STATE OF RHODE ISLAND
OFFICE OF THE ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903
(401) 274-4400 • www.riag.ri.gov

Peter F. Neronha
Attorney General

VIA EMAIL ONLY

December 10, 2020
OM 20-53

Lauren Clem

David V. Igliozzi, Esquire
Town Solicitor, Town of North Smithfield

RE: Clem v. North Smithfield Planning Board and North Smithfield Conservation Commission

Dear Ms. Clem and Attorney Igliozzi:

We have completed our investigation into the Open Meetings Act ("OMA") complaint filed by Ms. Lauren Clem ("Complainant") against the North Smithfield Planning Board ("Board") and the North Smithfield Conservation Commission ("Commission"). For the reasons set forth herein, we find that neither the Board nor the Commission violated the OMA.

Background

The Complainant alleges that the Board and the Commission held a joint meeting on June 18, 2020 "for the purpose of touring the future location of a solar farm operated by Green Development" in North Smithfield and that both bodies violated the OMA by conducting this tour outside of the public purview. The Complainant states that "Green Development Founder Mark DePasquale approached the group and announced that only individuals who were covered under the town's insurance policy, including members of the [Board and the Commission], would be allowed to participate[,]" citing insurance concerns and the concerns of the landowner.

North Smithfield Town Solicitor David V. Igliozzi submitted a response on behalf of both the Board and Commission. Attorney Igliozzi argues that the Commission did not have a quorum present, and that both the Commission and the Board did not conduct a "meeting" as defined by the OMA. In support, affidavits from all Board and Commission members who were present at the June 18, 2020 site tour were provided for our review.

For the Commission, sworn statements were provided by three members: Steven Berenback, Jonathan D. Depault, and Christopher Serano. Each affiant attests to the fact that four members of the Commission need to be present to achieve a quorum and, since only three members were

present, there was no quorum. Additionally, the Commission appended to its response as "Exhibit A" a roster of the Commission, listing seven (7) total members on the Commission. As such, the Commission argues, no meeting took place.

For the Board, sworn statements were provided by Board members Gary Palardy, Megan L. Staples, Jeffrey Porter, Richard F. Keene, and David J. Punchak. Each affidavit describes what transpired during the June 18, 2020 site walk from the affiant's perspective.

We acknowledge the Complainant's rebuttal and each party's supplemental submissions.

Relevant Law & Findings

When we examine an OMA complaint, our authority is to determine whether a violation of the OMA has occurred. *See* R.I. Gen. Laws § 42-46-8. In doing so, we must begin with the plain language of the OMA and relevant caselaw interpreting this statute.

For the OMA to apply, a "quorum" of a "public body" must convene for a "meeting" as these terms are defined by the OMA. *See Fischer v. Zoning Board of the Town of Charlestown*, 723 A.2d 294 (R.I. 1999). A "public body" is defined, in part, as "any department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government." R.I. Gen. Laws § 42-46-2(5). A "quorum" is defined as "a simple majority of the membership of a public body." R.I. Gen. Laws § 42-46-2(6). For purposes of the OMA, a "meeting" is defined as "the convening of a public body to discuss and/or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power." R.I. Gen. Laws § 42-46-2(1). All three of these elements—a quorum, a meeting, and a public body—must be present in order for the OMA to apply; the OMA is not applicable when one or more of these elements is absent. *See Callanan v. East Greenwich Town Councilors-Elect*, OM 19-35.

A quorum may be created, and a meeting "convened," by a "rolling" or "walking" quorum, where a majority of the members of a public body attain a quorum by a series of one-on-one conversations or interactions. *See, e.g., In Re: South Kingstown School Committee Electronic Mail Policy*, OM 04-01 (series of email communications among a quorum of a Committee would satisfy the quorum requirement and implicate the OMA). Our findings have centered on the nexus between these one-on-one conversations and whether they serve as a chain of communication sufficient to constitute a collective discussion. *See Guarino, et al. v. Rhode Island Atomic Energy Commission*, OM 14-07.

This Office has previously held that a "site visit" by a public body would constitute a "meeting" under the OMA if, during the viewing, the members *collectively discussed* and/or acted upon matters over which they had "supervision, control [jurisdiction] and advisory power." *Doe v. Cranston Planning Commission*, OM 19-25 (emphasis added). Conversely, if a "quorum" of a "public body" convenes, but the quorum does not collectively discuss and/or act upon matters over which they have "supervision, control, jurisdiction, or advisory power," a "meeting" has not convened." *See The Valley Breeze v. Cumberland Fire Committee*, OM 15-04.

- Commission

It is undisputed that the Commission is a "public body" subject to the OMA. The Commission presented undisputed evidence that the Commission consists of seven (7) members. Accordingly, four (4) members of the Commission constitute a quorum. *See* R.I. Gen. Laws §§ 42-46-2(5), (6). The sworn statements provided by the Commission members indicate that three (3) members of the Commission attended the site walk and no quorum was present. *See* R.I. Gen. Laws § 42-46-2(6). The Complainant acknowledged the same in her rebuttal, stating that she "was unaware the Conservation Commission did not have a quorum of members when I submitted my complaint." Thus, as to the Commission, we find that no quorum was present and as such the OMA was not implicated and there was no violation.

- Board

As to the Board, it is undisputed it is a "public body" subject to the OMA and that four (4) members of the Board constitute a quorum. *See* R.I. Gen. Laws §§ 42-46-2(5), (6). This is evidenced by "Exhibit A" of the Board's response, which includes a roster of the Board indicating that it has a total of seven (7) members.[1] The sworn statements provided by the Board show that five (5) Board members were present at the site walk. Thus, the evidence indicates there was a quorum present and to determine if the OMA is implicated, we must determine whether the site walk constituted a "meeting" as contemplated by the OMA.

