STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

August 25, 2020

VIA ELECTRONIC MAIL ONLY

Village of Corrales
Samuel C. DeFillippo, Esq.
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Re: Open Meetings Act Complaints – Curt Flora and Suzanne Huff Flora

Dear Mr. DeFillippo:

Thank you for your response to our inquiry into the eight complaints filed with the Office of the Attorney General by Curt Flora and Suzanne Huff Flora (hereinafter the "Floras") alleging that the Village of Corrales Planning and Zoning Commission (the "Commission") and the Village of Corrales Council (the "Council") violated the Open Meetings Act ("OMA"), NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2013). As you know, the Floras allege that the Commission violated OMA in connection with its meetings on July 18, 2018, September 19, 2018, November 14, 2018, and February 20, 2019, and that the Council violated OMA at its meeting on April 19, 2019. Having carefully reviewed both your response and complaints by the Floras, we write to provide several suggestions for how the Village – including both the Commission and the Council – may more closely adhere to the requirements of the Open Meetings Act.

Background

In New Mexico, the Open Meetings Act provides the public with access to "the *greatest possible information* regarding the affairs of government and the official acts of those officers and employees who represent them." Section 10-15-1(A) (emphasis added). *See also Kleinberg v. Bd. of Educ. of Albuquerque Pub. Sch.*, 1988-NMCA-014, ¶ 18 (noting that "the public policy of this state, as expressed in the Act, is to conduct the public's business in the open, allowing persons, so desiring, to attend and listen to the proceedings"). In line with the public policy behind the statute, OMA is broadly construed in favor of transparency. *See* Attorney General's Open Meetings Act Compliance Guide, p. 7 (8th ed. 2015) ("OMA Guide") (noting that "doubt as to the proper course of action should be resolved in favor of openness whenever possible").

The Floras' eight complaints allege violations of OMA by both the Commission and the Council at various meetings in 2018 and 2019. All of these complaints arise out of a zoning dispute between the Floras and the Village which culminated in an appeal and adjudication before the Council. For the purposes of reviewing the allegations made by the Floras, we will begin by addressing the allegations against the Commission before reviewing those against the Council related to its meeting on April 19, 2019.[1]

Allegations Against the Commission

The primary allegation made by the Floras against the Planning and Zoning Commission is that the minutes from the Commission's meetings were inaccurate and insufficient under OMA's Section 10-15-1(G). In relevant part, that statutory provision requires all meeting minutes to state, at a minimum, "the date, time and place of the meeting, the names of members in attendance and those absent, the substance of the proposals considered and a record of any decisions and votes taken that show how each member voted." Section 10-15-1(G). The Floras argue that the minutes of the Commission's meetings on July 18, 2018, September 19, 2018, November 14, 2018, and February 20, 2019 failed to state "the substance of the proposals considered" due to the omissions of various statements made by the Floras as well as individual commissioners. The Floras maintain that these omissions were so vital to the subject discussed at the meeting as to render the minutes themselves simply inaccurate. For its part, the Commission has denied these allegations.

As the Commission emphasized in response to our inquiry, OMA does not require that meeting minutes contain a verbatim transcript of everything said at an open meeting. Our Office states as much in our OMA Guide, where we explain that "minutes must contain a description of the subject of all discussions had by the body, even if no action is taken or considered. The description may be a concise, but accurate, statement of the subject matter discussed and *does not have to be a verbatim account of who said what*." OMA Guide, p. 18 (emphasis added). As a result, we do not conclude that the Commission's failure to include individual statements made at the meeting was necessarily an OMA violation.

However, we do nevertheless suggest that the Commission should, to the extent that it is able to do so, review the minutes from all of the meetings identified by the Floras to ensure their accuracy. Although we have not requested the audio recordings from these meetings (in part because we did not feel it necessary or appropriate to do so in the midst of the current COVID-19 pandemic), if they are still available the Commission should check to ensure that its meeting minutes are accurate.

