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December 20, 2019

Gary Aldridge
[REDACTED]

RE: *File No. 19-M-114; Lower Platte South Natural Resources District Board of Directors; Gary Aldridge, Complainant*

Dear Mr. Aldridge:

This disposition letter is in response to your correspondence received by our office on May 13, 2019. You have alleged that the chairman of the Lower Platte South Natural Resources District ("District") Board of Directors ("Board") violated the Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (2014, Cum. Supp. 2018, Supp. 2019) ("Act"), by refusing to let you speak during the time reserved for public comment. On May 20, 2019, our office received correspondence from current Board chairman Larry L. Ruth, which contained a legal analysis from Board legal counsel on the question posed in your complaint. We have now completed our review of your complaint and the analysis provided to us by the District. Our conclusion and future action in this matter is set forth below.

RELEVANT FACTS

You are an elected member of the Board. You indicate that at the November 14, 2018, Board meeting, you asked then chairman, Ray Stevens, "for time during the meeting to offer comments/observations" on an audit adopted by the Board at its previous meeting. You indicate that the chair initially agreed, but later informed you that you would not be allowed to speak on this subject. Consequently, at the December 12, 2018, Board meeting, you told Chairman Stevens that you "would speak at the microphone (re: audit), on the record, during the 'Public Comments' agenda item." You indicate that "[t]he normal procedure for 'Public Comments'" is that "the board chair will offer the microphone to anyone wishing to address the board on a matter NOT on the agenda." You state that the audit was not on the agenda. However, when you approached the microphone, Board legal counsel questioned the appropriateness of your speaking during public comment, stating that he did not believe that it would be in accordance with the open meetings law.

You question whether you “shed or park at the door—on entry to a public meeting—any right, privilege, and/or protection provided to citizens by law, rule, or regulation.” You state that Neb. Rev. Stat. § 84-1412(1) gives the public the right to speak at public meetings, and that the chairman and legal counsel denied you your right to make public comments during the public comment period. You further state that you “believe the action by Board chair and/or legal counsel is a misapplication, misinterpretation and/or misunderstanding of law, rule, or regulation.” In your complaint “Postscript,” you state: “My issue is simple and direct. Does a citizen, with certain guarantees provided by law, rule, and/or regulation (i.e., rights), give up those guarantees (rights) when elected to a political subdivision?”

DISCUSSION

You allege that Board officials violated the Act when they did not allow you to speak during public comment at the Board’s meeting on December 12, 2018. You argue that since the Act gives members of the public the right to speak at public meetings, you as a citizen should also have the right to speak. You further argue that you should not have to surrender the rights afforded members of the public as a result of your being elected to serve on the Board.

There is no provision in the Act that addresses the right of a member of the public body to speak during public comment. There is also no Nebraska case that addresses this issue. Consequently, we will focus on the statutory provisions that pertain to the *public’s* right to speak at open meetings of public bodies. Those provisions include:

- (1) Subject to the Open Meetings Act, the public has the right to attend and the right to speak at meetings of public bodies
- (2) It shall not be a violation of subsection (1) of this section for any public body to make and enforce reasonable rules and regulations regarding the conduct of persons attending [or] speaking at . . . its meetings. ***A body may not be required to allow citizens to speak at each meeting, but it may not forbid public participation at all meetings.***
- (3) No public body shall require members of the public to identify themselves as a condition for admission to the meeting nor shall such body require that the name of any member of the public be placed on the agenda prior to such meeting in order to speak about items on the agenda. The body may require any member of the public desiring to address the body to identify himself or herself.

In Nebraska, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Aksamit Resource Mgmt. v. Nebraska Pub. Power Dist.*, 299 Neb. 114, 907 N.W.2d 301 (2018); *Farmers Cooperative v. State*, 296 Neb. 347, 893 N.W.2d 728 (2017). In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Id.*; *Woodmen of the World Life Insurance Society v. Nebraska Dept. of Revenue*, 299 Neb. 43, 907 N.W.2d 1 (2018). It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Aksamit*, 299 Neb. at 123, 907 N.W.2d at 308; *State v. Gilliam*, 292 Neb. 770, 781, 874 N.W.2d 48, 57 (2016). When the Legislature provides a specific definition for purposes of a section of an act, that definition is controlling. *Farmers*, 296 Neb. at 356, 893 N.W.2d at 736.

