



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

April 11, 2014
OM 14-12

Mr. John Vitkevich

RE: Vitkevich v. Portsmouth Town Council

Dear Mr. Vitkevich:

The investigation into your Open Meeting Act (“OMA”) complaint filed against the Portsmouth Town Council (“Town Council”) is complete. By email correspondence dated December 12, 2013, you allege the Town Council violated the OMA when its agenda for the October 29, 2013 meeting, “Request for Additional Funding for the Mothballing of the Former Elmhurst School Chapel,” failed to specify the nature of the business to be discussed. Specifically, you allege the Town Council “allow[ed] a vote to develop a phasing plan for demolition of the Elmhurst Chapel which was not on the agenda.”

In response to your complaint, we received a substantive response from the Portsmouth Town Solicitor, Kevin P. Gavin, Esquire. Specifically, Mr. Gavin states in pertinent part:

“In September 2013, the Council voted to proceed with the demolition of the school to the north of the Chapel, while continuing to consider the option of preserving the former Chapel for potential future use.

On October 15, 2013, the Town Council held a workshop, where discussion continued on the subject of whether to demolish or preserve the former Elmhurst Chapel.

The next meeting was held on October 29, 2013. Mr. Faucher, Financial Director, worded the agenda item as follows: ‘OB1-Request for Additional Funding for the Mothballing of the Former Elmhurst School Chapel’.

After a lengthy presentation [at the October 29, 2013] meeting by the Town’s consultants and considerable public discussion, the consensus of the Town Council was not to incur the costs to mothball the Chapel, but instead to consider

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options for demolition. *** The Council voted to have VHB, the project engineer, develop a phasing plan and cost options for demolition of the Chapel.”
See October 29, 2013 Meeting Minutes.

Also included in the response was a memorandum prepared for the October 29, 2013 meeting, and made available to the public prior to the meeting, which explained the process and cost required for mothballing the Chapel and also discussed the alternative option of demolition.¹

In his response, Mr. Gavin cites Tanner v. Town Council of the Town of East Greenwich, 880 A.2d 784 (R.I. 2005), and concludes that under the “totality of the circumstances” presented here, the notice of the October 29, 2013 agenda item “Request for Additional Funding for the Mothballing of the Former Elmhurst School Chapel” was sufficient to fairly inform the public of the nature of the business to be discussed or acted upon by the Town Council. Mr. Gavin also cites Murphy v. North Smithfield Town Council, OM 12-23, in which this Department expressed that “an agenda item is not misleading where it does not include a verbatim list of every potential aspect that might be discussed in relation to a specific matter.” Further, Mr. Gavin contends that the agenda item was not misleading and that “[the agenda item] necessarily included the alternative option of proceeding with the demolition.”

We acknowledge your January 10, 2014 response.

At the outset, we note that in examining whether an OMA violation 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.

The issue before the Department is whether the agenda item for the October 29, 2013 meeting violated the OMA when it failed to provide a “statement specifying the nature of the business to be discussed.” See R.I. Gen. Laws § 42-46-6 (b). The agenda item reads in part:

“Request for Additional Funding for the Mothballing of the former Elmhurst School Chapel.”

¹ It appears Mr. Gavin suggests that adequate public notice was provided by virtue of this more detailed memorandum, but a more detailed memorandum maintained by a public body in no way serves as a substitute for the OMA’s requirement that a notice contain a “statement specifying the nature of the business to be discussed.” See R.I. Gen. Laws § 42-46-6(b). See also Anolik et al. v. Zoning Board of Review of the City of Newport, 64 A. 3d 1171, 1175 (R.I. 2013) (“text [of agenda] provides no basis for any further inference as to what might happen with respect to the request that had been ‘received’”).

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The OMA requires that all public bodies provide supplemental written public notice of all meetings at least forty-eight (48) hours in advance of the meeting. See R.I. Gen. Laws § 42-46-6(b). “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 Rhode Island Supreme Court examined this requirement in Tanner v. The Town Council of the Town of East Greenwich, 880 A.2d 784 (R.I. 2005), wherein the Court held 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 or acted upon. 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 reasoned 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. Although the Court provided no bright line rule regarding the specificity of the posted notice, the Court viewed the “totality of the circumstances” and concluded that the notice violated the OMA since it implied that merely “interviews” would be conducted, and that a vote or other action would not take place. The Court also observed “that the OMA places an affirmative duty on the public body to provide adequate notice of meetings.” *Id.* at 799.

Based upon the evidence presented, and consistent with Tanner’s “totality of the circumstances” analysis, this Department finds that the Town Council did violate the OMA. Similar to the agenda listed in Tanner, the specificity of the language used on the October 29, 2013 agenda requires a rather limited interpretation of the text. While Mr. Gavin argues that the “mothballing” agenda “necessarily” included the alternative “demolition” option, the Town’s response makes clear that the “mothballing” and the “demolition” represented two distinct alternatives. See Town’s December 31, 2013 response (“Indeed the very issue under consideration, for many months, was whether to demolish the entire Elmhurst School-including the former Chapel-immediately, or to mothball and preserve the Chapel for potential future use”) [Emphasis added]. Moreover, the October 29, 2013 minutes evidence that, despite the “mothballing” agenda, the Town Council voted in favor of developing a phasing plan for demolition and cost options for a fee not to exceed \$10,000. We conclude that the October 29, 2013 meeting agenda did not meet the Tanner and Anolik standards. Therefore, the Town Council violated the OMA.

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 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) “[t]he court may impose a civil fine not exceeding five thousand (\$5,000) dollars against a public body

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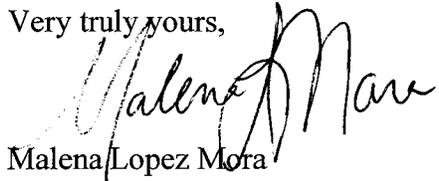
or any of its members found to have committed a willful or knowing violation of [the OMA].” R.I. Gen. Laws § 42-46-8(d).

Here, we conclude that neither remedy is appropriate. Although we conclude that the Town Council violated the OMA when it failed to fairly inform the public of the nature of the business to be discussed, we have been provided with no facts that suggest that the Town Council willfully or knowingly violated the OMA. Moreover, at its November 25, 2013 meeting, the Town Council voted in favor of proceeding with demolishing the Chapel.² There being no allegations that the November 25, 2013 vote was improper, injunctive relief would be inappropriate. This finding serves as notice to the Town Council that its actions violated the OMA and may serve as evidence of a willful or knowing violation in any future similar case.

Although the Attorney General will not file suit in this matter, 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 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.

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

Very truly yours,


Malena Lopez Mora
Special Assistant Attorney General
Extension 2307

MLM/pl

Cc: Kevin P. Gavin, Esquire

² The November 25, 2013 meeting minutes show that the Town Council voted to demolish everything north of the music room, including the Chapel and surrounding structures.