



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

July 3, 2013
OM 13-21

Mr. & Mrs. Jeffrey Macomber

RE: Macomber v. Warren Town Council

Dear Mr. & Mrs. Macomber:

The investigation into your Open Meetings Act (“OMA”) complaint filed against the Warren Town Council (“Town Council”) is complete. By correspondence undated, but received in our office on March 4, 2013, you allege the Town Council violated the OMA when the agenda for its February 12, 2013 meeting did not include a statement specifying the nature of the business to be discussed concerning your application regarding Shell Road. You further allege the Town Council failed to file its meeting minutes for its January 8, 2013 meeting within thirty-five (35) days of the meeting in violation of R.I. Gen. Laws § 42-46-7(b). Finally, you allege the Town Council violated the OMA when it posted the agenda for its 9:00 a.m. February 23, 2013 meeting on February 22, 2013 at 1:05 p.m.

In response to your complaint, we received a substantive response from the legal counsel for the Town Council, Anthony DeSisto, Esquire. Attorney DeSisto states, in pertinent part:

The February 12[] Town Council agenda included an item that read ‘Police Chief 1. Traffic Commission – Report on Shell Road.’ The purpose of this item was for staff to report back to the Town Council on their questions from the prior meeting. The results of the legal research were discussed, along with the recommendation of the traffic commission that the address of the Macomber residence be changed to North Street. Mr. and Mrs. Macomber were present at this meeting and extensively discussed the issues with the Town Council. The Town Council voted to adopt the report of the traffic commission.

* * *

[T]he complainants are correct that the Town Council did vote to deny their request and change their address to North Street at the February Town Council

meeting. The Department of the Attorney General has stated that ‘a public body need not indicate on its notice that it intends to vote on an item, as long as the notice is not misleading.’ See Montgomery v. New Shoreham Town Council, OM 12-16. * * * To determine whether notice is misleading, the Department will look to the ‘totality of the circumstances’ in a particular case. Further, ‘the OMA requires a statement specifying the ‘nature’ of the business to be discussed, not a verbatim list of every potential aspect that might be discussed in relation to that topic.’ []

At the January 8th Town Council meeting, Ms. Macomber presented the request to place shells on Shell Road as a way of providing appropriate access to the Macomber home for emergency vehicles. Through discussions at the January meeting, it was revealed that the most appropriate access to the Macomber home was through North Street, but that the Macomber house had an address of 22 Shell R[oa]d. This caused potential confusion for responding emergency vehicles. Two solutions were discussed at the January meeting: either (a) placing shells on Shell Road to allow emergency access to the Macomber home by way of Shell R[oa]d, or (b) changing the Macombers’ address to North Street so that all emergency vehicles would be directed down North Street when responding. * * *

The matter was referred to the traffic commission at the January meeting, so that the commission could give a recommendation at the February meeting on which of the two solutions was more appropriate. * * * As such, the agenda item ‘Police Chief 1. Traffic Commission – Report on Shell Road’ gave [] complete notice that the traffic commission would be recommending one of two possible options, and, accordingly, that the Town Council would be voting on the option recommended.

* * *

[T]he complainants allege that the meeting minutes of the January 8, 2013 [meeting] were not filed within thirty-five (35) days of the meeting. This is incorrect. The Town Council accepted the January meeting minutes at the February 12, 2013 [] Town Council meeting, and official minutes were available on the Town website and at the Town Clerk’s office as of that date. It should be noted that unofficial minutes were available at the Town Clerk’s office and a video of the January meeting was posted on the Town’s website prior to the February meeting.

The Macombers’ confusion arises from the fact that the January minutes are not posted on the Secretary of State’s website. However, since the Warren Town Council is not ‘within the executive branch of the *state* government,’ or a ‘*state* public [or] quasi-public board[],’ but is rather a body of municipal government, the Town Council is not required to file its meeting minutes with the Secretary of State. * * *

[T]he Town Council held a budget workshop on February 23, 2013, 9:00am. The supplementary agenda for the meeting was not filed with the Secretary of State until February 22, 2013, 1:05pm. This was an inadvertent mistake. * * *

The Clerk for the Town of Warren was on a leave of absence when the supplementary agenda for the budget workshop needed to be filed, and the delay in posting the agenda was caused by that staffing situation.”

