



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

May 12, 2017

OM 17-14

Ms. Lynda Avanzato

Re: Avanzato v. North Kingstown Town Council

Dear Ms. Avanzato:

The investigation into your Open Meetings Act (“OMA”) complaint filed against the North Kingstown Town Council (“Town Council”) is complete. You initially raised five (5) allegations that the Town Council violated the OMA.

In this Department’s acknowledgment correspondence to you, we indicated two (2) of your allegations would not be investigated. More specifically, you alleged that the September 28, 2015 meeting minutes did not record a statement that the affected individuals discussed in executive session were given notice and an opportunity to have the meeting held in open session.¹ See R.I. Gen. Laws § 42-46-5(a)(1). The second allegation we declined to investigate

¹ You do not have standing to raise this issue. See Black’s Law Dictionary, p. 1405 (6th Edition) (defining “standing” as “a concept utilized to determine if a party is sufficiently affected so as to insure that a justifiable controversy is presented,” “[t]he requirement of ‘standing’ is satisfied if it can be said that the plaintiff has a legally protectible and tangible interest at stake in the litigation”). Here, no evidence was presented that you were one of the affected persons entitled to notice, and in fact, the evidence demonstrates that you were not an affected person. See Okwara v. Rhode Island Commission on the Deaf and Hard of Hearing, OM 00-07. In any event, the September 28, 2015 minutes were approved on November 9, 2015, and accordingly, the statute of limitations for this Department to have filed a lawsuit with respect to this allegation would have expired on or about May 9, 2016, one week from the date your complaint was received in this Office. On prior occasions, we have declined to review the merits of an OMA allegation when a complaint was received in our Office days from the expiration of the statute of limitations. See e.g., Tingle v. Chariho School Committee, OM 98-21 (OMA complaint filed one (1) week prior to the statute of limitations expiring); Valentine v. Narragansett Bay Commission, OM 98-22 (OMA complaint filed eight (8) business days prior to the statute of limitations expiring); Engelhard v. Jamestown School Committee, OM 98-27 (OMA complaint

was your allegation that the Town Council failed to post its meeting minutes on the Secretary of State's website. Since the OMA provides no such requirement for municipal entities, this allegation, we explained, does not violate the OMA. See R.I. Gen. Laws § 42-46-7(b)(2) and (d); infra.

With respect to your remaining allegations, namely that the Town Council invited, or otherwise had a pre-arranged speaker during the public comment/hearing portion of the February 17, 2016 meeting without listing this person and/or the topic on the agenda; and that during the March 14, 2016 meeting, an attorney for the developer of the Wickford Elementary School was allowed to speak after the public hearing session from the prior meeting had been closed, we suggested that you supplement your complaint to indicate how you were "aggrieved" by these two (2) allegations. Finally, you alleged that the topics discussed in executive session during the September 21, 2015 and the January 20, 2016 meetings were improper topics for executive session.

In response to your complaint, we received a substantive response in affidavit form from the Solicitor for the Town, James H. Reilly, Esquire. Attorney Reilly, states, in pertinent part:

"The Complainant alleges that allowing William Fazioli to speak at the Town Council meeting of February 17, 2016 was somehow a violation of the Rhode Island Open Meetings Act (OMA). In fact, Mr. Fazioli spoke during the Public Hearing being held by the Town Council to consider an Amendment to the town's Comprehensive Plan which would permit the possible establishment of a town Redevelopment Agency for the purpose of redeveloping the Wickford Elementary School, a town property which has been vacant for more than ten years. On August 24, 2015, the town entered into an Option to Purchase Agreement with Wickford El Development Company, LLC which has proposed to finance the project, in part, with Tax Incentive Financing (TIF). Under Rhode Island law only a duly constituted Redevelopment Agency can authorize such financing. During the public hearing members of the public and the Town Council discussed the pros and cons of such financing. Mr. Fazioli, the vice-chairman of the East Providence Waterfront Special Redevelopment District Commission, discussed his past experiences operating a redevelopment agency and TIFs generally. He was not a 'pre-arranged speaker,' but one of many who gave input at the public hearing. * * *

