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# Curt Schauer and Susan Schauer, appellants, v. Alvin "Jeep" Grooms et al., appellees.

786 N.W.2d 909

Filed August 6, 2010. No. S-07-740.

1. **Jurisdiction: Judgments: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.
2. **Annexation: Ordinances: Equity.** An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity.
3. **Actions: Equity: Public Meetings: Appeal and Error.** An appellate court reviews actions for relief under the Open Meetings Act in equity because the relief sought is in the nature of a declaration that action taken in violation of the act is void or voidable.
4. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court. But when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.
5. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case.
6. **Standing: Words and Phrases.** Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court.
7. **Standing: Claims: Parties.** In order to have standing, a litigant must assert that his or her own legal rights and interests would benefit by the relief to be granted, and the litigant cannot rest his or her claim on the legal rights and interests of third parties.
8. **Standing: Legislature: Statutes.** The Legislature may, by statute, supplant common-law concepts of standing. When it does so, then a special injury is not required.
9. **Standing: Annexation.** Landowners do not have standing simply by virtue of their land's proximity to the annexed area.
10. **Zoning: Ordinances.** Zoning ordinances do not confer a vested right or interest upon their intended beneficiaries.
11. **Public Meetings: Statutes.** The open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public.
12. **Public Meetings: Statutes: Intent: Public Policy.** The intent of the Open Meetings Act is to ensure that the formation of public policy is public business, not conducted in secret, and to allow citizens to exercise their democratic privilege of attending and speaking at meetings of public bodies.
13. **Public Meetings: Statutes: Intent: Notice.** The purpose of the agenda requirement of the public meetings laws is to give some notice of the matters to be

considered at the meeting so that persons who are interested will know which matters will be for consideration at the meeting.

14. **Public Meetings: Statutes: Public Officers and Employees: Public Policy.** The Open Meetings Act does not require policymakers to remain ignorant of the issues they must decide until the moment the public is invited to comment on a proposed policy.
15. **Municipal Corporations: Public Officers and Employees: Statutes.** The fact that a statute gives a certain official the right to cast the deciding vote in case of a tie in a governmental body does not, of itself, make that official a member of that body for the purposes of ascertaining a quorum or majority, or for any other purpose.
16. **Municipal Corporations: Public Officers and Employees.** There is no meeting of a public body based upon unspoken thoughts of council members who happen to be sitting in the same room.
17. **Summary Judgment: Proof.** A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.
18. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

Appeal from the District Court for Valley County: KARIN L. NOAKES, Judge. Affirmed.

George G. Vinton for appellants.

Steven M. Curry for appellee Green Plains Ord LLC.

Justin R. Herrmann and Daniel L. Lindstrom, of Jacobsen, Orr, Nelson, Lindstrom & Holbrook, P.C., L.L.O., for appellees Alvin "Jeep" Grooms et al.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

## I. NATURE OF CASE

Curt Schauer and Susan Schauer live in Valley County, Nebraska, several miles outside of the City of Ord (City). The Schauers seek to invalidate the annexation by the City of neighboring vacant agricultural land. The annexation enabled the use of tax increment financing (TIF) for the construction of

an ethanol plant, which the Schauers opposed as a nuisance to their farmstead.

The Schauers alleged two causes of action: (1) that the annexation was invalid because it exceeded the statutory authority conferred to the City by Neb. Rev. Stat. § 17-405.01(2) (Reissue 2007) and by the Community Development Law[1] and (2) that the City had violated the Open Meetings Act[2] during the process that culminated in the formal action of the City's annexing the subject land. The district court granted summary judgment in favor of the defendants, and the Schauers appeal.

## II. BACKGROUND

Sometime in early 2005, the Valley County Economic Development Board determined that it would be economically beneficial to the county to recruit a developer to build and operate an ethanol facility on undeveloped land somewhere in the county. The Valley County Economic Development Board's business development and recruitment committee envisioned that the developer recruited for the ethanol plant would take advantage of TIF when the City annexed the land under special statutory provisions pertaining to land declared blighted and in need of redevelopment.[3] It was apparently the City's and the county's understanding that the City was to make the blight determination necessary for the annexation—a point on which the Schauers disagree. In any event, TIF would not be available to the ethanol plant developer unless the land was annexed.[4]

The site ultimately selected for the ethanol facility became known as Redevelopment Area #3. It consisted of land noncontiguous to the City, approximately 4½ miles east of its border. Redevelopment Area #3 is located approximately one-eighth of a mile from the Schauers' home. Val-E Ethanol, LLC (Val-E), was eventually recruited to build a 40-million-gallons-per-year

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[1] Neb. Rev. Stat. §§ 18-2101 to 18-2144 (Reissue 1997).

[2] Neb. Rev. Stat. §§ 84-1407 to 84-1414 (Reissue 1999, Cum. Supp. 2004 & Supp. 2005)

[3] See, generally, §§ 18-2101 to 18-2144.

[4] See *id.*

ethanol plant on the site. During the pendency of this appeal, Val-E's successor in interest filed for bankruptcy. Green Plains Ord LLC has since acquired the property and has been substituted as party defendant.

