in February 2010, when voting on changing its rules

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[1] Likewise, the Department of Law represents numerous State agencies and is aware first hand of the difficulties governmental actors sometimes have in complying with the law.

regarding comments; (2) that the vote was not unanimous; and (3) that the minutes of the meeting did not reflect how each member voted or even the numerical outcome of the vote.[2]

III. DISCUSSION

A. THE LITERAL LANGUAGE OF THE OPEN MEETINGS ACT DOES NOT REQUIRE THAT THE NUMERICAL OUTCOME OF AN AGENCY'S VOTE BE RECORDED WHEN THE VOTE IS NOT UNANIMOUS

The Open Meetings Act requires that minutes be taken for the open portion of each meeting of an agency. The law provides in pertinent part:

> Said minutes shall, as a minimum, include the names of the members present at the meeting, a description of each motion or other proposal made, and a record of all votes. In the case of a roll-call vote the name of each person voting for or against a proposal shall be recorded and in all other cases it shall be presumed that the action taken was approved by each person in attendance unless the minutes reflect the name of the persons voting against the proposal or abstaining.

O.C.G.A. § 50-14-1(e)(2) (emphasis added).

In the present case the City of Atlanta is correct that § 50-14-1(e)(2) can be read to not require that any details of the vote be recorded, only that the approval

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[2] This case arises from the grant of a motion to dismiss and all of Plaintiff/ Appellant Cardinale's well pleaded factual allegations are regarded as true. *Anthony v. Am. Gen. Fin. Servs.*, 287 Ga. 448, 449 n.1 (2010). *See also Cardinale v. City of Atlanta*, 308 Ga. App. 234, 234-35 (2011) (posture of case and allegations). The Court should note, as well, the distinction between merely recording the vote's numerical outcome (alleged here to be 8-7) and other details about the vote, such as each member's vote. The Attorney General only addresses the former question.

or rejection of a motion be shown. The statute is indeed silent on the details that must be recorded unless there is a roll call vote, and the question propounded by the Court states one did not occur. Under normal circumstances, a gloss should not be given to statutes if they lead to a non-absurd result on their face.

B. STATUTES THAT ARE OTHERWISE CLEAR ON THEIR FACE SOMETIMES HAVE TO BE CONSTRUED, CONSISTENT WITH THE INTENT OF THE GENERAL ASSEMBLY, SO AS TO AVOID ABSURD RESULTS

Under Georgia law it is axiomatic that "in all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times, the old law, the evil, and the remedy." O.C.G.A. § 1-3-1(a). In most cases no interpretation is needed at all because the words of a statute are so clear that the legislative intent is obvious. In some cases, however, even where the words may be objectively unambiguous their literal interpretation could lead to absurd or plainly unintended results. In such cases the role of the courts, per the General Assembly's own instructions in interpreting its statutes, is to follow the legislative intent as the courts determine it. *Id*; *Judicial Council v. Brown & Gallo, LLC*, 288 Ga. 294, 296-97 (2010) ("the 'golden rule', of statutory construction . . . requires us to follow the literal language of the statute 'unless it produces contradiction, absurdity, or such an inconvenience as to insure that the legislature meant something else,'") (quoting in part *Telecom*USA v. Collins*, 260 Ga. 362, 363 (1990)).

There should be no question that O.C.G.A. § 50-14-1(e)(2) *could* lead to absurd (or at least unintended) results if its words are taken too literally. Suppose, for example, minutes record "the council voted to approve the motion 8-7" yet list no names. In such an instance, the literal language of the subsection leads to an absurd result because the literal language of the subsection provides "it shall be presumed that the action taken was approved by each person in attendance unless the minutes reflect the name of the persons voting against the proposal or abstaining." O.C.G.A. § 50-14-1(e)(2) (emphasis added). If the names are not recorded, by the subsection's strict terms the vote is presumed to be approved by everyone even if the minutes say otherwise.

Such an absurdity can be avoided by understanding that the sentence in the subsection beginning "In the case of a roll-call vote the name of each person …" applies to instances where there is a roll call vote that allows names to be recorded. If there was a roll call and names were not recorded (though possibly in derogation of the statute's obligations), it is presumed that all who voted voted in favor of the outcome. That does not lessen the requirement that the numerical outcome of the vote still be provided. Such an interpretation is consistent with subsection's express command that there be "a record of all votes." O.C.G.A. § 50-14-1(e)(2).

C. IF THE COURT DETERMINES THAT CONSTRUCTION OF THIS STATUTE IS WARRANTED BECAUSE A LITERAL READING OF IT MAY LEAD TO ABSURD RESULTS, SUCH CONSTRUCTION SHOULD COMPORT WITH GEORGIA'S STRONG PUBLIC POLICY FAVORING OPEN GOVERNMENT.

D.

As this Court has repeatedly emphasized:

> The Open Meetings Act was enacted in the public interest to protect the public -- both individuals and the public generally -- from "closed door" politics and the potential abuse of individuals and the misuse of power such policies entail. Therefore, the Act must be broadly construed to effect its remedial and protective purposes.