At its March 14, 2016 meeting, the Town Council discussed the sequence of steps needed to establish a Redevelopment Agency, approve a Redevelopment Plan and authorize the issuance of TIF bonds. The Council discussed the issue

filed six (6) business days prior to the statute of limitations expiring); Portsmouth Democratic Town Committee v. Portsmouth Town Council, OM 11-33 (OMA complaint filed seven (7) business days prior to the statute of limitations expiring). For these reasons, we do not address the merits of this issue.

with the town's Principal Planner and the town's bond counsel. During these discussions a question was raised as to the point at which the amount of any TIF bonds would be determined. Attorney Jay Gower (an expert in TIF financing) who was present representing Wickford El Development Company, LLC, was asked to explain the timing issue. He explained that the Town Council would only vote on the size/amount of the bonds once the project was completed. As Town Solicitor, I cautioned the Council, both before and after Attorney Gower spoke, that his statement was advisory only, was not part of the public hearing, and should not be considered in voting on the proposed amendment to the comprehensive plan. * * * The video of this meeting completely debunks the Complainant's allegations.

At its meeting of September 21, 2015, the Town Council voted to adjourn to 'Executive Session pursuant to Rhode Island General Laws 42-46-4 and 42-46-5 Subsection (2) Personnel (Interim Town Manager).' Prior to the roll call vote, as Town Solicitor, I advised the council that several current town employees were candidates whose job performance might be discussed, that the Open Meetings Act required that they be notified of their right to have such discussion in public, and that the employees had waived such rights. In fact, the two town employees who were being considered for the position of Interim Town Manager both signed written waivers of their right to a public hearing. The Complainant is without standing to object to waivers willingly made by the affected individuals."

We acknowledge your rebuttal. Among the matters addressed in your rebuttal is your contention that in your complaint, you did not allege that the Town's failure to post its minutes on the Secretary of State's website violated the OMA, but rather you alleged "minutes are not being created or taken until months after the meetings, something [you] believe to be a violation of the [O]Pen [M]eetings Act, since they are not available to the public within 35 days or within 2 weeks of the date of the vote." In support of this allegation you referenced a comment made by a Town Council member at a May 23, 2016 meeting that the Town Council had not seen meeting minutes in months and the clerk's comment that "they are working on catching up." You provide no evidence or argument that you had sought to obtain access to any minutes that were unavailable.²

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

² While you contend that your May 2, 2016 complaint "is that the minutes are not being created or taken until months after the meetings," you support your allegation (in your rebuttal) by referencing a May 23, 2016 Town Council meeting. In any event, because you provide no evidence that you ever sought access to minutes, which were unavailable, we must conclude that you are not aggrieved by this allegation. This determination is dictated by our precedent. See Ayotte v. Rhode Island Commission on Deaf and Hard of Hearing, OM 17-12.

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.

The OMA provides that “[a]ny 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 Graziano v. Rhode Island State Lottery Commission, 810 A.2d 215 (R.I. 2002), the Rhode Island Supreme Court examined the “aggrieved” provision of the OMA. There, 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.

Here, pursuant to R.I. Gen. Laws § 42-46-8(a), and the standard established in Graziano, you must demonstrate that you are “in some way disadvantaged or aggrieved by such defect.” Id. at 221. Importantly, the test is not whether the public is aggrieved, but whether you, as an individual are aggrieved. See Riggs v. East Bay Energy Consortium, PR 13-25, OM 13-30.

To begin, we have concerns that this aspect of the Town Council’s meeting was not governed by the OMA. As we understand, this portion of the February 17, 2016 meeting was designated as “Public Hearing” and appeared under the agenda item “Second Reading – Amendment to the Comprehensive Plan – Land Use Element (Establishment of Redevelopment Agency).” We have previously concluded that a “Public Hearing” is not governed by the OMA. See Johnson & Wales v. Narragansett Bay Commission et. al, OM 02-06.

