



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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January 31, 2019

Via electronic mail

Mr. Kevin DuJan
Story Time Digital Media
storytimewithmeganfox@gmail.com

Via electronic mail

The Honorable Patrick Horcher
President, Board of Trustees
Village of Wheeling
2 Community Boulevard
Wheeling, Illinois 60090
phorcher@wheelingil.gov

Via electronic mail

Ms. Mallory A. Milluzzi
Village Attorney
Klein, Thorpe and Jenkins, LTD.
20 North Wacker Drive, Suite 1660
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Re: OMA Request for Review – 2017 PAC 49820

Dear Mr. DuJan, Mr. Horcher, and Ms. Milluzzi:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2016)). For the reasons discussed below, this office concludes that the Village of Wheeling (Village) Liquor Control Commission (Commission) and the Village Board of Trustees (Board) did not violate OMA in connection with their September 18, 2017, meetings.

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On September 26, 2017, Mr. Kevin DuJan filed this Request for Review alleging that the Commission and Board violated OMA at their September 18, 2017, meetings. Specifically, he asserted that the Village president and the Village attorney improperly restricted Mr. DuJan and another member of the public, Ms. Deborah Wilson, from addressing the Board by repeatedly interrupting their public comments. He also alleged that the Commission improperly restricted Ms. Wilson's ability to comment at this meeting based on the topic that she wished to address and attempted to do the same to him. Mr. DuJan's Request for Review also contends that the Village's rules for public comment do not comply with section 2.06(g) of OMA (5 ILCS/120/2.06(g) (West 2016)).

On October 13, 2017, this office forwarded a copy of the Request for Review to the Village and requested that it provide a copy of any established and recorded Village rules governing public comment during meetings, and copies of the agenda, open session minutes, and any audio or video recordings of the September 18, 2017, Commission and Board meetings along with a written response to the allegations in this Request for Review.

On October 24, 2017, this office received a written response with links to the Village Code (Code) and video recordings of the Board and Commission meetings at issue. This office also received the public comment sign-in sheets for both the Board and Commission meetings as well as a copy of the draft meeting minutes for the Commission meeting.¹ On October 25, 2017, this office forwarded a copy of the Village's written response to Mr. DuJan; he did not reply. On June 29, 2018, Mr. DuJan informed this office that he had not received a copy of the written response by the Village and indicated that he would like a chance to reply. On that date, this office forwarded a copy of the Village's written response to Mr. DuJan; he did not reply.

BACKGROUND

On September 18, 2017, the Commission, a held a special meeting that began at 6:30 p.m., the substance of which was to discuss a particular request for a liquor license. The members of the Commission consist of the Village President and the members of the Board.²

¹Although the written response indicated that agendas for the September 18, 2017, Commission and Board meetings, and the meeting minutes for the Village's meeting accompanied the written response, this office did not receive paper copies of those materials. Instead, in an October 24, 2017, e-mail from counsel for the Village, links to the Village's website where those materials could be retrieved was provided. See e-mail from Mallory A. Milluzzi, Associate Attorney, Klein, Thorpe & Jenkins, Ltd. to [Shannon] Barnaby, [Assistant Attorney General], [Public Access Bureau], [Office of the Illinois Attorney General] (October 24, 2017).

²Wheeling Municipal Code §4.32.030(a) (amended April 19, 2010).

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However, according to chapter 4.32 of the Code, when acting in this capacity, the Commission members have very limited authority. Specifically, section 4.32.030(b) of the Code provides, "[w]hen sitting as the liquor control commission, the members of the corporate authorities may exercise no authority other than the liquor control powers in accordance with this Chapter [which exclusively deal with licenses for alcoholic liquors]."³ The Board held its regular meeting immediately following the Commission's special meeting.

It is undisputed that the Village has established and recorded rules governing public comment for both the Commission and the Board, and that both the Commission and the Board provided an opportunity for public comment during their meetings. Therefore, this office reviews the rules that were enforced during the September 18, 2017, meetings in terms of their reasonableness and the asserted significant governmental interest.