Several meetings of the Ord City Council, the Ord Planning Commission, and the Ord Community Development Agency were held in the process of the City's (1) declaring Redevelopment Area #3 blighted, (2) formally adopting a redevelopment plan for the area, (3) entering into a redevelopment financing agreement with Val-E and, finally, (4) annexing the land. Because the meetings leading up to the annexation are the subject of the Schauers' challenge under the Open Meetings Act, we will describe them in detail.

### 1. Public Bodies

The city council consists of six persons and is overseen by the mayor. At all times pertinent to this case, the council members were Alvin "Jeep" Grooms, Debra Eppenbach, Michael Blaha, Leon Koehlmoos, Dennis Philbrick, and Daniel Petska. Pursuant to Neb. Rev. Stat. § 17-105 (Reissue 2007), a majority of all members of the city council, four persons, constitutes a quorum for the transaction of business. The mayor may vote only when his or her vote "shall be decisive and the council is equally divided on any pending matter, legislation, or transaction."[5]

The community development agency was formed pursuant to § 18-2101.01. It consists of the city council sitting as the agency, with the mayor presiding. Action by the agency is undertaken by a majority vote if a quorum of four is present.

The planning commission consists of five members appointed by the mayor and approved by the city council. A majority of the commission, or three members, constitutes a quorum for the transaction of business. During the period in question, Blaha was the only city council member who also served on the planning commission.

The city clerk testified that based upon her review of the minutes of the meetings of these bodies, it has been the

[5] Neb. Rev. Stat. § 17-110 (Reissue 2007).

standard practice of the city council since 1968, of the community development agency since 1999, and of the planning commission since 1983, to post advance notice of all of their meetings at three public locations: the Ord township library, the Valley County courthouse, and the Ord city hall. Every posted notice briefly describes the agenda for the meeting and the place it will be held; and the agenda is available for inspection by the public at the offices of the city clerk.

### 2. Preliminary Resolutions and Tour/Dinner

The first meeting concerning Redevelopment Area #3 occurred on February 7, 2005. It was a regular meeting of the city council at the city hall, and notice of the meeting was posted in the usual manner. On the agenda was a resolution to move forward in support of the proposed ethanol facility in Valley County. Grooms, Eppenbach, Koehlmoos, and Philbrick were present, and all voted in favor of the resolution.

On February 22, 2005, a special joint meeting was held between the city council and the board of public works of the City. Prior notice of the meeting was posted. The mayor reported to the city council on Valley County's efforts to recruit a developer to build an ethanol plant and on the need to consider annexation and TIF for the site. The mayor asked for and received approval to hire an attorney with experience in TIF for an ethanol plant. Grooms, Eppenbach, Blaha, and Koehlmoos were in attendance, and all voted in favor of hiring said attorney.

The next day, on February 23, 2005, a special meeting of the city council was held, with prior notice posted in the customary manner. The city council authorized the City to hire a consulting firm to complete a blight and substandard determination study of Redevelopment Area #3. All city council members were in attendance, and all voted in favor of the authorization.

On May 17, 2005, after the study was completed, concluding the area was blighted and in need of redevelopment, a public announcement ceremony was held for the proposed Val-E plant. There were over 200 members of the public present, as well as several media outlets. Three members of the planning

commission and three members of the city council were present at the ceremony. There is no evidence that these officials did anything other than observe the ceremony.

On June 1, 2005, the Valley County Economic Development Board hosted a dinner and a tour of an ethanol facility similar to the one proposed by Val-E. Personal invitations were sent out to various individuals, including all of the city council members and the Schauers, but no public notice regarding the tour/dinner was published or posted. The Schauers later reported to the city council that they had elected not to attend the tour/dinner because their former neighbors, who had sold the property for the ethanol plant, were going to be there. The mayor and three of the five city council members: Eppenbach, Blaha, and Petska attended the tour/dinner. It does not appear that any of the planning commission members, other than Blaha, attended. Approximately 40 other individuals were in attendance.

The mayor and those city council members who attended the tour testified that they were split into two groups. The mayor and Petska were in one group, and Eppenbach and Blaha were in the other. One group watched a video explaining how ethanol is produced, while the other group toured the facility. After the tour, the participants went to a restaurant to eat dinner. Eppenbach, Blaha, Petska, and the mayor explained that they ate dinner at the same restaurant but that they did not "eat dinner together." All members testified that on the day of the tour/dinner, they did not discuss or receive information associated with the redevelopment plan and contract, they did not hold any formal or informal hearings, and they did not make policy or take any formal action on behalf of the city council.

On June 6, 2005, at a regular meeting of the city council, conducted after the customary advance public notice, the city council determined to forward the completed blight and substandard study to the planning commission and to set a public hearing on the study at the regular July city council meeting. City council members Grooms, Blaha, Koehlmoos, Philbrick, and Petska were in attendance and voted in favor of the determination.

### 3. Declaration of Redevelopment Area #3

The city clerk posted notice of a meeting of the planning commission to be held on June 8, 2005, identifying as an agenda item the "Blight and Substandard Determination for Redevelopment Area #3." At that meeting, the commission reviewed the blight and substandard determination study and approved a motion to recommend to the city council that it be approved.