At the outset, we note that in examining whether a violation of the OMA has occurred, we are mindful that our mandate is not to substitute this Department’s independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the OMA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Town Council violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

We will address your three (3) allegations in order. You first allege that the agenda item for the February 12, 2013 meeting was sufficient to inform the public of the nature of the business to be discussed. The OMA provides a number of requirements to ensure that public meetings are open and accessible to the public. “Any citizen or entity of the state who is aggrieved as a result of violations of the provisions of this chapter may file a complaint with the attorney general.” R.I. Gen. Laws § 42-46-8(a). In the Rhode Island Supreme Court opinion of Graziano v. Rhode Island State Lottery Commission, 810 A.2d 215 (R.I. 2002), the Supreme Court examined the “aggrieved” provision of the OMA. In Graziano, an OMA lawsuit was filed concerning notice for the Lottery Commission’s March 25, 1996 meeting wherein its Director, John Hawkins, was terminated. At the Lottery Commission’s March 25, 1996 meeting, Mr. Hawkins, as well as his attorney, Ms. Graziano, were both present. Finding that the Lottery Commission’s notice was deficient, the trial justice determined that the Lottery Commission violated the OMA and an appeal ensued. On appeal, the Rhode Island Supreme Court found that it was “unnecessary” to address the merits of the OMA lawsuit because “the plaintiffs Graziano and Hawkins have no standing to raise this issue” since “both plaintiffs were present at the meeting and therefore were not aggrieved by any defect in the notice.” Id. at 221. The Court continued that it:

“has held on numerous occasions that actual appearance before a tribunal constitutes a waiver of the right of such person to object to a real or perceived defect in the notice of the meeting. * * * It is not unreasonable to require that the person who raises the issue of the defect in notices be in some way disadvantaged or aggrieved by such defect. While attendance at the meeting would not prevent a showing of grievance or disadvantage, such as lack of preparation or ability to respond to the issue, no such contention has been set forth in the case at bar. The burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice.” Id. at 221-22. (Emphasis added).

Here, pursuant to Graziano, you must demonstrate that you were “in some way disadvantaged or aggrieved by such defect” in the notice. Id. at 221. You have presented no evidence that you

were aggrieved or in any way disadvantaged by this potential allegation. A review of the evidence before us including the meeting minutes and video of the meeting indicates that you were present at the February 12, 2013 Board meeting. In fact, both of you addressed the Town Council about your application regarding Shell Road. Although there was a reference made that your legal counsel wanted to attend but could not due to a conflict, neither of you ever suggested to the Town Council that you were in any way unprepared to proceed or surprised at the topics discussed. You collectively addressed the Town Council for approximately fourteen (14) minutes. For this reason, and in accordance with Graziano, we do not address the merits of this issue.¹

You further allege that the Town Council failed to “file” its January 8, 2013 meeting minutes within thirty-five (35) days of the meeting. The OMA requires public bodies “to keep written minutes of all their meetings.” See R.I. Gen. Laws § 42-46-7(a). Additionally, R.I. Gen. Laws § 42-46-7(b) requires that “[t]he minutes shall be public records and unofficial minutes shall be available, to the public at the office of the public body, within thirty-five (35) days of the meeting or at the next regularly scheduled meeting, whichever is earlier . . .”. (Emphasis added). Here, based upon the evidence presented, Attorney DeSisto states that the meeting minutes of the January 8, 2013 meeting were available at the office of the public body and, although not required under the OMA, were also available on the Town of Warren’s website on February 12, 2013.² As presented in the Town Council’s response, R.I. Gen. Laws § 42-46-7(d) states, in pertinent part, “[a]ll public bodies with the executive branch of the state government and all state public and quasi-public boards * * * shall file a copy of the minutes of all open meetings with the secretary of state for inspection * * * within thirty-five (35) days of the meeting . . .”. (Emphases added). The Warren Town Council is not a public body defined within R.I. Gen. Laws § 42-46-7(d) and therefore is not required to file its minutes with the Secretary of State. As such, we find no violation with respect to this allegation.

