



STATE OF RHODE ISLAND
OFFICE OF THE ATTORNEY GENERAL

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Peter F. Neronha
Attorney General

VIA EMAIL ONLY

September 4, 2020
OM 20-43

Alfred W. DiOrio

Kevin J. McAllister, Esquire
Hopkinton Town Solicitor

RE: DiOrio v. Hopkinton Town Council

Dear Mr. DiOrio and Attorney McAllister:

The investigation into the Open Meetings Act (“OMA”) complaint filed by Mr. Alfred W. DiOrio (“Complainant”) against the Hopkinton Town Council (“Town Council”) is complete. For the reasons set forth herein, we do not find it necessary to determine whether the Town Council violated a provision of an executive order modifying the OMA because this provision has now expired and was subsequently modified to expressly allow the challenged conduct.

Background and Arguments

The Complainant alleges that the Town Council violated the OMA when it convened a meeting using telephonic means on April 6, 2020 and the agenda items did not constitute an “essential purpose” within the meaning of the Governor’s Executive Order 20-05, which permitted meeting by telephonic or electronic means for an “essential purpose.”¹ Specifically, Complainant contends that all three agenda items for the meeting “do not rise to the level of being necessary for continued government operations.” The Complainant particularly takes issue with agenda item I, reproduced below with formatting slightly altered:

¹ The Complaint alleges a violation of a provision in an executive order that modified the OMA. The Town Council did not contest this Office’s authority to investigate and resolve this Complaint. We assume jurisdiction to review this Complaint. *See* R.I. Gen. Laws § 42-46-8.

- I. Preliminary discussion by the Town Council sitting in a quasi-judicial capacity concerning the recommendation by the Town Solicitor to consider initiating further proceedings to determine whether Alfred W. DiOrio should be removed from the Hopkinton Planning Board for good and due cause under RIGL sec. 45-22-3 and Chapter 2, Article II Division 5, Section 2-112 of the Town Ordinances.

It is undisputed that Complainant was Chair of the Hopkinton Planning Board (“Planning Board”) and this agenda item stemmed from certain comments made by the Complainant at a March 4, 2020 Planning Board meeting and in a March 5, 2020 email to the Town Solicitor regarding Complainant’s intent to “not abide by” certain ordinances recently passed by the Town Council related to a solar energy project. The Complainant contests the Town Council’s characterization of this agenda item as “necessary for continued government operations” because “[t]here are no Planning Board meetings in the near future Nor are their [sic] any pending applications before the Planning Board that would be adversely impacted by my recent statements.”

The Complainant also takes issue with agenda item II wherein the Town Council discussed and voted on a special event permit application for “Huck Finn Day,” because “an annual fishing day *** hardly rises to the level of necessary for continued government operations.” Finally, Complainant contends that agenda item III, which included a number of sub-items related to various aspects of Town Council business, “contains a number of actions [sic] items, most of which do not adhere to EO 20-05.”

The Complainant has since acknowledged that Executive Order 20-05 is no longer in effect and that, pursuant to subsequent executive orders, public bodies may convene through telephonic or electronic means without regard to whether the agenda item pertains to an essential purpose, as long as the requirements of the executive order and the OMA are satisfied.

Town Solicitor Kevin J. McAllister, Esquire submitted a substantive response on behalf of the Town Council. The Town Council maintains that agenda item I constituted an “essential purpose.” In support, the Town Council asserts that following the Complainant’s March 4 and 5 statements, Attorney McAllister “recommended that the Council move quickly to begin the process for a due-cause removal hearing in order to avoid any potential prejudice against applicants before the Planning Board and to avoid inviting lawsuits against the Planning Board and the Town of Hopkinton that could harm the fiscal status of the Town.” At the April 6 meeting, the Town Council discussed agenda item I and voted to direct Attorney McAllister and the Complainant “to meet and ‘work-out’ a compromise that would protect the Town of Hopkinton.” The vote also required that the Complainant recuse himself from future Planning Board meetings “until the primary issues are resolved.”