In the meantime, Val-E applied to the Valley County zoning office for a conditional use permit to begin construction of the ethanol plant. On June 28, 2005, the Valley County Board of Supervisors approved Val-E's application for a conditional use permit, even though county zoning regulations stated that commercial fuel bulk plants shall be separated at least one-half mile from any neighboring dwelling unit. In a separate action, the Schauers instigated suit against the Valley County Board of Supervisors, its individual members, and Val-E, challenging the grant of the permit. After the annexation, the defendants moved to dismiss the case as moot.[6] The district court found the motion premature and stayed the suit pending the outcome of this appeal.

On June 29 and July 6, 2005, the city clerk posted notice in the customary manner, and also published notice in the local newspaper, of a July 19 hearing. The published notice stated that the purpose of the hearing was "to obtain public comment prior to consideration of declaration of an area of the City as blighted and substandard and in need of redevelopment pursuant to the Nebraska Community Development Law." The published notice also contained a legal description and map showing the area. The posted notice described the agenda as "Public Hearing on Blight and Substandard Analysis for Redevelopment Area #3."

The city clerk also mailed notice of the July 19, 2005, hearing by certified mail to representatives of neighborhood associations, presidents or chairpersons of the governing body of each county, and any school district, community college,

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[6] See, e.g., *Alderman v. County of Antelope*, 11 Neb. App. 412, 653 N.W.2d 1 (2002).

educational service unit, and natural resources district within a 1-mile radius of Redevelopment Area #3, in accordance with the requirements of § 18-2115(2). The notice gave a legal description and contained an attached map of Redevelopment Area #3.

At the July 19, 2005, meeting, after receiving public comment, including that of the Schauers, the city council passed resolution No. 949. City council members Eppenbach, Blaha, Koehlmoos, Philbrick, and Petska were in attendance, and all voted in favor of the resolution. Resolution No. 949 declared Redevelopment Area #3 blighted, substandard, and in need of redevelopment.

### 4. Adoption of Redevelopment Plan and Financing Contract

On September 19, 2005, a special meeting was held, with prior posted notice, to consider "Road Improvement for the Ethanol Plant." At the meeting, details of the TIF proposal were discussed in the context of the possible use of sales tax funds for a county road project to the site. All city council members were present, and all voted in favor of pursuing up to $750,000 in bonds, secured against the sales tax fund, that would pay for infrastructure improvements on the county road providing access to the ethanol plant.

A meeting of the city council, sitting as the community development agency, was held on October 24, 2005. The posted notice for the meeting stated that it was to consider "Cost benefit analysis for Val-E Ethanol" and "Preliminary approval of redevelopment contract for Val-E Ethanol." At the time of the posting, the plan for Redevelopment Area #3 was the only redevelopment plan pending before the city council and the planning commission and was the only matter associated with an ethanol plant.

At the meeting, the community development agency adopted resolution No. 3, which stated that after review of the cost-benefit analysis, it recommended that the City adopt the redevelopment plan. The matter was forwarded to the planning commission for further consideration. All city council members were in attendance. Grooms, Eppenbach, Blaha, Philbrick,

and Petska voted in favor of the resolution; Koehlmoos, however, abstained from voting. The minutes explain that Koehlmoos abstained to avoid any appearance of impropriety, because he also served on the Valley County Economic Development Board.

On November 1, 2005, a meeting of the planning commission was held. The posted notice for the meeting stated that the agenda was the "Redevelopment Plan and Redevelopment Contract for Val-E Ethanol." At the meeting, the planning commission, like the community development agency, adopted resolution No. 3, recommending that the City approve the redevelopment plan and enter into a redevelopment contract with Val-E.

Notice of a meeting of the city council, scheduled for November 14, 2005, was posted in the customary manner and described the agenda as "Public Hearing - Redevelopment Plan and Contract for Val-E Ethanol" and "Annexation Ordinance for Val-E Ethanol Site." On October 26 and November 2, the city clerk also published notice of the November 14 meeting in the local newspaper. The notice explained that the purpose of the meeting was to obtain public comment prior to consideration of a redevelopment plan "for an area of the City which has been declared as blighted and substandard and in need of redevelopment pursuant to the Nebraska Community Development Law." The published notice included a detailed legal description of the land and stated that the land was 4½ miles east of the corporate limits of the City.

At the November 14, 2005, meeting, several members of the public, including the Schauers, were heard. Afterward, the city council passed resolution No. 961, which approved the official plan for Redevelopment Area #3 and the official redevelopment contract with Val-E. All council members, including Koehlmoos, were present and voted in favor of the resolution. A first formal reading of the proposed annexation ordinance was also made.

### 5. Adoption of Annexation Ordinance

On November 16, 2005, the city council held a special meeting, after notice was posted in the customary manner, for

the second reading of the proposed annexation ordinance. The notice described the agenda as "Annexation Ordinance for Val-E Ethanol Site." At the meeting, the second reading was made and the final reading was scheduled for November 21.

Notice of the November 21, 2005, meeting was posted in the usual manner. The agenda item for the meeting was "Annexation Ordinance for Val-E Ethanol Site." At the meeting, there was a final reading of the annexation ordinance. The City then passed ordinance No. 731, annexing Redevelopment Area #3 and expanding the municipal boundaries of the City to include it. All council members were present. Council member Koehlmoos abstained from voting to avoid the appearance of impropriety because of his involvement with the Valley County Economic Development Board. The remaining members all voted in favor of the annexation.