DETERMINATION

Section 2.06(g) of OMA provides: "Any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body." Although OMA does not specifically address the types of rules that a public body may adopt, public bodies may generally promulgate reasonable "time, place and manner" regulations that are necessary to further a significant governmental interest. *See, e.g., I.A. Rana Enterprises, Inc. v. City of Aurora*, 630 F. Supp. 2d 912, 922 (N.D. Ill. 2009) (examining whether the application of city council's rules for public comment violated plaintiffs' rights). "City Councils have legitimate reasons for having rules to maintain decorum at public meetings[]" and "to assure that the meetings can be efficiently conducted." *Timmon v. Wood*, 633 F. Supp. 2d 453, 465 (W.D. Mich. 2008).

Public Comment at the Commission Meeting

In relevant part, the Village's rules governing public comment at Commission meetings states:

Members of the general public may address all village committees, *commissions*, boards, and any and all other subsidiary boards established by the village board or Village Municipal Code * * * with concerns or comments regarding *issues relevant to that specific board, committee or commission's agenda or topics that*

³Wheeling Municipal Code §4.32.030(b) (amended April 19, 2010).

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the specific board, committee, or commission has the authority, pursuant to the Village Code, to address. The chairperson or his or her designee shall strictly restrain comments to matters that are relevant to the board's, committee's, or commission's business and shall not permit repetitious comments or arguments.^[4]
(Emphasis added.)

This office has reviewed a recording of the public comment portion of the Commission's September 18, 2017, meeting.⁵ The recording of the meeting shows that Ms. Wilson addressed the Commission with concerns about renewing a funeral home's liquor license. Ms. Wilson then began to address her disagreement with an appointment to the Village's Board of Police and Fire Commissioners. During this portion of her public comment, she was interrupted by the Village's president, Mr. Patrick Horcher. Mr. Horcher informed Ms. Wilson that this topic was not relevant to the business of the Commission because it did not have authority over the Board of Police and Fire Commissioners but that she would have the opportunity to speak about this topic before the Board at its meeting, which Mr. Horcher stated would begin in approximately five minutes. Ms. Wilson disagreed with Mr. Horcher's authority to limit her speech and she attempted to argue that she was permitted to speak about any topic when the Village Attorney interrupted her and explained that the above-cited rule prohibited her comment on that topic. Ms. Wilson then left the podium.

Next, Mr. DuJan was called and walked up to a podium set in front of the Commission members. Mr. DuJan provides Mr. Horcher with a book, which he stated contained information about the law firm with which the Village Attorney is affiliated, he then began addressing the Commission about his perceived failings of the Village Attorney and his dislike of this law firm. During Mr. DuJan's public comment, Mr. Horcher, the Village Attorney, and Mr. DuJan repeatedly spoke over one another. Mr. Horcher and Village Attorney informed Mr. DuJan that the topic was not relevant to the business of the Commission but that he could address the matter at the Board meeting, and they indicated that they were attempting to enforce the Village's public comment rules. Mr. DuJan continued his public comment stating that the Commission was violating OMA because OMA permitted him to speak about anything he wanted, and he continued to cite his concerns about the law firm. Mr. DuJan then completes his comments and leaves the podium to return to his seat.

⁴Wheeling Municipal Code §2.03.060(b) (amended May 15, 2017), *available at* https://library.municode.com/il/wheeling/codes/code_of_ordinances

⁵Wheeling Liquor Control Commission, Meeting, September 18, 2017, *available at* <http://www.wheelingil.gov/659/Board-Meeting-Video-9-18-2017>.

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The Village's response to this office asserted that the relevancy rule imposed upon Mr. DuJan and Ms. Wilson at the September 18, 2017, Commission meeting was reasonable and served a significant governmental interest. Specifically, the Village stated:

Here, the Village's rules and regulations are content and viewpoint neutral and serve the significant government interest of maintaining civility and decorum.