The Board suggests that the site walk did not pertain to a matter over which the Board had supervision, control, jurisdiction, or advisory power. *See* R.I. Gen. Laws § 42-46-2(1). Specifically, the Board argues that it "completed *all* supervision, control, jurisdiction, and advisory power when the Final Plan Application Major Land Development Plan – Decision of Approval for this solar project was issued and recorded on June 5, 2020 ('Final Plan Approval')." (Emphasis in original). Our interpretation of this statement is that the Board is arguing that it had already engaged in any collective discussions or actions related to the solar project prior to the June 18, 2020 site tour, and thus no longer had any supervision, control, jurisdiction, or advisory power with regard to the solar project at the time when the site walk occurred.

We find this argument unavailing. The Complainant's rebuttal argues that Exhibit G of the Board's response establishes the Board's continuing advisory role as to approved projects if conditions within a development plan have not been complied with. The Final Plan Approval included 19 "Conditions of Final Plan Approval," including "peer review updates" that were to be provided to the Board, and Board review if at some point "substation power is increased."

Additionally, the affidavits of the Board members further evidence that the Board had an ongoing role with regard to the solar project. Mr. Porter's affidavit indicated that the Board would discuss at a "future planning board meeting … what legal ramifications/implications [there may be] for

[1] Even if the two alternate members were not included in the quorum, the evidence indicates that four of the Board's five regular members attended the site walk, which would constitute a quorum and the Board does not dispute that a quorum was present.

over clearing, the destruction of the historic stone wall, and the maintenance of the historic areas." Other affidavits similarly indicate that the Board may take future action related to what was observed on the site visit. Thus, the evidence shows that the Board's supervision, control, jurisdiction, and/or advisory power with regard to the solar project had not been "completed" as of June 5, 2020, as the Board argues, but was in fact continuing at that time.

By supplemental submission, the Board avers that enforcement actions related to non-compliance with a development plan are vested with the "Town Planner and Zoning Official" and not the Board, thereby ceasing any further advisory powers of the Board upon final plan approval. However, per Town Planner Thomas Kravitz's affidavit, the Board may "ask to receive reports" following plan approval and did so "in the case of Green's solar project." This, and the very fact that the Board engaged in a tour of the site, undermines the Board's argument and indicates its ongoing role in the development process post-plan approval.

Whether a meeting occurred during the site tour thus hinges on whether the Board "*collectively discussed and/or acted upon* matters over which they had 'supervision, control [, jurisdiction] … and advisory power.'" *See Cranston Planning Commission*, OM 19-25 (emphasis added). If the Board "only viewed the site and did not collectively discuss their observations or findings during the site visit and did not take any action … this Office has previously opined that such a gathering would not rise to the level of a 'meeting' under the OMA." *Id*. (citing *Lamb v. Tiverton Budget Committee*, OM 98-31).

Here, although it is a close question, the record indicates that a collective discussion did not occur during the site visit. The evidence indicates that the tour group was divided into smaller groups at various parts of the tour. Based on the affidavits, the various discussions that occurred during the site walk involving various Board members were somewhat haphazard and there is no evidence that a collective discussion about a specific topic among a quorum occurred, either all at once or on a rolling basis.

The Board closely approached implicating the OMA regarding the topic of whether the project owner had cleared an excessive amount of trees. Each Board member affiant (Mr. Palardy, Ms. Staples, Mr. Porter, Mr. Keene, and Mr. Punchak), mentioned that this clearing topic was discussed at some point. Mr. Porter, Mr. Keene, and Mr. Palardy mentioned that they themselves had discussed this topic at times during the site visit (though seemingly not together all at once). However, Ms. Staples and Mr. Punchak indicated that they only overheard discussions on this topic. Further, there is no evidence that Ms. Staples or Mr. Punchak contributed to the discussion nonverbally or otherwise gave implied consent. Thus, at most, the evidence indicates that only three members of the Board were active participants in the over-clearing discussion. Our precedent is clear that when members only overhear a conversation such as the one described above, without more, that discussion does not then constitute a "meeting." *See Callahan v. East Greenwich Town Councilors-Elect*, OM 19-35 (noting that a "collective discussion" is not present where members are only within earshot of each other and heard another member's remarks to a third party as opposed to having a colloquy amongst themselves). It is also undisputed that no formal votes or action were taken during the site walk.

After a close examination of the record, it appears that this discussion of over-clearing, although dangerously close to implicating the OMA, was the closest the group ever came to engaging in "collective conversation," but fell short of reaching that mark. Consequently, we find that the site visit did not constitute a "meeting" as defined within the OMA. We thus find no violation as to the Board.

However, we appreciate Complainant's concerns about the site visit and strongly urge the members of the Board to be mindful about assembling outside of an open meeting and discussing matters related to the Board. Having such discussions outside the public purview, such as occurred during the site visit, not only risks violating the OMA, but also can create the impression that public business is being conducted outside the public purview and erode trust in government. Members of public bodies must bear in mind the OMA's purpose "that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy." R.I. Gen. Laws § 42-46-1.

Conclusion

Although the Attorney General will not file suit in this matter, nothing in the OMA precludes an individual from pursuing a complaint in the Superior Court as specified in the OMA. The Complainant may pursue an OMA complaint 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 consider this matter closed as of the date of this decision.

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

Sincerely,

PETER F. NERONHA
ATTORNEY GENERAL

By: */s/ Adam D. Roach*
Adam D. Roach
Special Assistant Attorney General