Four months later, on March 21, 2006, the Schauers filed this action seeking to void the annexation. They alleged two causes of action. In their first cause of action, the Schauers asserted that the annexation was brought about in a manner which was beyond the scope of the authority granted to the City through the relevant annexation and redevelopment statutes. In their second cause of action, the Schauers asserted that the annexation was tainted by violations of the Open Meetings Act.

## III. ASSIGNMENTS OF ERROR

The Schauers assert generally that the district court erred in granting summary judgment in favor of the defendants and in refusing to grant summary judgment in their favor. More particularly, as concerns their first cause of action, the Schauers allege the court erred in (1) ruling that a second-class city can declare noncity land substandard and blighted under § 18-2109 and then annex the land because it is blighted under § 17-405.01(2); (2) concluding that there is an obvious conflict between §§ 17-405.01(2) and 18-2109; (3) ruling that there is no restriction in the Community Development Law, §§ 18-2101 to 18-2144, as to where a redevelopment project area can be located; (4) ruling that there is no issue of material fact regarding whether or not the City failed to specifically identify the area to be redeveloped under the redevelopment

plan as required under § 18-2115; (5) ruling that § 17-405.01 does not require the City to annex all of the property designated blighted and substandard in the redevelopment plan; (6) ruling that proper notice of the public hearings required under the Community Development Law was given by the City; (7) ruling that the Schauers have no standing to contest annexation of land by the City; (8) not ruling that the mayor of the City is required to vote on the ordinance annexing land; and (9) not ruling that the City's annexation of the real estate was an ultra vires act and was null and void ab initio.

As concerns their second cause of action, the Schauers allege that the district court erred in (10) ruling that the City had a designated method of giving notice of the time and place of public meetings as required under § 84-1411 and (11) ruling that the Open Meetings Act was complied with relating to the announcement ceremony on May 17, 2005, and the tour/dinner on June 1.

## IV. STANDARD OF REVIEW

[1] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach an independent conclusion.[7]

[2] An action to determine the validity of an annexation ordinance and enjoin its enforcement sounds in equity.[8]

[3] An appellate court reviews actions for relief under the Open Meetings Act in equity because the relief sought is in the nature of a declaration that action taken in violation of the act is void or voidable.[9]

[4] On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.[10] But

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[7] See *Crosby v. Luehrs*, 266 Neb. 827, 669 N.W.2d 635 (2003).

[8] *County of Sarpy v. City of Papillion*, 277 Neb. 829, 765 N.W.2d 456 (2009).

[9] *City of Elkhorn v. City of Omaha*, 272 Neb. 867, 725 N.W.2d 792 (2007). See *Shoemaker v. Shoemaker*, 275 Neb. 112, 745 N.W.2d 299 (2008).

[10] See *Shoemaker v. Shoemaker, supra* note 9.

when credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.[11]

## V. ANALYSIS

### 1. Standing

[5-8] We first address whether the Schauers, as neighboring landowners to the area being annexed, have standing to bring the two causes of action currently before us. Standing is a jurisdictional component of a party's case.[12] It is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court.[13] In order to have standing, a litigant must assert that his or her own legal rights and interests would benefit by the relief to be granted, and the litigant cannot rest his or her claim on the legal rights and interests of third parties.[14] The Legislature may, however, by statute, supplant common-law concepts of standing.[15] When it does so, then a special injury is not required.[16]

At the outset, we clarify that while the Schauers allege numerous ways in which their interests were and will be physically and financially harmed by the construction and operation of the ethanol plant, this appeal solely concerns the validity of the annexation of the land on which the plant was built. The Schauers failed to bring an action within 30 days of the

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[11] See *id.*

[12] See *Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004).

[13] *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005). See, also, *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009).

[14] See *County of Sarpy v. City of Gretna*, 267 Neb. 943, 678 N.W.2d 740 (2004).

[15] See, e.g., *In re Guardianship & Conservatorship of Cordel*, 274 Neb. 545, 741 N.W.2d 675 (2007); *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996).

[16] See, *Hall v. Progress Pig, Inc.*, 254 Neb. 150, 575 N.W.2d 369 (1998); *Metropolitan Utilities Dist. v. Twin Platte NRD, supra* note 15.

city council's decision to formally approve the redevelopment project with Val-E, ensuring its financing and redevelopment contract. Thus, under § 18-2142.01, this agreement is conclusively presumed to be in accordance with the purposes and provisions of the Community Development Law and Neb. Rev. Stat. §§ 18-2145 to 18-2154 (Reissue 1997 & Cum. Supp. 2004).[17] Furthermore, this appeal is not from an action for nuisance, because, at the time this suit was brought, the ethanol facility had not yet begun its operations.[18] Thus, the question of standing in this case is narrow: Do the Schauers have a personal stake in the annexation of their neighbor's land? If not, did the Legislature grant the Schauers standing by statute? We reject the Schauers' contention that no standing analysis is required because the annexation was void ab initio as an ultra vires act.