[1] Preliminarily, we note that the Floras sent both a written narrative and our Office's formal complaint form to our Office in making their complaints, the latter of which involves a series of boxes that complainants may check to provide us with information as to the allegations involved. Rather than basing our analysis of these complaints on the checked boxes on our complaint form, as did the Village's response, we focus instead on the substantive allegations made by the Floras in their narrative of each complaint.

The two remaining allegations made by the Floras against the Commission are unrelated to OMA. First, although the Floras contend that the Commission violated OMA at its September 19, 2018 meeting by failing to include several documents in its publicly available meeting packet, the statute does not set any such requirement. In fact, OMA does not mention or address meeting packets at all. Secondly, the Floras also allege that the Commission violated OMA at its July 18, 2018 meeting by failing to respond to their request to be placed on the agenda of the meeting within fifteen days, but this too is not an OMA requirement. While the statute guarantees the public the right to "attend and listen" at meetings of public bodies, Section 10-15-1(A), it does not provide individuals the right to have an item of business placed on the agenda of a particular meeting. As such, we do not conclude that the Commission violated OMA in either of these respects.

Allegations against the Council

The Floras also submitted a number of complaints against the Village of Corrales Council based on its meeting on April 19, 2019. On that date, the Council held a special meeting, which was transcribed by a certified court reporter, for the purposes of hearing the appeal by the Floras as to their zoning dispute with the Village. This was the only item on the agenda. Although the Floras filed six (6) complaints with our Office about this single meeting, their allegations can generally be categorized as those alleging that the Council discussed items not listen on the agenda, those alleging improprieties connected with closed session, and those that are unrelated to OMA.

Firstly, the Floras allege that the Council discussed or took action on items not listed on the agenda. In relevant part, that agenda read as follows:

> NOTICE IS HEREBY GIVEN that the appeal by Mr. Curt Flora and Ms. Suzanne Huff-Flora (the "Floras") with regard to their Subdivision Application No. 18-02 (the "Application") for a three (3) lot subdivision (the "Subdivision") on a six (6) acre tract of land known as Tract 60B, Map 18 and Tract 2, Map 20 located east of Andrews Lane, Corrales, New Mexico (the "Property"). The appeal will be heard by the Village Council, the Village ("Governing Body"), at a special meeting of the Governing Body on Friday, April 19th, 2019.

Based on this language, the Floras contend that the Council was not permitted to discuss or take action on a utility easement condition that was involved with their subdivision application. Their argument seems to be that because the utility easement condition was not listed on the agenda, it could not be discussed even if it was directly related to their subdivision application. We do not agree. OMA requires that agendas must contain "a list of specific items of business to be discussed or transacted at the meeting," not that it set out with exacting detail the minutiae of each item of business. Section 10-15-1(F). *See also* N.M. Atty. Gen. Letter to Pete Dunavant, at 3 (Apr. 15, 2019) (finding as "reasonably specific" an item of business that "gave the public sufficient information to know what it was that the [public body] … would discuss at the meeting"). Because the subdivision application was clearly listed on the agenda as the (only) item of business, it is our opinion that the discussion of and the motion on the utility easement condition were not violations of OMA.

The Floras also argue that the Council violated OMA by failing to specify on its meeting agenda that the Council would be considering entering into closed session at the meeting. This, however, is not a requirement of OMA. While, as we will next discuss in greater detail, public bodies must abide by certain procedural requirements in order to enter into closed session at a meeting, the possibility of entering into closed session is not required to be listed or specified on an agenda. *See generally* § 10-15-1(I). The particular item of business that will be discussed in closed session absolutely does have to appear on the agenda, but the possibility of the public body's entrance into closed session does not. *See* § 10-15-1(F) (providing that agendas must include "a list of specific items of business to be discussed or transacted at the meeting"). For this reason, the Council's failure to state in its agenda that it might enter into closed session was not a violation of OMA.