EarthResources, LLC v. Morgan County, 281 Ga. 396, 399 (2006) (quoting in part *Atlanta Journal v. Hill*, 257 Ga. 398, 399 (1987)). *See also Kilgore v. R. W. Page Corp.*, 261 Ga. 410, 411 (1991); *Red & Black Publ'g Co. v. Board of Regents*, 262 Ga. 848, 853 (1993); *Steele v. Honea*, 261 Ga. 646 (1991); *Atlanta Journal v. Babush,* 257 Ga. 790, 792 (1988); *McLarty v. Board of Regents,* 231 Ga. 22, 23 (1973); *Bryan County Bd. of Equalization v. Bryan County Bd. of Tax Assessors,* 253 Ga. App. 831, 832 (2002); *The Claxton Enter. v. Evans County Bd. of Comm'rs*, 249 Ga. App. 870, 873 (2001) (*Claxton I*); *Moon v. Terrell County*, 249 Ga. App. 567, 568-69 (2001) (*Moon I*); *Beck v. Crisp County Zoning Bd. of Appeals*, 221 Ga. App. 801, 803 (1996); *Crosland v. Butts County Bd. of Zoning Appeals*, 214 Ga. App. 295, 296 (1994); *Jersawitz v. Fortson*, 213 Ga. App. 796, 798 (1994).

The public policy behind the Open Meetings Act is transparency. It is

designed not only to allow citizens to see what their officials are acting upon but to see how their officials are acting. No purpose of the Act that this Court has ever recognized is served by indulging in a presumption that is contrary to the actual facts and conceals officials' actions, for no particular public purpose or benefit, from the public view.

We have witnessed, however, a retrenchment over the last two years from the well established purposes that were previously understood to animate the Act. Recently, in *Johnson v. Board of Comm'rs of Bibb County*, 302 Ga. App. 266 (2010), the Court of Appeals held that agencies can vote in closed session on the acquisition of real estate. Although there was no textual support in the Open Meetings Act for this conclusion, the court stated it had held that "unless an exception to the open meetings requirement specifically provides that a vote on an excepted issue must be taken in public, a vote may be taken in closed session." 302 Ga. App. at 269 (citing *Brennan v. Chatham County Commissioners*, 209 Ga. App. 177, 178 (1993)). This decision reverses the well established presumption that conduct in a meeting is required to be open unless the Act expressly permits it to be closed. It also ignored the plain language of the Act that "Any resolution, rule, regulation, ordinance, or other official action of an agency adopted, taken, or made at a meeting which is not open to the public as required by this chapter shall not be binding." O.C.G.A. § 50-14-1(b).

Similarly, in *Gumz v. Irvin*, 300 Ga. App. 426 (2009), the Court of Appeals held that a gathering of a quorum of county commissioners was not a "meeting" within the Open Meetings Act because "the post-hearing conference was not held 'pursuant to schedule, call, or notice ....'" 300 Ga. App. at 429. Such a ruling leads to the absurd result that officials might evade the openness requirements that the Act imposes on them by never noticing their meetings to begin with. Such a holding is contrary to the longstanding caselaw in Georgia that a meeting is a "meeting" under the Act if a quorum was present and public business was conducted, even despite a lack of proper notice. *See Kilgore, supra* (unnoticed coroner's inquest is "meeting" governed by the Act); *Crosland v. Butts County Bd. of Zoning Appeals*, *supra* (non-public meetings attended by members of the board, the county attorney and others could be "meetings" under the Act); *Jersawitz v. Fortson*, *supra* (committee meetings were meetings under the Act even though not noticed and committee included persons not members of the governing body of the agency). *Cf. Red & Black Publ'g Co. v. Board of Regents*, *supra* (meeting of student disciplinary council is "meeting" under the Act).

The statements in both *Johnson v. Board of Comm'rs of Bibb County* and *Gumz* were not necessary for the results in those cases (and are arguably dicta). In *Johnson* the closed vote was subsequently ratified in an open meeting, and the Court of Appeals did not need to approve a closed vote. 302 Ga. App. at 270. In

Gumz the Court of Appeals noted that no official action was taken so it had nothing to enjoin, anyway. 300 Ga. App. at 430. The Attorney General participated in neither of these cases.

IV. CONCLUSION

Without question, this Court should be loath to interpret or otherwise construe statutes that are plain on their face. In those rare cases where the Court determines that construction of a statute that is otherwise plain on its face is necessary to avoid absurd results, it should do so consistent with the intent of the General Assembly. If such construction is undertaken by the Court in this case, it should take into consideration the strong policy of this State in favor of open government.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing **BRIEF OF THE ATTORNEY GENERAL AS AMICUS CURAE** by electronic filing by depositing a copy of the same to be delivered via United States Mail, addressed as follows:

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This 28th day of September, 2011.

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