

NOTICE
Decision filed 09/19/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 130507-U

NO. 5-13-0507

IN THE

APPELLATE COURT OF ILLINOIS

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DISTRICT

P AND S GRAIN, LLC, an Illinois Limited Liability Company, and V.W. BOWMAN OIL COMPANY, a Missouri Corporation,)	Appeal from the
Plaintiffs-Appellants,)	Circuit Court of
)	Williamson County.
)	
v.)	No. 08-CH-100
)	
WILLIAMSON COUNTY, ILLINOIS, an Illinois Unit of Local Government, BRIAN A. HAMER, Director, Illinois Department of Revenue, an Agency of State Government, and BOARDS OF EDUCATION OF JOHNSTON CITY, MARION, CRAB ORCHARD, HERRIN, and CARTERVILLE SCHOOL DISTRICTS,)	
)	
Defendants-Appellees.)	Honorable
)	John Speroni,
)	Judge, presiding.

PRESIDING JUSTICE WELCH delivered the judgment of the court. Justices Spomer and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in finding that the county had not violated the Open Meetings Act, nor had it exceeded its authority in passing a resolution authorizing the imposition of a school facility occupation tax.

¶ 2 P&S Grain, LLC, an Illinois limited liability company, and V.W. Bowman Oil Company, a Missouri corporation (hereinafter the plaintiffs), appeal from the denial, by

the circuit court of Williamson County, of their second amended complaint, filed September 9, 2011, to have declared void and unenforceable, for violations of the Open Meetings Act (5 ILCS 120/1 *et seq.* (West 2012)), ordinances of Williamson County authorizing the imposition of a countywide sales tax pursuant to the School Facility Occupation Tax Law (55 ILCS 5/5-1006.7 (West 2012), to have declared void the tax imposed by the void ordinances, and for the entry of a permanent injunction enjoining any future collection of that tax. Joined as defendants are Williamson County, the Illinois Department of Revenue, and the Boards of Education of Johnston City, Marion, Crab Orchard, Herrin, and Carterville School Districts. For reasons which follow, we affirm.

¶ 3 The School Facility Occupation Tax Law (the Tax Law) (55 ILCS 5/5-1006.7 (West 2012)) allows a county board to impose a tax of up to 1% upon all retail business to provide revenue to be used exclusively for school facility purposes when that tax is approved by the voters of the county through a referendum placed on the ballot of a regularly scheduled election. 55 ILCS 5/5-1006.7(a) (West 2012). If the retail sales tax is imposed, then a service occupation tax must also be imposed at the same rate upon all persons engaged in the business of making sales of service who, as an incident of those sales of service, transfer tangible personal property. 55 ILCS 5/51006.7(b) (West 2012). Upon a resolution by the county board, or a resolution by school district boards that represent at least 51% of the student enrollment within the county, the county board must certify the question of the imposition of the sales tax to the proper election authority in accordance with the Election Code. 55 ILCS 1006.7(c) (West 2012). The Tax Law provides that the election authority must submit the question in substantially the

following form:

"Shall (name of county) be authorized to impose a retailers' occupation tax and a service occupation tax (commonly referred to as a 'sales tax') at a rate of (insert rate) to be used exclusively for school facility purposes?" 55 ILCS 5/5-1006.7(c) (West 2012).

If a majority of electors voting on the question vote in the affirmative, then the county may impose the tax. 55 ILCS 5/5-1006.7(c) (West 2012).

¶ 4 In November 2007, the defendants boards of education, all of which are located within Williamson County and represent at least 51% of the student enrollment within the county, presented identical resolutions to the Williamson County board requesting that the question of whether to assess the sales tax be presented to the voters. The county board considered the resolutions at its November 28, 2007, reconvened board meeting. The agenda for this meeting refers to the resolutions as "Superintendent of Schools Resolution" under the agenda item, "Resolutions." At that meeting, the county board passed resolution No. 07-11-28-65, providing for the submission of the question whether to impose the sales tax to the voters of Williamson County at the February 2008 general primary election. Accordingly, the question was placed upon the ballot and voted on in that election. It was approved by the voters.