The Floras next argue that the Council violated OMA by entering into closed session without having stated in a motion to close the meeting which specific item of business would be discussed. This most assuredly is an OMA requirement, as the statute explicitly requires that both "the authority for the closure and *the subject to be discussed* shall be stated with reasonable specificity in the motion calling for the vote on a closed meeting." Section 10-15-1(I)(1) (emphasis added). Here, the transcript of the April 19, 2019, meeting reflects that the following motion was made to enter into closed session:

> THE MAYOR: Thank you. All right. I'm going to – at this point, the meeting of the Governing Body now intends to go into closed session pursuant to NMSA 1978 Section 10-15-1, specifically, Section (h)(3) for purposes of deliberations by a public body in connection with an administrative adjudicatory hearing. The closure requires the majority vote of a quorum by voice vote. Do I have a motion to close the meeting?
>
> COUNCILOR DORNBURG: So moved.

The Floras contend that this motion was deficient because it failed to state for the benefit of the public the specific subject the Council intended to discuss in closed session. We think this argument has merit, at least to a point. Although the relevant motion language (which, for all intents and purposes, was effectively stated by the Mayor) did clearly identify the exception in law authorizing closed session, Section 10-15-1(H)(3), it arguably did not state *which* "administrative adjudicatory hearing" the Council intended to discuss in closed session. To that extent, the Floras have correctly identified a possible violation of OMA. However, New Mexico's appellate courts have repeatedly held that OMA requires "substantial, not strict, compliance," and since both the meeting agenda and the meeting's overall context arguably made it clear which particular adjudication would be discussed, we think it is likely that a court would find that the Council substantially complied with the mandates of the statute. *Parkview Community Ditch Association v. Peper,* 2014-NMCA-049, ¶ 12. *See also Gutierrez v. City of Albuquerque,* 1981-NMSC-061, ¶ 14. Regardless, we would advise the Council to more carefully craft its future motions to enter into closed session so as to avoid any ambiguity on the part of the public or a legal challenge under OMA.

Finally, although the Floras also argue that the Council violated OMA by failing to provide them the opportunity to "rebut" both a statement made by the Planning and Zoning Administrator and "the utility easement," neither of these claims are cognizable under OMA. The statute does not require public bodies to provide members of the public the opportunity to speak at open meetings, much less the right to rebut statements made by others. While we recognize that other statutes might very well have vested such rights in the Floras as parties to an administrative adjudication, those other laws are beyond our review.

Conclusion

Based on our consideration of the Floras' complaints against the Commission and the Council, we recommend that both public bodies take steps to ensure their full compliance with OMA. The Commission should, we think, take steps to review the minutes of its meetings on July 18, 2018, September 19, 2018, November 14, 2018, and February 20, 2019 to ensure their accuracy, completeness, and compliance with Section 10-15-1(G). Although we do not have sufficient information to conclude that these minutes were statutorily noncompliant, the Commission should act in the spirit of transparency by further reviewing them. Similarly, we recommend that the Council take care in all future motions to enter into closed session to detail with specificity and clarity *both* the exception authorizing closed session *and* the subject to be discussed while behind closed doors.[2]

For your reference, a copy of the OMA Guide is available on the website of the Office of the Attorney General at www.nmag.gov. If you have any questions regarding this determination or OMA in general, please let me know.

Sincerely,

John Kreienkamp
Assistant Attorney General

Enclosure

cc Curt Flora and Suzanne Huff Flora

[2] For the sake of thoroughness and to ensure that the Council is aware of OMA's requirements, we would also notify the Council that special meetings are not an exception to OMA's requirement that all draft minutes be "approved, amended or disapproved at the next meeting where a quorum is present." Section 10-15-1(G). This means that, even at a special meeting, the draft minutes of the public body's previous meeting must be considered as an item of business. Although the Council did not violate this provision at its April 19, 2019, meeting because the meeting was held within ten business days of its previous meeting on April 9, 2019, see N.M. Att'y Gen. Letter to Esther Garduno Montoya, Las Vegas City Council, at 2 (Jan. 6, 2020) (explaining that the Las Vegas City Council "was not required to approve the June 12 minutes five business days later at its June 19 meeting, because the statute allowed the Council another five business days to prepare its draft minutes"), we bring this requirement to the Council's attention so that it may be aware of it for future special meetings.