(a) First Cause of Action

We have addressed on numerous occasions the question of who, under common-law principles of standing, may challenge an annexation ordinance. We have long held that a person who owns property or is a voter in the territory sought to be annexed has standing to maintain an action against a municipality to enjoin the enforcement of the annexation or to have the attempted annexation declared void.[19] We have also held that a public power district has standing to challenge an annexation if the annexation removes property from within the power district's service territory, thereby causing lost revenue.[20] We have said that a municipality that is in the crosshairs of annexation has standing.[21] Finally, we have recognized the standing of

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[17] See §§ 18-2115(2) and 18-2129.

[18] See, e.g., *Horn v. Community Refuse Disposal, Inc.*, 186 Neb. 43, 180 N.W.2d 691 (1970); *Demont v. Abbas*, 149 Neb. 765, 32 N.W.2d 737 (1948).

[19] *Adam v. City of Hastings, supra* note 12; *Wagner v. City of Omaha*, 156 Neb. 163, 55 N.W.2d 490 (1952).

[20] *Cornhusker Pub. Power Dist. v. City of Schuyler*, 269 Neb. 972, 699 N.W.2d 352 (2005).

[21] *City of Elkhorn v. City of Omaha, supra* note 9. See, also, *County of Sarpy v. City of Gretna, supra* note 14.

plaintiffs whose land would fall under a new zoning authority as a result of the challenged annexation ordinance.[22]

[9] But we have never held that a neighboring landowner, who neither owns a property interest in the annexed territory nor will be subject to new zoning regulations as a result of the annexation has standing to challenge the annexation of someone else's land. To the contrary, we have been clear that landowners do not have standing simply by virtue of their land's proximity to the annexed area.[23]

In *Adam v. City of Hastings*,[24] for instance, we held that landowners living adjacent to land being annexed did not have standing, even though their land fell within the zoning jurisdiction of the annexing body. This was because the plaintiffs' land fell within the annexing body's zoning jurisdiction even before the annexation. Furthermore, in *Adam*, we rejected the landowners' argument that they were harmed because of their new proximity to the city, which made them more susceptible to future annexation.[25] We concluded that such an alleged personal interest in the annexation was simply too remote.[26]

In this case, it is undisputed that the Schauers' property was not being annexed. They are not citizens or taxpayers of the annexing entity. Nor will the City's zoning authority extend to the Schauers' land by virtue of the annexation.[27] Nevertheless, the Schauers assert that they have standing. The Schauers argue they have a legal interest in the annexation, because, as a result of the annexation, Redevelopment Area #3 is no longer subject to a county zoning law prohibiting the construction of commercial fuel bulk plants within one-half mile of a neighboring dwelling unit.

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[22] See, *Adam v. City of Hastings, supra* note 12; *Johnson v. City of Hastings*, 241 Neb. 291, 488 N.W.2d 20 (1992); *Piester v. City of North Platte*, 198 Neb. 220, 252 N.W.2d 159 (1977).

[23] See *Adam v. City of Hastings, supra* note 12.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] See § 17-405.01(2).

The Schauers acknowledge that even before the annexation of Redevelopment Area #3 by the City, the Valley County Board of Supervisors granted Val-E a conditional use permit to construct the ethanol plant. But the Schauers claim that the annexation still caused them harm because, if they lose this appeal to invalidate the annexation, then the Schauers' lawsuit against the county will be rendered moot.

[10] Zoning ordinances do not confer a vested right or interest upon their intended beneficiaries.[28] And we conclude that the mootness of another lawsuit, which may or may not have otherwise been successful, is too remote an interest to confer standing. Beyond that, all of the alleged personal, pecuniary, or property interests that the Schauers claim give them standing in this case pertain to the existence of the ethanol plant, not whether the land on which the plant is located should have been annexed by the City.

We are cognizant of the fact that only a city or village may offer TIF, and so, the annexation enabled financing which otherwise would not have been available. This, in turn, facilitated the ethanol plant's construction, which may or may not have occurred without it. But such a link is, again, too tenuous to give the Schauers a legal interest in the annexation. Moreover, as already mentioned, the financing contract is not in issue in this case, but is conclusively presumed to be in accordance with redevelopment laws.

Challenges to rezoning and to redevelopment plans and agreements are distinct from challenges to set aside an annexation. Standing to contest the former is unrelated to standing to contest the latter.[29] Under our common-law principles of standing for challenges to annexations, we conclude that we have no jurisdiction over the Schauers' claims described in their first cause of action.

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[28] See, *Whitehead Oil Co. v. City of Lincoln*, 234 Neb. 527, 451 N.W.2d 702 (1990); *City of Omaha v. Glissmann*, 151 Neb. 895, 39 N.W.2d 828 (1949).

[29] See *Town of Berthoud v. Town of Johnstown*, 983 P.2d 174 (Colo. App. 1999). See, also, *Smith v. City of Papillion, supra* note 13.

### (b) Second Cause of Action: Open Meetings Act

But, in their second cause of action, the Schauers allege that the Legislature has conferred standing upon them regardless of whether they can allege a particularized injury as a direct result of the annexation. We agree that the Open Meetings Act confers standing for the very limited purpose of challenging meetings allegedly in violation of the act.

