State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

June 4, 2018
OM 18-16

Mr. Tarney Waring

RE: Waring v. Portsmouth Town Council

Dear Mr. Waring:

The investigation into your Open Meetings Act ("OMA") complaint filed against the Portsmouth Town Council ("Town Council") is complete.

You allege that the Town Council violated the OMA when the agenda for its September 11, 2017 meeting was insufficiently specific with respect to a sound variance and when the September 11, 2017 meeting minutes were insufficient and/or inaccurate.[1] Your Complaint included a video recording of the September 11, 2017 Town Council meeting.

The Town Council filed a substantive response through its Solicitor, Kevin P. Gavin, Esquire. Solicitor Gavin's affidavit states, in pertinent part:

> "The Town Council Agenda for September 11, 2017 was sufficient to apprise the public of the nature of the business before the Council. There was nothing in the notice that in any way could be considered to have been misleading to the public.
> ***
> The Minutes for the Town Council Meeting of September 11, 2017 met all requirements of the OMA."

You provided a rebuttal stating, in relevant part:

> "The 9/11/17 Council minutes gives [sic] the impression that Saturday only is permanent, whereas the entire Sound Variance was voted to be permanent. The

[1] Your Complaint also alleged violations of a Portsmouth Ordinance. However, these allegations do not implicate the OMA and, accordingly, are not within this Department's jurisdiction to investigate. See R.I. Gen. Laws § 42-46-8(a).

> 9/11/17 Council meeting minutes does [sic] not represent what was said in the motion and vote for the 9/11/17 Council meeting.
> ***
> The action for the Council['s] 9/11/17 agenda was – Sound Variance review and approval to continue. But the action seemed to be a renewal and change to a permanent installed Sound Variance.
>
> In reference to Mr. Gavin's response about written minutes requirements, I will focus on 'the minutes shall include but need not be limited to' wording. Accurate minutes accountability should be shown to the public, especially if the minutes are the only means to document terms and conditions to a granted Sound Variance."

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 the 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.

Before this Department can address the issues raised in your complaint, we must determine as a threshold matter whether you are an aggrieved party and have legal standing to bring this OMA complaint. See Grieb v. Aquidneck Island Planning Commission, OM 15-16. As discussed below, this conclusion is dictated by the Rhode Island Supreme Court.

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 the allegation raised in your complaint. Id. at 221. Importantly, the test is not whether the public is aggrieved, but whether you are aggrieved. See Riggs v. East Bay Energy Consortium, PR 13-25, OM 13-30.

A review of the undisputed evidence indicates that you were present at the September 11, 2017 Town Council meeting. The video recording from the September 11, 2017 meeting demonstrates that you had ample opportunity to voice your opinions and concerns during the nearly thirty-minute discussion you had with the Town Council.[2] Nothing in the audio recording could be fairly construed to show that you were unprepared for or unable to respond to the agenda item discussed and you made no assertion during this meeting that you were aggrieved due to an insufficient agenda. See Rider v. Foster Town Council, OM 14-11. Additionally, you provide no articulation of how the allegations of an insufficient agenda item or insufficient meeting minutes specifically disadvantaged you. Cf. Tanner v. Town Council of Town of East Greenwich, 880 A.2d 784, 793 (R.I. 2005) ("[E]ven an individual who actually attends a meeting still may establish standing through demonstrating that he or she was aggrieved or disadvantaged by, for example, the lack of preparation or inability to respond to an issue."). Having not been provided with any indication of how, specifically, the allegedly inadequate agenda item disadvantaged you, we fail to see how the present case is distinguishable from Graziano. See Block v. Board of Elections, OM 13-25 (noting that the facts demonstrated "a situation no different than Graziano, i.e., a person who complains about the sufficiency of notice, but nonetheless attends the meeting and provides no evidence of any particular detriment or injury."). Since you have presented no evidence to the contrary, and because we find no evidence indicating otherwise, this Department finds that you are not an "aggrieved" party and therefore have no standing to object to the agenda for the September 11, 2017 Town Council meeting. See Curt-Hoard v. Woonsocket School Board, OM 14-20. Accordingly, we find no violations.

Notwithstanding, even assuming, arguendo, that you had standing to bring your complaint regarding an insufficient agenda, we would still find no violation. With respect to your first allegation, we note that the Town Council's September 11, 2017 meeting agenda stated:

> "**OLD BUSINESS**
> ** 3. Discussion/Action – Sound Variance Review And Approval To Continue For Bill's Sales Firewood. Request Variance Hours For Saturdays Be Extended From The Current 4:00 PM To 5:00 PM/ A. Thayer, Sayer, Regan & Thayer, LLP (20) Documents:
> Bills Sales.pdf[.]"