* * *

The significant interest of effectively conducting a meeting is particularly true for a subsidiary body. A Commission like the Liquor Control Commission has extremely limited authority and a limited, narrow purpose. Allowing public comment on any and all topics at Liquor Commission meetings would, and does, interfere with the orderly and effective action of the Village Board meeting. In fact, at the September 18, 2017 Liquor Control Commission meeting, Chairperson Horcher pointed out that the actual business of the Liquor Commission would take less time than the public comment portion. Additionally, as repeatedly told to Mr. DuJan and Ms. Wilson, they were able to talk about those topics, namely the qualification of Village attorneys and appointments to the BOFPC [Board of Police and Fire Commissioners], at the Village Board meeting that immediately followed the Liquor Control Commission meeting. The Village Attorney indicated to Mr. DuJan that he would be able to make all of his comments about the Village Attorney and the law firm representing the Village when the Village Board meeting began in less than five minutes. Thus, speakers have ample alternative means of communication.^[6]

In his Request for Review, Mr. DuJan contends that OMA requires a public body to allow members of the public to "speak about whatever they want to speak about[]"⁷ during the public comment portion of a meeting.

⁶Letter from Mallory A. Milluzzi, Village Attorney, Klein, Thorpe and Jenkins, LTD., to Shannon Barnaby, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (October 24, 2017).

⁷E-mail from Kevin DuJan, Story Time Digital Media to Public Access Counselor (September 26, 2017).

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This office has previously determined that a rule which limits members of the public to only provide comments related to subjects listed on the agenda exceeded the scope of permissible rulemaking authorized by section 2.06(g). *See, e.g.*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 38037, issued August 1, 2016; Ill. Att'y Gen. PAC Req. Rev. Ltr. 45349, issued March 16, 2017. These determinations, however, do not support the contention that participants have complete freedom during the public comment portion of an open meeting to provide comment on any issue that one wishes. Instead, this office emphasized that under section 2.02(a) of OMA (5 ILCS/120/2.02(a) (West 2016)), the public body itself is able to discuss *matters concerning the business of the public body* that are not specifically listed on the agenda, and therefore, it would be unreasonable to prohibit members of the public from doing so. Ill. Att'y Gen. PAC Req. Rev. Ltr. 38037, issued August 1, 2016, at 3; Ill. Att'y Gen. PAC Req. Rev. Ltr. 45349, issued March 16, 2017, at 6.

Moreover, courts have consistently recognized an important governmental interest in limiting comments to matters directly relevant to that public body's business. *See, e.g., Scroggins v. City of Topeka, Kan.*, 2 F. Supp. 2d 1362, 1373 (D. Kan. 1998) (city council did not violate first amendment to the United States Constitution by restricting personal comments about an appointee to a mayoral commission that were not directly relevant to the business of the public body). Requiring a public body to permit public comment on matters unrelated to its public business would impede the public body's ability to run efficient meetings. *See Rowe v. City of Cocoa, Fla.*, 358 F.3d 800, 803 (11th Cir. 2004) ("a city council meeting is not open for endless public commentary speech but instead is simply a limited platform to discuss the topic at hand.").

As the Commission has described in its response, the Commission has very limited authority and purpose, which is restricted solely to matters related to licenses for alcoholic liquors. The Commission does not have the authority to discuss, or make decisions, regarding neither the appointment of the Village attorney nor the appointment of commissioners to the Board of Fire and Police Commissioners. In this case, the video recording shows that the Commission restricted Ms. Wilson and Mr. DuJan's comments only when they spoke about topics that were not relevant to the business of the Commission, in any way. Accordingly, this office concludes that the Commission did not violate OMA by enforcing section 2.03.060(b) of the Code to limit public comment to matters that were germane to matters that the Commission has the authority to consider.

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Public Comment at Board Meeting

Section 2.03.060(a) of the Code contains the pertinent Village rule governing public comment at Board meetings, and provides:

- (a) Citizen Concerns and Comments at Village Board Meetings. *Members of the general public may address the board with concerns or comments regarding issues relevant to village business. Issues relevant to village business are defined to mean information about village events; issues that the public body has the authority to address; items listed on the agenda; and items or issues previously voted on by the village board or that the village board has the authority to consider or vote on in the future.* The village president or his designee shall strictly restrain comments to matters that are relevant to village business and shall not permit repetitious comments or arguments. Members of the general public who wish to address the board must sign the request to speak form prior to the commencement of the public meeting. *The persons submitting a petition, concern or other comment shall be allotted five minutes to present their points.* The manager or corporate authorities may respond for the village.
(Emphasis added.)