Section 84-1414(3) of the Open Meetings Act states:

> *Any citizen* of this state may commence a suit . . . for the purpose of requiring compliance with or preventing violations of the Open Meetings Act, for the purpose of declaring an action of a public body void, or for the purpose of determining the applicability of the act to discussions or decisions of the public body.

(Emphasis supplied.) Section 84-1414 does not exclude challenges under the Open Meetings Act when the ultimate result of the meetings is an annexation, as opposed to anything else; none of the cases discussed above involved challenges under the Open Meetings Act.[30]

[11] Furthermore, we have explained that the open meetings laws should be broadly interpreted and liberally construed to obtain their objective of openness in favor of the public.[31] Through the Open Meetings Act, the Legislature has granted standing to a broad scope of its citizens who would lack the pecuniary interest necessary under common law, so that they may help police the public policy embodied by the act.[32] As the Nebraska Court of Appeals has explained, the electors of the township where the meetings are held may not be the only

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[30] See *City of Elkhorn v. City of Omaha, supra* note 9.

[31] *State ex rel. Newman v. Columbus Township Bd.*, 15 Neb. App. 656, 735 N.W.2d 399 (2007).

[32] See, e.g., *Cournoyer v. Montana*, 512 N.W.2d 479 (S.D. 1994); *Pueblo School Dist. v. High School Act*, 30 P.3d 752 (Colo. App. 2000); *Mayhew v. Wilder*, 46 S.W.3d 760 (Tenn. App. 2001); *Highsmith v. Clark*, 245 Ga. 158, 264 S.E.2d 1 (1980); *Society of Plastics Ind. v. Suffolk Cty.*, 77 N.Y.2d 761, 573 N.E.2d 1034, 570 N.Y.S.2d 778 (1991); *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006).

"'persons who are interested'" in the township's actions to be considered during the meeting.[33] Rather, the act clearly contemplates that "citizens," as well as members of the general public and reporters or other representatives of news media, are the intended beneficiaries of the openness sought by the act.[34] Having determined that they have standing, we turn now to the merits of the Schauers' Open Meetings Act claims.

### 2. Meetings

[12] Through the Open Meetings Act, the Legislature has declared that "the formation of public policy is public business and may not be conducted in secret."[35] The intent of the Open Meetings Act is thus to ensure that the formation of public policy is public business, not conducted in secret, and to allow citizens to exercise their democratic privilege of attending and speaking at meetings of public bodies.[36]

#### (a) Officially Recognized Meetings

[13] An integral part of a meeting which is "open to the public"[37] is that the public be adequately notified of when and where the meeting will take place. Section 84-1411 of the Open Meetings Act governs the required notice and states in relevant part:

> (1) Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the

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[33] *State ex rel. Newman v. Columbus Township Bd., supra* note 31, 15 Neb. App. at 663, 735 N.W.2d at 406.

[34] *Id.*

[35] § 84-1408.

[36] See *Alderman v. County of Antelope, supra* note 6.

[37] § 84-1408.

> principal office of the public body during normal business hours.

We have explained that the purpose of the agenda requirement of the public meetings laws is to give "some notice of the matter[s] to be considered at the meeting so that persons who are interested will know which matters will be for consideration at the meeting."[38]

The Schauers make no claim that any of the notices for the meetings leading up to the annexation were untimely or that they failed to specify where a meeting would be held. In fact, we cannot fully discern from the Schauers' briefs and the proceedings below exactly which meetings and in what manner the Schauers believe the various bodies of the City violated the Open Meetings Act. We have reviewed all of the meetings relevant to this case and find no violations of the act. But we discuss in more detail those meetings and gatherings for which the Schauers clearly articulate a challenge.

The Schauers first suggest that describing the land in the published notices as being "within the city," when actually it was not, was misleading.[39] We agree with the district court that the accompanying map and statement that the land was 4½ miles from the City's boundaries was sufficient to give reasonable notice to the public of which matters were to be under consideration at the meeting.

The Schauers also claim that the City somehow violated the Open Meetings Act, because the designated method of notice was not formally set forth in the minutes as such. We find no merit to this contention, derived from the statutory language set forth in § 84-1411 that the notice be "by a method designated by each public body and recorded in its minutes." The city clerk testified that she was able to discern, through the minutes of past meetings, a customary and consistent method of notifying the public.

Finally, the Schauers assert that the publications and postings—in public places within the City—were not likely to

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[38] *Pokorny v. City of Schuyler*, 202 Neb. 334, 339-40, 275 N.W.2d 281, 285 (1979).

[39] Brief for appellants at 22.

be seen by "the rural persons who would truly be affected by the redevelopment project and annexation."[40] We reject the Schauers' underlying premise that the citizens of the City are not the ones "truly . . . affected" by the annexation of this new territory within the City's boundaries and the resulting TIF indebtedness incurred by the City. But, regardless, we find the places of posting, combined with the publication of several key meetings in the local newspaper, were reasonable under the circumstances.

In summary, we reject any contention that the City failed to give proper notice or leave open for the public its official meetings leading up to and concerning the annexation of Redevelopment Area #3. The Schauers' main concern in this appeal, however, is with the presence of the City's officials at events the officials did not consider "meetings" at all.