¶ 5 On February 29, 2008, the Williamson County board reconvened and passed ordinance No. 08-02-29-02, titled, "Ordinance imposing school facility retailers' occupation and service taxes in The County of Williamson." The agenda for this meeting referred to this action as "Superintendent of Schools Resolution" under the agenda item,

"Old Business."

¶ 6 Upon receipt of documentation from the county, the defendant Department of Revenue requested that ordinance No. 08-02-29-02 be amended to show that it did not take effect until July 1, 2008. On April 8, 2008, the county board met during a regularly scheduled meeting and passed ordinance No. 08-04-08-03, which effectively amended the previous ordinance to reflect the correct effective date as requested by the Department of Revenue. The agenda for the April 8, 2008, meeting lists under the agenda item, "Ordinances," the phrase, "Amend Ordinance 08-02-29-02, An Ordinance Imposing School Facility Retailers' Occupation and Service Occupation taxes—Section 6."

¶ 7 On July 1, 2008, the Department of Revenue began collecting, administering, and enforcing Williamson County's school facility retailers' occupation tax and service occupation tax. During the period of October 2008 through June 2012, \$23,651,743.27 in tax proceeds were distributed to the defendant school districts and seven other Williamson County school districts.

¶ 8 On September 9, 2011, the plaintiffs filed their second amended complaint for declaratory and injunctive relief.¹ Count II of the complaint alleges that ordinance No. 08-02-29-02, adopted February 29, 2008, which imposed the sales tax following the referendum, was void *ab initio* because it was passed in violation of the Open Meetings Act (5 ILCS 120/1 *et seq.* (West 2012)). Specifically, the plaintiffs alleged that the

¹Count I of the second amended complaint is not before us on appeal and we will not discuss it.

agenda which was required by the Open Meetings Act to be posted 48 hours in advance of the meeting was not specific enough to notify the public that the county board would be adopting an ordinance to impose a sales tax within the county. Furthermore, the plaintiffs alleged that the ordinance was void *ab initio* because it exceeded the authority granted by the boards of education's resolutions which had requested only the imposition of a retailers' occupation tax and not the service occupation tax.

¶ 9 Count III of the second amended complaint alleged that ordinance No. 08-04-08-03, passed April 8, 2008, which purported to amend the effective date of ordinance No. 08-02-29-02, is void *ab initio* because the agenda for the April 8, 2008, meeting indicated that action would be taken to "amend Ordinance No. 08-02-29-02 An Ordinance Imposing School Facility Retailers' Occupation and Service Occupation Taxes–Section 6," and in fact that ordinance was not amended, but a brand new ordinance was adopted. The agenda of the April 8, 2008, meeting did not indicate that action would be taken to adopt a new ordinance to impose a school facility occupation tax within the county.

¶ 10 Furthermore, count III alleged that ordinance No. 08-04-08-03 was void *ab initio* because it exceeded the authority granted by the boards of education's resolutions which had asked to impose only the retailers' occupation tax and not a service occupation tax.

¶ 11 Count IV of the second amended complaint alleges that because the ordinances which imposed the sales tax are void *ab initio*, the filing certificate of the Department of Revenue which authorized collection of the tax was also void *ab initio* and accordingly, the tax itself is void.

¶ 12 Count V of the second amended complaint seeks an injunction against collection

and/or distribution of any future sales tax based upon the void ordinances and filing certificate.

¶ 13 The defendants answered the complaint and the matter was submitted to the court for bench trial on a stipulation of facts and authenticity of documents. Oral arguments were heard.

¶ 14 On September 13, 2013, the circuit court of Williamson County entered an order denying the requested relief. The court first held that the plaintiffs' claim in count II of their second amended complaint that ordinance No. 08-02-29-02, imposing the sales tax, (passed at the February 29, 2008, meeting), and the tax imposed thereby, were void because of violations of the Open Meetings Act is time-barred because it was not brought within 60 days of the alleged violations, as required by section 3(a) of the Open Meetings Act (5 ILCS 120/3(a) (West 2012)).