There are four distinct entities listed in the provisions set forth above: (1) “public body”; (2) the “public” and “members of the public”; (3) “persons”; and (4) “citizens.” A “public body” subject to the Act is expressly defined in Neb. Rev. Stat. § 84-1409(1)(a) and (b).¹ “Public” may be defined as “2: the people as a whole: POPULACE; 3: a group of people having common interests or characteristics *specifically*: the group at which a particular activity or enterprise aims.”² A “person” is simply defined as a “[a] human being.”³ A “citizen” is “[s]omeone who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its privileges.”⁴ The plain language of Neb. Rev. Stat. § 84-1412(1) indicates that members of the public, *not* members of a public body, have the right to speak at public meetings subject to provisions of the Act and reasonable rules adopted by the public body. The plain language in Neb. Rev. Stat. § 84-1412(2) indicates that a public body is required to allow citizens to speak

¹ “Public bodies” include the following entities:

(i) governing bodies of all political subdivisions of the State of Nebraska, (ii) governing bodies of all agencies, created by the Constitution of Nebraska, statute, or otherwise pursuant to law, of the executive department of the State of Nebraska, (iii) all independent boards, commissions, bureaus, committees, councils, subunits, or any other bodies created by the Constitution of Nebraska, statute, or otherwise pursuant to law, (iv) all study or advisory committees of the executive department of the State of Nebraska whether having continuing existence or appointed as special committees with limited existence, (v) advisory committees of the bodies referred to in subdivisions (i), (ii), and (iii) of this subdivision, and (vi) instrumentalities exercising essentially public functions Neb. Rev. Stat. § 84-1409(1)(a) (2014).

² See <https://www.merriam-webster.com/dictionary/public> accessed December 18, 2019.

³ Person Definition, *Black's Law Dictionary* (11th ed. 2019), available on Westlaw.

⁴ Citizen Definition, *Black's Law Dictionary* (11th ed. 2019), available on Westlaw.

at some of its meetings. The plain language in Neb. Rev. Stat. § 84-1412(3) indicates that a public body may require a member of the public to identify himself or herself before addressing the public body. None of these provisions, read in their plain and ordinary sense, expressly provides, or even remotely suggests, that members of a public body are authorized to speak during the time reserved for public comment. Moreover, the Board's rules, i.e., "C-16: Public Participation at Board Meetings," contain no provision that would allow members of the Board to speak during public comment. Consequently, in the absence of any statutory provision authorizing you to engage in such conduct, we are unable to conclude that the Board chair violated the Act by not allowing you to speak during public comment at its December 12, 2018 meeting.

We find additional guidance and support for our conclusion in authority from other jurisdictions. In *Shields v. Charter Tp. of Comstock*, 617 F. Supp. 2d (W.D. Mich. 2009), a member of a township board sued the township and its individual board members seeking injunctive relief and damages for alleged violations of his First Amendment rights when defendants prevented him from speaking during the time reserved for public comment, and adjourning the meeting before he finished speaking. The court noted that the plaintiff spoke for more than thirty minutes in a meeting that lasted just over two hours, and that he "repeatedly accused his fellow board members or other Township employees of misconduct." *Id.* at 609. The official agenda included an item for "Citizen Comments," which, according to the township supervisor, is a period "reserved for the limited purpose of giving individual members of the public the opportunity to address the elected members of the Township Board with issues of concern." *Id.* at 610. While the plaintiff maintained that there were no written rules, etc. relating to citizen comments at township meetings, he did not dispute that the purpose of the period was to give private citizens the opportunity to communicate with board officials. *Id.*

At the conclusion of a forty-minute citizen comment period, in which ten private citizens spoke, the plaintiff attempted to address the board, described by the court as follows:

Defendant Hudson [township supervisor] informed Shields that he could not speak during the citizen comment period because that period was reserved for citizen correspondence with the Board. Mr. Shields replied, "I'm talking as a citizen. I get my three minutes like a citizen." A brief exchange then ensued between Mr. Hudson, Mr. Shields, and the Township attorney, Kenneth Sparks. Shields shouted at Hudson, and Hudson replied, "Bill you are out of line, and I'm going to ask you to sit down."