(b) Tour/Dinner

The Schauers' principal concern under the Open Meetings Act is with the June 1, 2005, tour of the kindred ethanol facility and the dinner following the tour. It appears that there was no public notice of this tour/dinner because the City did not think it was a "meeting" governed by the act.

Section 84-1409(2) defines meetings as "all regular, special, or called meetings, formal or informal, of any public body for the purposes of briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body." Section 84-1410(4) states further that "[n]o closed session, informal meeting, chance meeting, social gathering, email, fax, or other electronic communication shall be used for the purpose of circumventing the requirements of the [Open Meetings A]ct." However, § 84-1410(5) states:

> The act does not apply to chance meetings or to attendance at or travel to conventions or workshops of members of a public body at which there is no meeting of the body then intentionally convened, if there is no vote or other action taken regarding any matter over which the

[40] Brief for appellants at 42.

public body has supervision, control, jurisdiction, or advisory power.

In *City of Elkhorn v. City of Omaha*,[41] we explained that the requirement of the Open Meetings Act is that "'[e]very meeting of a *public body* shall be open to the public . . . .'"[42] Thus, informational sessions attended by a subgroup of the city council, consisting of less than a quorum which, accordingly, had no power to make any determination or effect any action, were not meetings of a "public body" under the act.[43] We noted that the act defines "public body" so as to exclude "subcommittees of such bodies unless a quorum of the public body attends a subcommittee meeting or unless such subcommittees are holding hearings, making policy, or taking formal action on behalf of their parent body."[44] And "if the [Open Meetings] Act does not apply to a subcommittee, it would also not apply to an even lesser subgroup."[45]

[14] We explained that the Open Meetings Act does not require policymakers to remain ignorant of the issues they must decide until the moment the public is invited to comment on a proposed policy.[46] "The public would be ill served by restricting policymakers from reflecting and preparing to consider proposals, or from privately suggesting alternatives."[47] We concluded that by excluding nonquorum subgroups from the definition of a public body, the Legislature had balanced the public's need to be heard on matters of public policy with a practical accommodation for a public body's need for information to conduct business.[48]

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[41] *City of Elkhorn v. City of Omaha, supra* note 9.

[42] *Id*. at 880, 725 N.W.2d at 805. See, also, § 84-1408 (emphasis supplied).

[43] § 84-1409.

[44] § 84-1409(1)(b)(i).

[45] *City of Elkhorn v. City of Omaha, supra* note 9, 272 Neb. at 881, 725 N.W.2d at 805.

[46] See *id.*

[47] *Id.* at 881, 725 N.W.2d at 806.

[48] *Id.*

During the tour of the ethanol facility, there was never a group of more than two city council members. Thus, we conclude that, as in *City of Elkhorn*, there was no meeting of a public body. As in *City of Elkhorn*, the small groups were merely acquiring information—information that was amply commented upon by the public in subsequent meetings of a quorum of the city council and which, moreover, there is no reason to believe the public did not have access to. We see no special benefit derived from passively touring an ethanol facility *at the same time* as the city council members.

Nor is there evidence, as the Schauers suggest, that separating the groups into less than a quorum for the tour was somehow a "'walking quorum[]'"[49] designed to circumvent the requirements of the Open Meetings Act. There is simply no evidence that, through the tour, the city council was attempting to reach a consensus and form public policy in secret.

[15] With regard to the dinner, there were three city council members and the mayor eating at the same restaurant. The presence of the mayor is inconsequential, because the fact that a statute gives a certain official the right to cast the deciding vote in case of a tie in a governmental body does not, of itself, make that official a member of that body for the purposes of ascertaining a quorum or majority, or for any other purpose.[50] But the Schauers argue that city council member Koehlmoos was disqualified, as opposed to merely abstaining from voting, and that therefore, he should not be counted in determining whether there was a quorum present at the dinner.[51] Accordingly, the three members present at the dinner constituted a quorum and a "public body."

The Schauers are incorrect in their somewhat bald assertion that city council member Koehlmoos was disqualified. The only evidence in the record as concerns Koehlmoos' decision to abstain from voting on the annexation was that he served on the Valley County Economic Development Board.

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[49] Brief for appellants at 41.

[50] See 59 Am. Jur. 2d *Parliamentary Law* § 9 (2002).

[51] See *id.*

The Schauers assert that we should infer that Koehlmoos was "working with" Val-E "in promoting the ethanol plant to the City."[52] Even if true, there is no evidence that this alleged promotion of the facility was for anything other than the benefit of Valley County residents. There is no evidence that Koehlmoos had either a personal interest affecting his partiality or a personal, financial gain at stake.[53] The Schauers make no argument as to how Koehlmoos' favoring of the ethanol project made him unable to be a fair arbiter of the City's interests. In fact, the Schauers make no argument that the annexation of Redevelopment Area #3 was anything other than beneficial to the City.

Furthermore, the Schauers were unable to present any evidence that the dinner was "for the purposes of briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body."[54] Rather, the attending city council members and the mayor specifically testified that at the dinner, they did not discuss or receive information associated with the redevelopment plan and contract and that they did not hold any hearing, make policy, or take any formal action on behalf of the city council.

