

2006 WL 4573812 (R.I.A.G.)

Office of the Attorney General
State of Rhode Island

OM 06-25

PR 06-19

February 28, 2006

RE: Lefebvre v. Gloucester Zoning Board et al.

Joyce Lefebvre

Dear Ms. Lefebvre:

The investigation into your Open Meetings Act [OMA]/Access to Public Records Act [APRA] complaint against the Gloucester Zoning Board, Planning Board, and Town Council is complete. You allege that these three entities violated the OMA by failing to comply with the notice requirements provided in [R.I. Gen Laws § 42-46-6](#). Specifically, you allege that, although “posted in several newspapers,” notice for a March 3, 2005 Town Council meeting was deficient. Further, you allege that notice for the Zoning and Planning Board meetings, at which “the change of zoning laws and approval of” a CVS building took place, was deficient for failure to post the topics of discussion. You indicate that you were “unaware of the zoning and planning board meetings.”

You also allege that the Planning Board violated the OMA and/or APRA because minutes were not made timely available to you and that when made available to you, the minutes were incomplete. Specifically, you indicate that upon your March 28, 2005 request for the January 10th minutes you received (on March 28th) 5 pages. However, you state that a repeated request for the same minutes on April 4th resulted in 7 pages, with 2 extra pages of previously omitted pertinent information provided. You further indicate that the minutes you received on April 5th, which included both the January 3rd and January 10th meeting minutes, were the “unapproved” minutes. You have included copies of the relevant minutes for our review.

We have received a substantive response from John J. Bevilacqua, Esq., Town Solicitor for the Town of Gloucester. First, concerning your allegation that the Gloucester Zoning Board, Planning Board, and Town Council violated the OMA by failing to comply with the notice requirements provided in [R.I. Gen Laws § 42-46-6](#), Attorney Bevilacqua states, “I have examined the record in reference to the complaint filed, and there is no records of any hearing before the Zoning Board involving the property...also known as CVS zone change” and that “[T]he only Board that met was the Planning Board on January 3, 2005. The matter was continued to the January 10, 2005 workshop meeting.”

Addressing your allegation that notice regarding the CVS zone change at the Planning Board meeting was deficient for failure to post the topics of discussion, Attorney Bevilacqua states:

“All meeting notices were faxed to the police station for posting and the Secretary of State website and posted in

Town Hall. The matter was considered at the January 10, 2005 meeting. This Board is advisory only and reports their recommendation to the Council. There is no advertising of this meeting or any registered mail sent to abutters. The meeting is posted in the usual locations, i.e. town hall, police station and Secretary of State's website...The topic of discussion where the Council had considered the Application for Zoning Map Amendment are in Exhibit D, which included Town Council meeting notices of February 15, March 3, and 24 of 2005, all in compliance with legal notice requirements.”

***2** The OMA requires that public bodies “shall give supplemental written public notice of any meeting within a minimum of forty-eight (48) hours before the date” and that “[T]his 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.” [R.I. Gen. Laws § 42-46-6\(b\)](#). Previous findings from this Department acknowledged this requirement and maintained that the notice “must advise the general public of the nature of the business to be discussed.” See *Cervasio v. Town of Foster*, OM 04-09; see also *Schmidt v. Ashaway Fire District*, OM 98-34; *Payne v. Town of New Shoreham Town Council*, OM 97-17. That said, this Department has previously opined 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 *Warfel v. New Shoreham Town Council*, OM 00-26. However, all of these opinions took place prior to the Rhode Island Supreme Court's opinion in [Tanner v. Town Council of the Town of East Greenwich, 880 A.2d 784 \(R.I. 2005\)](#).

In *Tanner*, the Court found 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. In that case, 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 found 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 a posted notice, the Court viewed the totality of the circumstances at and surrounding the meeting and found that the notice was misleading since it implied that merely interviews would be conducted, and that a vote or other action would not be taken. The Court reiterated “that the OMA places an affirmative duty on the public body to provide adequate notice of meetings.” *Id.* at 799.

In *Tanner*, the Rhode Island Supreme Court attempted to give guidance as to what constitutes a statement specifying the nature of the business to be discussed at a public body meeting. The Court stated that “the Legislature intended to establish a flexible standard aimed at providing fair notice to the public under the circumstances, 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.* Furthermore, the Court declined to provide specific guidelines because “such an approach accounts for the range and assortment of meetings, votes, and actions covered under 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.* However, while making its holding in *Tanner*, the Court recognized that the OMA does not require a public body to identify on the notice that it intends, to vote on an issue at the meeting, as long as the notice is not misleading. In fact, the determination hinges upon “whether the notice provided by the town council fairly informed the public, under the totality of the circumstances, of the nature of the business to be conducted.” *Id.*

***3** The holding in *Tanner* does not mark a change in Rhode Island law regarding what constitutes “a statement specifying the nature of the business to be discussed.” Instead *Tanner* provides guidance as to how to analyze whether a violation occurred under existing law. In reaching our finding to the case at hand, we must apply the

guidance provided in *Tanner* even though the Court's opinion post-dated the March 24, 2005 meeting. By applying *Tanner* to your complaint, we must weigh whether the notice provided by the Gloucester Planning Board fairly informed the public, under the totality of the circumstances, of the nature of the business that would be conducted at the January 3, 2005 and January 10, 2005 meetings, respectively.