At that point, Mr. Sparks again stepped in and informed the Board that although the period normally was reserved for citizen comments, the Board could amend its agenda to allow Mr. Shields to speak. Mr. Hudson asked for a motion on whether the agenda should be amended, and

Defendant Jeffrey Bogema, a Township Trustee, responded by making a motion to “get on with business.” Mr. Shields stated “I move we let me speak. It’s freedom of information and its also my Fourth [sic] Amendment right.” Shields then shouted, apparently to Mr. Hudson, “Did you [inaudible] to uphold the Constitution when you raised your hand for this office? To uphold the United States Constitution? Either do it or get out of the office.” Shortly thereafter, Defendant Bogema’s motion was seconded, and it passed by a voice vote. Mr. Shields was the only board member to oppose the motion. The Board then proceeded to the next item on the agenda.

Id. at 610.

The board attorney subsequently suggested that the plaintiff be allowed to speak during the final agenda item—“Any and All Other Business to come before this Board”—since he was not allowed to speak during citizen comment. After speaking for approximately nine minutes, Mr. Hudson asked for a motion to adjourn, to which plaintiff responded, “I’m not done yet.” *Id.* at 611. A motion to adjourn was subsequently made, seconded and approved.

Plaintiff argued that defendants’ actions with respect to the two motions constituted unlawful viewpoint discrimination because the board members sought to suppress plaintiff’s speech.⁵ However, the court found that “[a] governmental body has significant discretion to regulate its own meetings in the manner it sees fit.” *Id.* at 613. “To the extent Plaintiff challenges the Board’s authority to regulate the citizen comment period or adjourn the meeting, that challenge fails because the Board’s actions fit comfortably within the scope of the reasonable time, place, and manner restrictions routinely upheld as part of a public body’s authority to regulate its own meetings.” *Id.*

Plaintiff also argued that his First Amendment rights were violated because board members acted with “improper motives” when exercising their lawful authority. The court noted that this argument would require it “to speculate as to each board’s member’s true impetus” underlying the two votes, *id.* at 614, which is exactly the type of inquiry the U.S. Supreme Court has instructed federal courts not to do. *Tenney v. Brandhove*, 341 U.S. 367 (1951). As a member of the board, the plaintiff had the same policymaking ability as other board members, and the same opportunity to vote on the motions that allegedly injured him. *Id.* at 614. In this regard, the court concluded that “[p]laintiff stands on much different footing than an ordinary citizen who desires to speak at a public meeting.” *Id.* And while the First Amendment may shield the private citizen against government power, “it does not immunize an elected official from the ire of his political adversaries.” *Id.*

⁵ The court considered plaintiff’s claims for damages only, since he had been removed from office by a recall election approximately sixteen months following the meeting at issue.

The court further found that plaintiff had ample time to speak at the meeting and did not identify any particular topic he was prevented from discussing. Rather, plaintiff alleged only that he should have been allowed to speak longer and at different times during the meeting. Plaintiff had the opportunity to argue his point and vote on the questions when raised, but was unable to persuade his fellow board members and was outvoted on two procedural motions. *Id.* at 616. “The First Amendment does not allow Plaintiff to transform this political defeat into a civil damages action merely because some members of the Board may have disagreed with the substance of his allegations. . . . Plaintiff may question his former colleagues’ motives in the court of public opinion, but he cannot state a First Amendment claim here.” *Id.*

In *Higgs v. Houston-Philpot*, 2012 WL 1314104 (April 17, 2012), a member of a college board of trustees sued the board of trustees alleging violations of the Michigan Open Meetings Act because he was interrupted while speaking during the public comment segment of a budget meeting. Plaintiff claimed that he had the right to speak during the public comment period even though he was a member of the public body. The trial court held that the act was not violated because plaintiff was allowed to speak during public comment, and dismissed his claim. *Id.* at 1.