This office has reviewed a recording of the public comment portion of the Board's September 18, 2017, meeting.⁸ Summarized, the recording of the meeting shows that Ms. Wilson addressed the Board concerning an alleged home invasion in 2013. Ms. Wilson begins to discuss a private physician that allegedly has personal ties with particular board members, Mr. Horcher can be heard briefly interrupting Ms. Wilson asking that she keep her public comments relevant to Village business. After approximately five minutes, an alarm can be heard at which point Mr. Horcher informs Ms. Wilson that her five minutes to address the Board had expired. Ms. Wilson continued speaking while Mr. Horcher reminded her several times that the five-minute bell had rung. Ms. Wilson finished her comments and left the podium. Next, Mr. DuJan addressed the Board about certain aspects of previous Board meetings that Mr. DuJan believed violated the constitution, ancient Greek mythology, his perceived failings of the Village Attorney, and his dislike of that law firm. At no point was

⁸Wheeling Liquor Control Commission, Meeting, September 18, 2017, available at <http://www.wheelingil.gov/659/Board-Meeting-Video-9-18-2017>.

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Mr. DuJan interrupted. After approximately five minutes, an alarm can be heard at which point Mr. Horcher informed Mr. DuJan that his five minutes to address the Board had expired. Mr. Horcher asked Mr. DuJan to wrap up his comments, which Mr. DuJan did.

Based on our review of the recording, this office is unable to conclude that Mr. Horcher's brief interruption of Ms. Wilson during the Board's September 18, 2017, meeting deprived her of an opportunity to fully address the Board. The recording established that Ms. Wilson was permitted to address the Board and provide public comment, and that the brief interruption did not prevent Ms. Wilson from continuing to address the Board until after the five-minute bell rang. This office has previously determined that a temporary interruption that does not preclude a speaker from completing his or her public comment does not constitute an improper restriction on public comment. Ill. Att'y Gen. PAC Rev. Ltr. 37496, issued on December 11, 2015, at 3.

Additionally, this office's review of section 2.03.060(a) of the Code confirmed that the Board's established public comment rules limit a person's comments to five minutes. The Attorney General has previously determined that "a public body may legitimately prescribe reasonable time limits for public comment." Ill. Att'y Gen. Pub. Acc. Op. No. 14-012, issued September 30, 2014, at 5. Because the Village's established and recorded rules permit the Board to limit a person's comments to five minutes, and because such a rule appears designed to advance a significant governmental interest in holding orderly and efficient meetings, this office concludes that Board did not violate section 2.06(g) of OMA by enforcing the five-minute public comment rule at the September 18, 2017, meeting. Accordingly, the Public Access Bureau concludes that the Board did not violate section 2.06(g) of OMA during its September 18, 2017, meeting.

Additional Complaints about Public Comment Rules

Although Mr. DuJan's Request for Review alleges that the entirety of the Village's rules governing public comment run afoul of section 2.06(g), the Public Access Bureau generally reviews a particular rule governing public comment only if there is an allegation that a member of the public has been prohibited from speaking at a meeting because of that rule, as opposed to evaluating the propriety of all rules absent a specific complaint that the rules prevented a member of the public from addressing officials at a meeting. Accordingly, this office emphasizes that a determination by this office that one of a public body's rules for public comment violates, or does not violate, OMA cannot be extrapolated to mean that other rules that were not specifically addressed would, or would not, pass muster.

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Also, please note that the Public Access Counselor's authority is limited to resolving disputes concerning the Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2016)) and OMA. *See* 15 ILCS 205/7(c) (West 2016). To the extent Mr. DuJan's Request for Review alleges violations of laws other than FOIA or OMA, the Public Access Counselor does not have authority to review those allegations.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this matter. If you have any questions, you may contact me by mail at the Chicago addresses listed on the first page of this letter, by phone at (312) 550-4480, or by e-mail at sbarnaby@atg.state.il.us.

Very truly yours,


SHANNON BARNABY
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