[2] The September 11, 2017 meeting video recording was provided to this Department as an attachment to your Complaint.

Your rebuttal appears to center on the allegation that the agenda item did not indicate that the sound variance would be permanently extended. This allegation implicates R.I. Gen. Laws § 42-46-6(b), which states, in pertinent part: "This notice shall include the date the notice was posted, the date, time and place of the meeting, and a statement specifying the nature of the business to be discussed." Id. (Emphasis added). The level of specificity that must be detailed for each agenda item depends on the facts and circumstances surrounding each item.

In Tanner v. Town of East Greenwich, 880 A.2d 784 (R.I. 2005), the Rhode Island Supreme Court examined this OMA provision. The Court determined that the agenda item "Interviews for Potential Boards and Commission Appointments" did not adequately apprise the public of the nature of the business to be discussed at a Town Council meeting. Specifically, after conducting interviews as indicated on the notice, the East Greenwich Town Council proceeded to vote to appoint various individuals to the planning and zoning boards for the Town.

The Court concluded that although the standard is "somewhat flexible," the contents of the notice "reasonably must describe the purpose of the meeting or the action proposed to be taken." Id. at 797-98. The Court added that a flexible "approach accounts for the range and assortment of meetings, votes, and actions covered under the OMA, and the realities of local government, while also safeguarding the public's interest in knowing and observing the workings of its governmental bodies." Id. at 797. Although the Court provided no bright line rule regarding the level of specificity of a posted notice, the Court determined the appropriate inquiry is "whether the [public] notice provided by the [public body] fairly informed the public, under the totality of the circumstances, of the nature of the business to be conducted." Id.

The Rhode Island Supreme Court re-examined this provision in Anolik v. Zoning Board of Review of the City of Newport, 64 A.3d 1171 (R.I. 2013). The relevant facts of that case are as follows. In November of 2008, defendants received a letter from counsel for Congregation Jeshuat Israel requesting an extension of the time in which to substantially complete certain improvements to Congregation Jeshuat Israel's property that had been approved by a previous zoning board decision. Id. at 1172. That previous decision expressly contained a condition to the effect that there be substantial completion of the improvements within two years. Id. The agenda item for the February 23, 2009 meeting stated:

> "IV. Communications:
> Request for Extension from Turner Scott received 11/30/08 Re: Petition of Congregation Jeshuat Israel"

At the meeting, the board voted unanimously to approve the request for an extension of time, which required that the "improvements must be started and [be] substantially complete [by] February 23, 2011." Id. at 1173. On appeal, the Supreme Court looked to Tanner and noted that R.I. Gen. Laws § 42-46-6(b) requires the "public body to provide fair notice to the public under the circumstance, or such notice based on the totality of the circumstances as would fairly inform the public of the nature of the business to be discussed or acted upon." Id. at 1175 (internal quotations omitted). The Court held that the agenda item was "completely silent as to which specific property was at issue; the agenda item provided no information as to a street address, a parcel or lot numbers, or

even an identifying petition or case number." Id. (Emphasis in original). The agenda item "fails to provide any information as to exactly what was the reason for the requested extension or what would be its duration." Id. at 1176.

The Rhode Island Supreme Court more recently addressed this issue in Pontarelli v. Rhode Island Board Council on Elementary and Secondary Education et al., 151 A.3d 301 (R.I. 2016). The pertinent agenda item stated: "7.b. Approval of RIDE's Executive Pay Plan and Organizations Chart." Next to this agenda item was a description that noted "Enclosure 7b." Id. at 303.

The Supreme Court analyzed the sufficiency of this agenda item as follows:

> "After a careful review of the record and consideration of the undisputed facts before us, it is this Court's opinion that the agenda provided by defendants, as it relates to the September 8, 2014 meeting, falls short of satisfying the statutory requirements of notice set forth in § 42–46–6(a). Although the notice placed on the Secretary of State's website undeniably informed the public that '[a]pproval of RIDE's Executive Pay Plan' was on the agenda for the council meeting, there was no indication that more than one pay plan would be considered. Moreover, there was also no indication that the additional pay plans (ultimately considered and decided by the council at the meeting) would relate to retrospective fiscal years dating back to 2012. Additionally, while the 7b enclosure that should have been attached would have informed the public that the meeting would involve pay plans from fiscal year 2012 and forward, it is undisputed that the enclosure was not available on the Secretary of State's website as required by § 42–46–6.
>
> It is our opinion that based on the totality of the circumstances of this case—including that the term 'plan' was in the singular and that the stated 'Enclosure 7b' was not actually available on the Secretary of State's website—adequate public notice was lacking. The public had the statutory right to receive a more complete notice of what would be discussed and decided at the council meeting; this is especially true where the matters relate to expenditures of taxpayer monies. The agenda did not provide the public with fair notice 'of the nature of the business to be discussed' where it completely omitted any information that one could construe to mean that more than one pay plan would be discussed." Id. at 306.

Accordingly, the Supreme Court concluded that the agenda item violated the OMA. Id.

Here, we find no violation. Based on our review of the September 11, 2017 agenda and video recording, we find nothing that indicates the agenda item provided "vague and indefinite notice to the public." Anolik, 64 A.3d at 1175; cf. Fagnant v. Woonsocket City Council, OM 15-17. Indeed, the Town Council did "review and approv[e]" the Bill's Sales Firewood's request for a sound variance. As the agenda item specifically notes, the Town Council discussed the propriety of extending the variance hours on Saturdays "from the current 4:00 PM to 5:00 PM[,]" eventually voting to extend it to 4:30 P.M. Based on the totality of the circumstances, we find that the agenda

item "would fairly inform the public of the nature of the business to be discussed or acted upon[.]" Anolik, 64 A.3d at 1175. Therefore, we find no violation.

With respect to your other allegation concerning the allegedly inadequate meeting minutes, we note that this allegation implicates R.I. Gen. Laws § 42-46-7(a), which provides, in relevant part:

> "[a]ll public bodies shall keep written minutes of all their meetings. The minutes shall include, but need not be limited to:
>
> (1) The date, time, and place of meeting;
> (2) The members of the public body recorded as either present or absent;
> (3) A record by individual members of any vote taken; and
> (4) Any other information relevant to the business of the public body that any member of the public body requests be included or reflected in the minutes." R.I. Gen. Laws § 42-46-7(a).

Based on our review of the September 11, 2017 meeting minutes, we find no violation. The meeting minutes provide, in pertinent part:

> "PORTSMOUTH TOWN COUNCIL MEETING
> SEPTEMBER 11, 2017 MINUTES
> 6:00 PM – Town Council Chambers, Portsmouth Town Hall, 220 East Main Road
> MEMBERS PRESENT: Keith E. Hamilton, Kevin M. Aguiar, David M. Gleason, Elizabeth A. Pedro, Paul F. Kesson, J. Mark Ryan, and Linda L. Ujifusa
> ***
> Mr. Thayer outlined the history of the original variance and listed the improvements that have been made to mitigate the noise. Chief Lee mentioned that noise complaints have lessened over the last year. Mr. Tarney Waring, 30 Crossings Ct, abutter, reported that noise continues to be an issue, despite the actions identified by Mr. Thayer. He requested that the Council not vote on this until a completely independent investigation be conducted and more information is available. Laura Thibault, office manager of Bill's Sales, indicated that the extended hour requested was to provide a buffer, so that trucks could be loaded/unloaded at the end of the work shift without worry of going past the time allowed. Motion made by Mr. Gleason to renew the variance to the same existing conditions with extending the Saturday hour until 4:30 permanently, seconded by Mr. Kesson. Motion passed 6-1. Mr. Kesson in dissent."

You appear to acknowledge that the meeting minutes contain all the requisite information, focusing your rebuttal argument on the "need not be limited to" language. Respectfully, this concedes the point. Furthermore, after reviewing the video recording of the September 11, 2017 meeting, we find that the meeting minutes accurately detail what transpired at the meeting. To the extent that you suggest that the minutes indicate that only the Saturday hours were "permanently" extended as opposed to all hours of operation being permanent, we simply disagree with your interpretation. Notably, the only issue before the Town Council was extending Saturday hours

and for this reason, among others, we find that the minutes accurately recorded the Town Council vote. For these reasons, we find no violation.

Although the Attorney General will not file suit in this matter, nothing within the OMA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws § 42-46-8(c). 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. We are closing this file as of the date of this correspondence.

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

Very truly yours,

Sean Lyness
Special Assistant Attorney General

SL/kr

Cc: Kevin P. Gavin, Esq.