On appeal, the Michigan Court of Appeals agreed that no violation of the act occurred since plaintiff spoke during public comment. *Id.* at 2. It also found that the trial court did not abuse its discretion by failing to enter a declaratory judgment in favor of plaintiff’s right to speak during public comment in the future, since the claim was premised on speculation as to how the board of trustees would act in future meetings and lacked an actual controversy. With respect to plaintiff’s assertion that he had a legal right to address the board during public comment, the court stated:

[Plaintiff] fails to provide persuasive rationale to support this claimed right. Plaintiff was a member of the public body that he wished to address as “a member of the general public.” That fact distinguishes this case from all of the cases plaintiff cites in support of his argument; in fact, he has failed to cite a single factually similar case and we could not find one.

The purpose of the OMA “is to promote governmental accountability by facilitating public access to official decision making, and to provide a means through which the general public may better understand issues and decisions of public concern.” Stated another way, “[t]he primary purpose of the OMA is to ensure that public entities conduct all their decision-making activities in open meetings and not simply hold open meetings where they rubber-stamp decisions that were previously made behind closed doors.” We fail to see how the purpose of the OMA is achieved when individual members of the public body are permitted to present their personal disagreements about the decision-making of the public body to which they are a member during the public comment

segment of the meeting. Every member of a public body is also a member of the general public. We do not believe that [Michigan Compiled Laws] 15.263(5)⁶ was intended to provide such a forum or to promote such objectives. And, here, there was a particular time set forth in the agenda that permitted members of the Delta College Board of Trustees to speak. There was also a procedure in place by which a member of the Delta College Board of Trustees could attempt to have an issue added to the agenda; however, plaintiff apparently did not utilize these options. In any case, we have significant reservations as to whether MCL 15.263(5) entitled plaintiff to address the “public body” in which he was a member during the public comment segment of a meeting, but we need not decide this issue here because plaintiff was permitted to make his comments.

Id. at 2.

These cases suggest that there is a serious question as to whether there is any *right* to speak during public comment when serving as a member of the public body. *Shields* indicates that governmental bodies have “significant discretion” in regulating its own meetings in the matter it sees fit. The court in *Higgs*, while not deciding the issue, expressed “significant reservations” as to whether the Michigan open meetings law allows members of the public body to speak during public comment. We find no statutory right exists that would allow you, as a member of the Lower Platte South Natural Resources District Board of Directors, to speak during the time expressly reserved on the agenda for members of the public to speak. It is on this basis that we find no merit to your complaint, and we are closing our file.

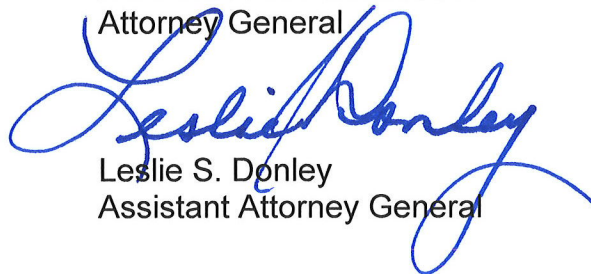
⁶ This provision of the Michigan Open Meetings Act provides that “[a] person shall be permitted to address a meeting of a public body under rules established and recorded by the public body. The legislature or a house of the legislature may provide by rule that the right to address may be limited to prescribed times at hearings and committee meetings only.”

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If you disagree with the analysis we have set out above, you may wish to contact your private attorney to determine what additional remedies, if any, may be available to you under the Open Meetings Act or any other provision of law.

Sincerely,

DOUGLAS J. PETERSON
Attorney General

A handwritten signature in blue ink, appearing to read "Leslie S. Donley", is written over the typed name and title of the Assistant Attorney General.

Leslie S. Donley
Assistant Attorney General

c: Larry L. Ruth
Patrick F. Condon

49-2338-29