¶ 15 With respect to count III of the plaintiffs' second amended complaint, the court held that the meeting of April 8, 2008, at which ordinance No. 08-04-08-03 was passed (which effectively amended the effective date of the new sales tax), was not held in violation of the Open Meetings Act. The court held that the agenda for that April 8, 2008, meeting was adequate to meet the requirement of the Open Meetings Act that the agenda for a meeting "set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting." 5 ILCS 120/2.02(c) (West 2012). The Open Meetings Act further provides that "the validity of any action taken by the public body which is germane to a subject on the agenda shall not be affected by other errors or omissions in the agenda." 5 ILCS 120/2.02(a) (West 2012). The court held that

the action taken by the Williamson County board in passing ordinance No. 08-04-08-03 was clearly germane to the agenda item which concerned amending ordinance No. 08-02-29-02 because the subject matter of both ordinances was the same. Therefore, neither ordinance No. 08-04-08-03 nor the sales tax imposed thereby was void for violations of the Open Meetings Act.

¶ 16 The circuit court also rejected the plaintiffs' claims that the county board resolutions, and the tax imposed thereby, were void because they exceeded the authority granted by the resolutions of the defendant boards of education, which had requested only imposition of the retailers' occupation tax and not the service occupation tax. The court pointed out that the Tax Law requires that any time a retailers' occupation tax is imposed, the service occupation tax must also be imposed at the same rate. 55 ILCS 5/5-1006.7(b) (West 2012). The court held that it was clear that the resolutions of both the boards of education and the county were based on section 5-1006.7 of the Tax Law, which mandates that both taxes be imposed, and that the question placed on the ballot had included a reference to both taxes. Accordingly, the county board did not exceed its authority in imposing both taxes.

¶ 17 The circuit court rejected the plaintiffs' claim in count IV of their second amended complaint that the filing certificate of the Department of Revenue is void because the county ordinances on which it is based are void for violations of the Open Meetings Act. The court had found that those ordinances were not void.

¶ 18 Finally, the circuit court rejected the plaintiffs' prayer for an injunction against any future collection of the tax because all of the plaintiffs' other claims regarding the

invalidity of the tax had been rejected.

¶ 19 For reasons which follow, we affirm. The parties agree that, because the facts are undisputed and the case presents only a question of law, our standard of review is *de novo*. See *Board of Education v. Jackson*, 401 Ill. App. 3d 24, 31 (2010).

¶ 20 We begin with the circuit court's holding that the plaintiffs' claims of violations of the Open Meetings Act with respect to the county board meeting of February 29, 2008, at which the board passed ordinance No. 08-02-29-02, imposing the sales tax after the referendum, were time-barred. Section 3(a) of the Open Meetings Act provides in pertinent part as follows:

"Where the provisions of this Act are not complied with, *** any person, including the State's Attorney of the county in which such noncompliance may occur, may bring a civil action in the circuit court for the judicial circuit in which the alleged noncompliance has occurred or is about to occur, or in which the affected public body has its principal office, prior to or within 60 days of the meeting alleged to be in violation of this Act, or if facts concerning the meeting are not discovered within the 60-day period, within 60 days of the discovery of a violation by the State's Attorney." 5 ILCS 120/3(a) (West 2012).

¶ 21 It is undisputed that the plaintiffs did not bring their action within 60 days of the February 29, 2008, meeting complained of. Their initial complaint in this cause was filed May 8, 2008. Nevertheless, the plaintiffs argue that their action is timely because they brought it within 60 days of the discovery of the violation by the State's Attorney, who, they argue, even at the time of judgment had not yet "discovered" the violation.