Regarding agenda items II and III, the Town Council maintains that because it met “primarily for the purposes of Agenda Item I *** the additional agenda items does [sic] not warrant any need to undergo a thorough analysis of whether they, too, were for an essential purpose.” The Town Council concedes that not all of the agenda items or sub-items pertained to an essential purpose, but states that these agenda items were included “solely for the convenience of alleviating some

of the back-log of items that were accumulating due to cancelled and postponed Town Council meetings are [sic] a result of the COVID-19 state of emergency.”

It is undisputed that the Complainant participated in the April 6, 2020 meeting telephonically.

We acknowledge Complainant’s rebuttal wherein he argues, *inter alia*, that “it is blatantly inappropriate to lump actions related to the ‘...the convenience of alleviating some of the back-log of item [sic] that were accumulating...’ under the definition of ‘essential purpose[.]’”

Relevant Law

When we examine an OMA complaint, our authority is to determine whether a violation of the OMA has occurred. *See* R.I. Gen. Laws § 42-46-8. In doing so, we must begin with the plain language of the OMA and relevant caselaw interpreting this statute.

Subject to certain very limited exceptions not applicable here, the OMA provides that “discussions of a public body via electronic communication, including telephonic communication and telephone conferencing, shall be permitted only to schedule a meeting.” R.I. Gen. Laws § 42-46-5(b).

On March 9, 2020, Governor Gina Raimondo declared a state of emergency in response to the public health crisis created by the outbreak of the 2019 novel Coronavirus (“COVID-19”). *See* Executive Order 20-02 (March 9, 2020). On March 16, 2020, Governor Raimondo issued an executive order that temporarily modified certain provisions of the OMA as part of the State’s emergency response to the COVID-19 crisis. *See* Executive Order 20-05, “Third Supplemental Emergency Declaration – Public Meetings and Public Records Requests” (March 16, 2020) (“Executive Order” or “Executive Order 20-05”). Specifically, Executive Order 20-05, sec. 1 provided, in pertinent part, that:

Public bodies conducting meetings, as those terms are defined by the Open Meetings Act are hereby relieved from the prohibitions regarding use of telephonic or electronic communications to conduct meetings, contained in Rhode Island General Laws § 42-46-5(b), provided that the public body is meeting for an essential purpose and makes provisions to ensure public access to the meeting of the public body for members of the public through adequate, alternative means.

The Executive Order defines “essential purpose” as “either that which is necessary for continued government operations or to ensure compliance with statutory or regulatory deadlines.” Executive Order 20-05, sec. 1(a). Executive Order 20-05, with its “essential purpose” requirement for telephonic or electronic meetings, expired on April 15, 2020 and was replaced by a subsequent executive order that did not include an “essential purpose” requirement.² *See id.*; *see also* Executive Order 20-25 (April 15, 2020). Executive Order 20-25, and subsequent iterations of the

² Other provisions of Executive Order 20-05, such as those allowing conducting remote meetings by providing adequate, alternative means of public access, were extended through subsequent Executive Orders, with certain modifications.

executive order issued since, relieve public bodies from the OMA's general prohibitions regarding the use of telephonic or electronic communications to conduct meetings, without regard to whether the meeting pertains to an essential purpose. This allowance of meeting by electronic or telephonic means is subject to the requirement that the public has adequate alternative means of accessing the meeting and that the other requirements of the OMA and the applicable executive order are satisfied. *See* Executive Order 20-46 (June 12, 2020) (current executive order pertaining to open meetings, which has since been extended, without modification, by subsequent executive orders).

Findings

In the context of the Access to Public Records Act ("APRA"), this Office has previously determined it unnecessary for us to consider whether a public body violated the APRA when, even if a violation has occurred, there is no appropriate remedy. *See Lamendola v. East Greenwich School Committee*, PR 20-11; *Piskunov v. Town of North Providence*, PR 16-38. The reason for this conclusion is because, even assuming a violation occurred, the APRA only provides for two types of remedies: injunctive relief and civil fines for a willful and knowing or reckless violation. *See* R.I. Gen. Laws § 38-2-9(d). In a case where there is no need for injunctive relief (such as where the complainant receives the documents) and no evidence of conduct that would warrant pursuing civil fines, then no action by this Office would be appropriate, even if a violation were found.