According to Attorney Bevilacqua, the Planning Board was the only public body besides the Town Council to address this issue. Mr. Bevilacqua represents that the topic in question was originally scheduled to be discussed at the January 3, 2005 meeting, but was continued to the January 10, 2005 meeting. The evidence provided to our Department indicates that the posted agenda for the January 3, 2005 and January 10, 2005 Planning Board meetings listed the matter to be discussed as "Application for Zoning Map Amendment." Based on the applicable statute and *Tanner*, we conclude that the Gloucester Planning Board did not violate the OMA. The Planning Board stated with sufficient specificity the nature of the business to be discussed at the January 3, 2005 and January 10, 2005 meetings. The evidence also illustrates that public notice for these minutes was published in accordance with [R.I. Gen. Laws § 42-46-6\(c\)](#), and that to the extent that you claim you were not provided personal notice as an abutter, our finding previously explained that the OMA governs only public notice and not personal notice.

Furthermore, to the extent you contend that the Town Council's March 3, 2005 meeting was not properly posted, we observe that the OMA requires that notice shall include "posting a copy of the notice at the principal office of the public body" and "at least one other prominent place within the governmental unit, and electronic filing of the notice with the secretary of state." [R.I. Gen. Laws § 42-46-6\(c\)](#). However, "in the case of school committees, the required public notice shall [also] be published in a newspaper of general circulation." *Id.*

We find that no violation occurred as to this allegation. Attorney Bevilacqua states that notice was posted at "the usual locations, i.e. town hall, police station and Secretary of State's website." Our review confirms these assertions and we simply have been presented with no evidence that the Town Council's notice violated the OMA's posting requirements. Based on the evidence provided by both parties, we conclude that the Town Council did not violate the OMA's notice requirement for the March 3, 2005 meeting.

In your last allegation, you allege that the Planning Board violated the OMA and/or the APRA because minutes were not made timely available to you and that when made available to you, the minutes were incomplete. Specifically, you indicate that upon your March 28, 2005 request for the January 10th minutes you received (on March 28th) 5 pages. However, you state that a repeated request for the same information on April 4th resulted in 7 pages, with 2 extra pages of previously omitted information provided. You further indicate that the minutes you requested on April 4 were received on April 5th, and included both the January 3rd and January 10th meeting minutes, which were the "unapproved" minutes. You have included copies of the relevant minutes for our review. You also claim that on February 15, March 3 and March 23 you requested the Planning Board's minutes, but were told that these minutes were unavailable.

*4 Concerning this allegation, Attorney Bevilacqua states "The discrepancy in the amount of [extra 2 pages of] information is that the employee who transcribes the minutes was ill and out of work" and that "[I]n an effort to get the minutes completed, a substitute attempted to complete the task." Attorney Bevilacqua continues that "the minutes [you received on March 28] did not include all the testimony from the applicant and therefore had to be redone." Attorney Bevilacqua contends that "both copies were available for the public, and they did receive the minutes in both versions in a timely fashion."

The OMA provides in part 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 * * *.” [R.I. Gen. Laws § 42-46-7\(b\)](#). Moreover, the OMA requires that the minutes contain, but need not be limited to the date, time, and place of the meeting, the members of the public body present or absent, a record by individual member of any vote taken, and any other relevant information a member of the public body requests to be included. [R.I. Gen. Law 42-46-7\(a\)](#).

In this case, we believe that Planning Board violated the OMA by failing to make its January 10, 2005 minutes publicly available in a timely manner. Specifically, pursuant to [R.I. Gen. Law § 42-46-7\(b\)](#), the Planning Board's unofficial minutes had to be made available no later than thirty-five (35) days after its meeting, or, February 14, 2005. Here, the evidence presented demonstrated that on February 15, March 3, and March 28, you requested copies of the Planning Board's minutes, yet were told these minutes were unavailable. This violated the OMA.

With respect to your other allegations, we find no violations. In particular, the evidence demonstrates that the portions not included in the March 25 minutes you received were as a result of an ill employee that had not transcribed this portion of the meeting. Although we acknowledge that you believe a more sinister motive is behind this omission, the evidence presented simply does not lead to this conclusion. Moreover, we observe that the OMA does not require the portions omitted from the March 28 minutes you received on March 28 to even be included in a public body's minutes. See [R.I. Gen. Law 42-46-7\(a\)\(1-4\)](#). Lastly, nothing within the OMA or the APRA requires a public body to approve its minutes. See *Bernard v. Foster School Committee*, OM 03-05.

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

***5** In this case, we believe that neither remedy is appropriate. We have found no evidence to support a finding of a knowing or willful violation of the law. Furthermore, we do not believe injunctive relief is appropriate. Nonetheless, this finding serves as notice to the Planning Board that subsequent, comparable violations may be considered willful and/or knowing.

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

Very truly yours,
Adam J. Sholes
Special Assistant Attorney General

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