Notwithstanding the foregoing, we have been supplied with no evidence that you were aggrieved by this speaker’s public comment. A review of the undisputed evidence indicates that you were present at the February 17, 2016 regularly scheduled Town Council meeting, and in fact, in your

rebuttal, you state that you found the speaker's presentation to be "informative, interesting and enlightening." Your rebuttal also noted that the speaker "helped the audience to understand [tax incremental financing] and in what circumstances they should, and should not, be used." To be sure, your rebuttal contends that both yourself and "other citizens/taxpayers would probably have had further input had we known that the [tax incremental financing] was also going to be a topic that was presented," but earlier in your rebuttal you explained "I did not speak at the microphone because the president of the council was urging public speakers to restrict their comments to three minutes, and frankly I felt as though I wouldn't have been heard, or would be told to stop at three minutes." This evidence is far from satisfying the Graziano standard. See Graziano, 810 A.2d at 222 ("The burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice."). As such, we find no violation with respect to this allegation.³

Next, you allege that during the March 14, 2016 meeting "the attorney of a developer (of Wickford Elementary School) was allowed to speak for several minutes after the public hearing had been closed in the previous meeting. * * * We do not believe the comments of the developer's attorney fall properly within the topic on the agenda, thereby constituting a violation of the Open Meetings Act." According to your rebuttal, you did not attend the meeting on March 14, 2016, but you represent that you would have attended the meeting had you "known that TIF financing was going to be discussed."

To place this allegation in context, during the agenda item entitled "Second Reading – Amendment to the Comprehensive Plan – Land Use Element (Establishment of Redevelopment Agency),"⁴ the Town Council was engaged in discussion concerned this agenda topic. You raise no issue that this general discussion was outside the posted agenda item. Rather, you take issue

³ A review of the video and the written minutes for the February 17, 2016 meeting reveals that this speaker was one (1) of fourteen (14) individuals that spoke during the agenda topic entitled, "Public Hearing." While we can sympathize, construing the evidence and arguments in the light most favorable to you, that you may have wanted to respond to this speaker's comments, we know of no legal authority – and none has been cited to us – that requires the nature of one's comments during a public hearing or a public comment to have been noted on the agenda. See R.I. Gen. Laws § 42-46-6(d) ("Nothing within this chapter shall prohibit any public body, or the members thereof, from responding to comments initiated by a member of the public during a properly noticed open forum even if the subject matter of a citizen's comments or discussions were not previously posted"). Your argument that this speaker was "invited" by the Town Council – notwithstanding conflicting evidence on this point – does not alter our legal analysis.

⁴ As an aside, the agenda topic for the February 17, 2016 meeting (that you attended) was entitled "Second Reading – Amendment to the Comprehensive Plan – Land Use Element (Establishment of Redevelopment Agency)." During that meeting the concept of TIF financing was robustly discussed. The agenda topic for the March 14, 2016 meeting (that you did not attend) was worded exactly the same as the February 17, 2016 agenda, namely "Second Reading – Amendment to the Comprehensive Plan – Land Use Element (Establishment of Redevelopment Agency)." In your rebuttal, you allege that agenda topic for the March 14, 2016 meeting was not sufficient because it did not indicate a discussion of TIF financing would occur.

with the comments by an attorney for the developer, who you contend spoke for “several minutes” after the public hearing closed and on a matter that was outside the posted agenda. Our review of the video recording finds, however, that this individual spoke for approximately fifty (50) seconds and that this individual spoke in reference to a particular question raised by a Town Council member related to the ongoing discussion. Because there is no issue that the Town Council’s general discussion of this matter fell outside the posted agenda, we cannot find that the Town Council violated the OMA when a member of the audience (who apparently had a familiarity with the tax incremental financing subject-matter) answered a question from a Town Council member related to the ongoing discussion. See Miller v. Chariho School Committee, OM 17-03. Indeed, in your rebuttal, you acknowledged that the posted agenda topic and tax incremental financing “although arguably somewhat connected, they are two separate topics.” To the extent that you contend the Town Council violated the OMA because this individual’s comment/response occurred after “public hearing,” such an allegation does not implicate the OMA. We find no violation.

Finally, you allege the Town Council, or more specifically the Town Council Town Manager Search Citizens Panel (“Panel”) engaged in improper discussions during its January 20, 2016 executive session meeting.⁵ The agenda topic indicated the Panel intended to convene into executive session under “Subsection (1) – Personnel (Town Manager Interview Process and distribution of materials).” We reviewed a copy of executive session meeting minutes in camera.