[16] As indicated by *City of Elkhorn*,[55] the secret formation of policy prohibited by the Open Meetings Act refers to the formation of such policy as a group. This implies some communication between a meaningful number of its members, from which the public has been excluded. If there is no meeting of a public body when less than a quorum convenes and discusses an issue, there is likewise no meeting of a public body when, although there is a quorum present, there is no interaction as to the policy in question. There is no meeting of a public body

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[52] Brief for appellants at 41.

[53] See, generally, Annot., 4 A.L.R.6th 263 (2005 & Supp. 2010); 83 Am. Jur. 2d *Zoning and Planning* § 731 (2003 & Cum. Supp. 2010); 56 Am. Jur. 2d *Municipal Corporations, Etc.* § 126 (2000).

[54] See § 84-1409(2).

[55] *City of Elkhorn v. City of Omaha, supra* note 9.

based upon unspoken thoughts of council members who happen to be sitting in the same room.[56]

A similar case to the one at hand was presented in *Harris v. Nordquist*.[57] There, the court held that gatherings of a quorum of the school board at various restaurants, sometimes after official meetings, were not "meetings" under open meetings law, and the trial court was correct in granting summary judgment in favor of the board. The court explained that the only evidence presented was that the board did not meet for the purpose of deciding on or deliberating toward a decision on any matter and, furthermore, that the board did not discuss or deliberate about board business at the gatherings.

Likewise, in *Board of Com'rs v. Costilla Conservancy*,[58] the court held that the plaintiffs had failed to demonstrate the requisite link between the policymaking function of the board and the attendance of certain members at an informational meeting held at a restaurant. The meeting was organized by two state government departments and a private mine to report about the mine's efforts to comply with pollution regulations. Although the plaintiffs argued that the lack of detailed information on what occurred at the gathering should not be held against the people, the council members testified that they did nothing other than listen passively to a highly technical presentation, eat dinner, and leave.

The court in *Costilla Conservancy* explained that the public meetings law was not so broad and sweeping as to require public access to any gathering of any sort that is attended by a quorum of a local public body.[59] Such a position, the court explained, would make an already broad statute virtually limitless. Instead, the transparency required by the law pertained only to those gatherings in which the public could legitimately take part in or gain insight into the policymaking

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[56] See, generally, *Harris v. Nordquist*, 96 Or. App. 19, 771 P.2d 637 (1989). See, also, *Kessel v. D'Amato*, 97 Misc. 2d 675, 412 N.Y.S.2d 303 (1979); *Board of Com'rs v. Costilla Conservancy*, 88 P.3d 1188 (Colo. 2004).

[57] *Harris v. Nordquist, supra* note 56.

[58] *Board of Com'rs v. Costilla Conservancy, supra* note 56.

[59] *Id.*

process.[60] There was simply no evidence that the gatherings in question involved a policymaking function, and thus, the board was entitled to summary judgment.

[17,18] While the Schauers argue that it can be "inferred"[61] that a public meeting occurred, the defendants presented to the court evidence that there was no formation of public policy at the gathering, and the Schauers failed to present any evidence showing otherwise. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.[62] After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.[63] The district court properly concluded on summary judgment that the tour/dinner was not a meeting under the Open Meetings Act.

### (c) Announcement Ceremony

Based on our discussion concerning the tour/dinner, it should be apparent that the passive attendance of several officials at the May 17, 2005, announcement ceremony likewise did not violate the Open Meetings Act. But, in any event, the announcement ceremony was not placed in issue below, and it is thus not properly before us on appeal.[64] The Schauers allege no other secret meetings in violation of the act.

## VI. CONCLUSION

The Schauers lack standing to assert the claims made in their first cause of action, and they failed to raise any material issue

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[60] *Id.*

[61] Brief for appellants at 36.

[62] *Corona de Camargo v. Schon*, 278 Neb. 1045, 776 N.W.2d 1 (2009).

[63] *Id.*

[64] See, e.g., *Ballard v. Union Pacific RR. Co.*, 279 Neb. 638, 781 N.W.2d 47 (2010).

of fact in their second cause of action. We affirm the court's judgment in favor of the defendants in this suit to set aside the annexation of Redevelopment Area #3 by the City.

AFFIRMED.

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VIVIKA A. DEVINEY, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, A DELAWARE CORPORATION, APPELLEE.

786 N.W.2d 902

Filed August 6, 2010. No. S-08-1259.

1. **Summary Judgment.** A court should grant summary judgment when the pleadings and evidence admitted show that no genuine issue exists regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence.** Foreseeable risk is an element in the determination of negligence, not legal duty. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of the foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable.
4. **Federal Acts: Railroads: Liability: Negligence: Damages.** Under the Federal Employers' Liability Act, railroad companies are liable in damages to any employee who suffers injury during the course of employment when such injury results in whole or in part due to the railroad's negligence.
5. **Federal Acts: Railroads: Employer and Employee.** The Federal Employers' Liability Act requires that a railroad provide its employees with a reasonably safe workplace.
6. **Negligence: Damages: Proximate Cause.** In order to prevail in a negligence action, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately caused by the failure to discharge that duty.
7. **Negligence: Proximate Cause.** Foreseeability in the context of proximate cause relates to the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's breach of duty.
8. **Animals: Liability.** The doctrine of ferae naturae essentially provides that a landowner cannot be held liable for the actions of dangerous animals on his or