¶ 22 Relying on *Safanda v. Zoning Board of Appeals of the City of Geneva*, 203 Ill. App. 3d 687 (1990), the plaintiffs argue that *any* person, and not only the State's Attorney, may bring an action within 60 days of discovery *by the State's Attorney* of the violation. At the time *Safanda* was decided, the Open Meetings Act provided that "any person, including the State's Attorney ***, may bring a civil action in the circuit court *** prior to or within 45 days after the meeting alleged to be in violation of this Act or within 45 days of the discovery of a violation by the State's Attorney." Ill. Rev. Stat. 1989, ch. 102, ¶ 43(a). In *Safanda*, the plaintiff brought her civil action for a violation of the Open Meetings Act 194 days after the alleged violation. The appellate court held that, because the record contained no evidence that the State's Attorney had ever discovered the violation, the "discovery period" had not run and the plaintiff's complaint was timely filed. 203 Ill. App. 3d at 691. The *Safanda* court held that a private citizen could file a complaint within 45 days of discovery of the violation by the State's Attorney. 203 Ill. App. 3d at 691.

¶ 23 The holding of *Safanda* has been soundly rejected by the court in *Paxson v. Board of Education of School District, No. 87*, 276 Ill. App. 3d 912 (1995). In *Paxson*, the court held that the "discovery rule" inured only to the benefit of the State's Attorney and is inapplicable to private citizens. 276 Ill. App. 3d at 921-22. The court found that the plain language of the statute requires persons other than the State's Attorney to file suit either prior to or within 45 days of the alleged violation:

"If, as contemplated by plaintiffs, any person could file suit as late as 45 days after the State's Attorney's discovery of a violation of the Act, then the 45-day

limitations period from the date of the meeting is rendered superfluous. In other words, it is illogical for the legislature to provide a period of limitations which is either 45 days from the date of the meeting or 45 days from the date of the discovery of a violation by the State's Attorney, unless the legislature intended the two periods to apply to two different entities, *i.e.*, the office of the State's Attorney and all other persons. It is illogical because the 45-day period from the date of discovery of a violation by the State's Attorney is always at least equal to, but in no event less than, the 45-day period from the date of the meeting. The former period of limitations subsumes the latter.

On the other hand, if the Act is properly read as limiting the effect of the 'discovery rule' to the State's Attorney, the 45-day limitations period from the date of the meeting is not rendered superfluous. Only then does the language of the Act become sensible." 276 Ill. App. 3d at 922-23.

The court concluded that any person other than the state's attorney must file suit prior to or within 45 days of the alleged violation. 276 Ill. App. 3d at 924.

¶ 24 Subsequent to the decisions in *Safanda* and *Paxson*, the statute was amended to its present form which, the plaintiffs argue, "clearly indicates the intent to allow private citizens to file actions for violations of the Open Meetings Act after 60 days from the meeting where the violation occurred so long as that action is filed within 60 days of the discovery of the violation by the State's Attorney." We do not agree. The rationale of *Paxson*, quoted above, applies equally to the current version of the statute. Other courts have agreed. See *Chicago School Reform Board of Trustees v. Martin*, 309 Ill. App. 3d

924, 935 (1999); *Sangirardi v. Village of Stickney*, 342 Ill. App. 3d 1, 13 (2003). Accordingly, the circuit court did not err in holding that the plaintiffs' claim in count II of its second amended complaint, based on violations of the Open Meetings Act, was time-barred.

¶ 25 The plaintiffs next argue that the circuit court erred in holding that the agenda for the April 8, 2008, county board meeting, at which ordinance No. 08-04-08-03, which effectively amended the effective date of the tax, was passed, was sufficient to satisfy the requirements of the Open Meetings Act. The Open Meetings Act requires that an agenda for a regular meeting "shall set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting." 5 ILCS 120/2.02(c) (West 2012). The plaintiffs argue that although the agenda stated that ordinance No. 08-02-29-02 would be amended at the meeting to reflect the correct effective date of the tax, in fact it was not amended; a new ordinance was passed instead—ordinance No. 08-04-08-03. Accordingly, the plaintiffs argue, the new ordinance imposing the sales tax is void *ab initio* and the tax cannot be imposed.