Throughout the years, this Department has been faced with similar situations, namely public bodies convening into executive session for the purpose of hiring an individual, such as Town Manager, Police/Fire Chief, or Superintendent. In In re: Warwick Police Department, ADV OM 99-13, this Department issued an advisory opinion to the Warwick Police Department, which had inquired whether a search committee established to advise the Mayor on the hiring of a new Chief of Police may meet in closed session in different situations. This Department determined that with respect to the review of the qualifications and background investigations of candidates to determine which candidate (based on qualifications, background investigations, performance evaluation and character traits) should be recommended to the Mayor and Board of Public Safety for Chief of Police, this Department referred to R.I. Gen. Laws § 42-46-5(a)(1), which permits any discussion of the job performance, character, or physical or mental health of a person or persons in closed session. This Department advised that if the committee intended to discuss the job performance, character, or physical or mental health of a person or persons in closed session, that the committee must notify the person or persons affected in advance in writing that they intended to discuss that individual in closed session and advise the individual that they may require that the discussion be held at an open meeting.

Another finding is The Westerly Sun v. Westerly Town Council, OM 94-01. In seeking to hire a Town Manager, the Town advertised and accepted applications for the position. The Town

⁵ You also contend that the Town Council violated the OMA when it convened into executive session on September 21, 2015, but these minutes were approved on October 19, 2015. Accordingly, the statute of limitations expired well before the instant complaint was filed and this allegation will not be examined.

Council reviewed the applications and, by majority vote of the Town Council, selected certain individuals for an interview. The purpose of the interview was to determine the qualifications of the applicant to serve as Town Manager. This Department determined that “[i]ndeed, the primary goal of job interviews is for both the interviewers and interviewees to discuss job performance, character, or physical or mental health of the applicants.”

We have, however, determined that R.I. Gen. Laws § 42-46-5(a)(1) does have limits. See Medeiros v. Tiverton Town Council, OM 00-14 (the Town Council violated the OMA by discussing the formation of potential interview questions in executive session since these discussions fall outside R.I. Gen. Laws § 42-46-5(a)(1)); Moon v. East Greenwich Fire District, OM 96-23 (closed session to open job applications was improper).

With respect to your allegation that the discussion during the January 20, 2016 executive session meeting was improper, we agree. Based on our review of the executive session minutes, during the meeting, the resumes, the interview schedule and the interview questions were distributed. While the executive session nature of this discussion hinders our ability to fully discuss our rationale, it suffices that our review finds no discussion concerning the job performance, character, or physical/mental health of any applicants. We find this discussion akin to our holdings in Medeiros and Moon and, as such, more appropriate for open session. The discussions in executive session were not appropriate for executive session and therefore violated the OMA.

Upon a finding of an OMA violation, the Attorney General “may file a complaint on behalf of the complainant in the superior court against the public body.” R.I. Gen. Laws § 42-46-8(a). “The court may issue injunctive relief” and/or “may impose a civil fine not exceeding five thousand dollars (\$5,000) against a public body or any of its members” for a willful or knowing violation. R.I. Gen. Laws § 42-46-8(d).

Regarding injunctive relief, the Town Council Town Manager Search Citizen Panel took no action in executive session so there is nothing to declare null and void. Moreover, we find no evidence of a willful or knowing violation. Because we conclude that the executive session discussion was not appropriate for executive session, however, we require the release the January 20, 2016 executive session meeting minutes. Any documents submitted during this executive session need not be disclosed. This finding serves as notice that the conduct discussed herein is unlawful and may serve as evidence of a willful or a knowing violation in any similar future situation. The Town Council Town Manager Search Citizen Panel must release the January 20, 2016 executive session meeting minutes within ten (10) business days of the date of this finding and a copy should be provided to this Department.

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 file a suit “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(c). Please be advised that we are closing our

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file as of the date of this letter, but reserve the right to reopen this matter should the circumstances require such action.

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

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Pinsonneault". The signature is fluid and cursive, with a large initial "L" and "P".

Lisa Pinsonneault

Special Assistant Attorney General

LP/kr

Cc: Matthew F. Callaghan, Jr., Esq.