Lastly, you allege the Town Council violated the OMA when it posted the agenda for its 9:00 a.m. February 23, 2013 meeting on February 22, 2013 at 1:05 p.m. We observe the OMA requires that “[p]ublic bodies shall give supplemental written public notice of any meeting within a minimum of forty-eight (48) hours before the date [of the meeting].” R.I. Gen. Laws § 42-46-6(b). Based upon the evidence presented, it is undisputed that the Town Council posted notice on February 22, 2013 for its February 23, 2013 meeting, which did not comply with the forty-eight (48) hour requirement. The Town Council admitted that the February 23, 2013 meeting agenda was not timely posted on the Secretary of State’s website but the delay in posting was due to the fact that the Town Clerk was on a leave of absence at the time the agenda needed to be

¹ In your complaint, you allege the Town Council voted or otherwise took action on six (6) items regarding the subject agenda item. Respectfully, the evidence demonstrates that the Town Council voted to: (1) deny the petition to extend Shell Road and (2) refer to the appropriate staff to change the address to a North Street address.

² Legal counsel for the Town Council also states that the unofficial minutes were available at the office of the Town Clerk prior to February 12, 2013 and, although not required by the OMA, a video of the meeting was also available on the Town’s website prior to February 12, 2013.

filed. The Town Council submits that the delay in posting was an inadvertent mistake due to this staffing situation. We conclude that the Town Council violated the OMA when it convened its February 23, 2013 meeting on less than forty-eight (48) hours notice.

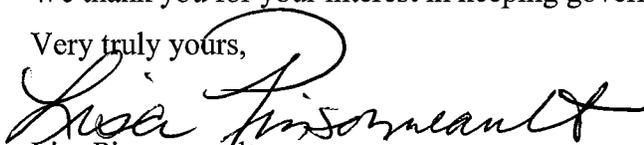
Upon a finding that a complaint brought pursuant to the OMA is meritorious, the Attorney General may initiate suit in the Superior Court. R.I. Gen. Laws § 42-46-8(a). There are two remedies available in suits filed under the OMA: (1) “[t]he court may issue injunctive relief and declare null and void any actions of a public body found to be in violation of [the OMA];” or (2) “the court may impose a civil fine not exceeding five thousand dollars (\$5,000) against a public body or any of its members found to have committed a willful or knowing violation of [the OMA].” R.I. Gen. Laws § 42-46-8.

In this instance, we find no evidence that the Town Council knowingly or willfully violated the OMA. Although this Department has concerns that the notice was filed on less than forty-eight (48) hours notice, we observe that the Town Clerk was on a leave of absence at the time the February 23, 2013 meeting notice was required to be posted. Nonetheless, we conclude that the Town Council should reconsider and re-vote on the matters discussed at its February 22, 2013 budget workshop at a properly posted future meeting. While injunctive relief would be appropriate, we prefer to allow the Town Council the opportunity to remedy the violation on its own. See Tanner v. Town Council of the Town of East Greenwich, 880 A.2d 784, 802 (R.I. 2005) (“By scheduling, re-noticing, and re-voting on the challenged appointment, the town council, albeit belatedly, was acting in conformity with both the letter and spirit of the avowed purpose of the OMA – to ensure that ‘public business be performed in an open and public manner.’”). The Town Council should notify this Department within ten (10) business days to advise of its intentions concerning whether it will voluntarily reconsider and re-vote on these matters. This finding serves as notice to the Town Council that the conduct discussed herein is unlawful and may serve as evidence of a willful or a knowing violation in any similar future situation.

Although the Attorney General will not file suit in this matter at this time, nothing in the OMA precludes an individual from pursuing an OMA complaint in the Superior Court. The complainant may do so within ninety (90) days from the date 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. Please be advised that we are closing our file as of the date of this letter, although we reserve the right to reopen this matter should the Town Council not remedy this violation on its own.

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

Very truly yours,



Lisa Pinsonneault

Special Assistant Attorney General

Cc: Anthony DeSisto, Esquire