Similar to the APRA, the OMA only provides for two types of substantive remedies: injunctive relief and civil fines for a willful or knowing violation *See* R.I. Gen. Laws § 42-46-8(a), (d).

It is uncontested that the Executive Order provision at issue in this matter is no longer in effect. Rather, it has been replaced by a broader, still-existing provision that would now permit the challenged conduct. As such, the focus of this complaint can properly be characterized as whether the Town Council's action violated the now expired Executive Order 20-05 when such actions would have been permissible under a subsequent (and still-existing) executive order. The parties disagree about whether agenda item I constituted an "essential purpose" and about whether the Executive Order permitted a public body to discuss and/or vote on non-essential items at a telephonic meeting, as long as another agenda item for the meeting pertained to an essential purpose. Although resolution of these questions might have been instructive if the relevant portion of Executive Order 20-05 were still in effect, we do not find it necessary to resolve these questions in this matter because the "essential purpose" provision at issue is no longer in effect. Additionally, we do not find that either of the two substantive remedies provided for in the OMA is appropriate in this case.³

³ We do question the Town Council's contention that it could meet regarding non-essential agenda items as long as at least one agenda item pertained to an essential purpose. To the extent the Town Council met to discuss admittedly non-essential items, we have strong reservations about whether those portions of the meeting would constitute "meeting for an essential purpose." Executive Order 20-05, sec. 1.

Here, even assuming that the Town Council violated the OMA, we do not find that injunctive relief would be appropriate. It is undisputed that Complainant attended the meeting in question telephonically, even though it was not conducted in person. Additionally, this Office has reviewed the approved minutes of the Town Council's May 4, 2020 meeting that are available to the public on the Secretary of State's website. Those minutes reveal that, at its May 4, 2020 meeting, the Town Council affirmatively voted to rescind the April 6, 2020 motion regarding the Complainant and voted to "not proceed with a further show cause hearing." In other words, the Town Council, through its own actions, has taken actions that nullified its April 6, 2020 vote. Accordingly, injunctive relief would serve no purpose in this case because the Town Council has already rescinded its vote regarding agenda item I.

It was unclear to this Office whether injunctive relief regarding the other agenda items could be appropriate if this Office determined there was a violation. Accordingly, this Office asked the parties to provide supplemental submissions addressing this issue. In response, the Complainant stated, "I do not seek any form of injunctive relief, as any order to stop the behavior outlined in my complaint is moot at this point." Based on the particular record before us, including Complainant's explicit statement that he is not seeking injunctive relief and his telephonic attendance at the meeting in question, we do not find that injunctive relief is appropriate.

Further, Complainant does not allege, nor do we find evidence, that the convening of the April 6 meeting, even assuming it was improper, would have constituted a willful or knowing violation that would warrant civil penalties. *See* R.I. Gen. Laws § 42-46-8(a), (d). Complainant also indicates that he "do[es] not seek any monetary damages for the actions of the Town Council." We acknowledge the Town Council's stated reasons for believing that agenda item I pertained to an essential purpose. Although we do not find a need to determine whether agenda item I actually pertained to an "essential purpose," the Town Council has at the very least articulated reasonable grounds for its belief that the essential purpose element was satisfied with regard to that item. Although we question the Town Council's interpretation of the Executive Order as permitting the Town Council to discuss and vote on non-essential items, *see* footnote 3, we acknowledge that the Executive Order was newly issued in response to an emergency and there was no precedent or prior findings that would have provided the Town Council guidance on the meaning of the "essential purpose" requirement. As such, this Office does not find that any violation would have been knowing or willful and declines to further address the merits of this allegation.

Conclusion

Although the Office of the Attorney General will not file a lawsuit, nothing in the OMA precludes an individual from pursuing a complaint in the Superior Court. The Complainant may pursue an OMA complaint within "ninety (90) days of the attorney general's closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later." R.I. Gen. Laws § 42-46-8. We are closing our file as of the date of this finding.

DiOrio v. Hopkinton Town Council

OM 20-43

Page 6

We thank you for your interest in keeping government open and accountable to the public.

Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL

By: /s/ Kayla E. O'Rourke
Kayla E. O'Rourke
Special Assistant Attorney General