¶ 26 Section 2.02(c) of the Open Meetings Act requires simply that "[a]ny agenda required under this Section shall set forth the general subject matter of any resolution or ordinance that will be the subject of final action at the meeting." 5 ILCS 120/2.02(c) (West 2012). Although the circuit court relied on a provision in section 2.02(a) of the Act which pertains only to "special meetings," and not to "regular meetings" ("the validity of any action taken by the public body which is germane to a subject on the agenda shall not be affected by other errors or omissions in the agenda"), to find that the

subject matter of the new ordinance was "germane" to amendment of the old ordinance, we find any error to be harmless. It remains true that the general subject matter of the new ordinance which imposed the sales tax on an amended effective date, which was the subject of final action at the April 8, 2008, meeting, was certainly set forth in the agenda, which referred to amendment of the previous ordinance imposing the sales tax. Both ordinances pertained to the same general subject matter—imposition of the sales tax. The agenda was specific enough to put the public on notice that action would be taken on a resolution imposing the sales tax. The circuit court did not err in holding that ordinance No. 08-04-08-03 was not enacted in violation of the Open Meetings Act.

¶ 27 The plaintiffs next argue that the circuit court erred in holding that the county board did not exceed the authority granted it by the resolutions of the defendants boards of education when it passed a resolution authorizing imposition of a tax including both the retailers' occupation tax and the service occupation tax, where the boards of education's resolutions had sought only imposition of the retailers occupation tax. The plaintiffs argue that the boards of education's resolutions did not make reference to the service occupation tax, but only asked the county board to submit to the voters the question of whether to impose the retailers' occupation tax. They argue that when the county board submitted to the voters the question of whether to impose *both* taxes, as required by the Tax Law, the county board exceeded the authority granted to it by the boards of education's resolutions, rendering the county ordinances and the tax itself void.

¶ 28 The resolutions of the boards of education are identical and read as follows:

"RESOLUTION requesting the County Board of The County of Williamson, Illinois, to certify to the County Clerk of said County the question of imposing a 1% sales tax for school facility purposes for submission to the electors of said County at the general primary election to be held on the 5th day of February, 2008."

¶ 29 The plaintiffs take issue with the fact that the preamble to the resolution, which is incorporated by reference into the resolution, references only "a tax upon all persons engaged in the business of selling tangible personal property *** at retail", which they argue is a reference only to the retailers' occupation tax, but does not include a reference to the service occupation tax. We note that the quoted language is taken directly from section 5-1006.7(a) of the Tax Law and is generic language describing the school facility occupation tax. It is not meant to exclude the service occupation tax. Indeed section 1006.7(b) expressly provides that if the above tax is imposed, "then a service occupation tax must also be imposed at the same rate." 55 ILCS 5/5-1006.7(b) (West 2012).

¶ 30 We further note that the boards of education's resolutions request the submission to the voters of the question whether to impose a "1% sales tax," which is precisely how section 5-1006.7(c) describes the school facility occupation tax which consists of "a retailers' occupation tax and a service occupation tax (commonly referred to as a 'sales tax')." 55 ILCS 5/5-1006.7(c) (West 2012).

¶ 31 We find that the boards of education's resolutions properly sought a resolution of the county board submitting to the voters of Williamson County the question of whether to impose a school facility occupation tax consisting of a retailers' occupation tax and a

service occupation tax, commonly referred to as a sales tax. Accordingly, the circuit court did not err in holding that the county board did not exceed its authority in passing an ordinance submitting the question to the voters. The circuit court properly found that ordinances Nos. 08-02-29-02 and 08-04-08-03 were not void.

¶ 32 The plaintiffs' final two arguments are that, due to the invalidity of the county ordinances authorizing the referendum and imposing the school facility occupation tax, the Illinois Department of Revenue's filing certificate and resulting tax should also be declared void, and that the circuit court erred in failing to issue an injunction against any future collection of the tax. Because we have affirmed the circuit court's decision that the county ordinances were not invalid and void, we also affirm the circuit court's decision to not declare the tax void, and to not enter an injunction against its future collection.

¶ 33 For the foregoing reasons the judgment of the circuit court of Williamson County is hereby affirmed.

¶ 34 Affirmed.