STATE OF NEW HAMPSHIRE
SUPREME COURT

Paul Martin

v.

City of Rochester

#2019-0150

MEMORANDUM IN REPLY TO
DEFENDANT'S MEMORANDUM IN OPPOSITION

The City filed a Memorandum of Law (the "Memorandum") in opposition to Dr. Martin's brief, asking this Court to conclude that Rochester's Technical Review Group (TRG) is not a "public body" under RSA 91-A and that Rochester's fees for copies of public records are reasonable. Much of the City's argument was addressed in Dr. Martin's initial brief. However, to the extent that some arguments were not squarely addressed or require emphasis or clarification, Dr. Martin does so here.

I. TRG AS A PUBLIC BODY

The City appears to raise five related arguments in support of its conclusion that the TRG is not a "public body" as defined by RSA 91-A:1-a: (1) the TRG was not created by formal authority and not vested with approval power; (2) the TRG is merely a "convenient mechanism" to assemble individuals otherwise not subject to 91-A; (3) the TRG does not advise its appointing authority; (4) the TRG's function benefits the public, not the Planning Board; and (5) subjecting a municipal agency to the open meetings requirement is absurd. Because each argument is either contrary to precedent or in conflict with the text of RSA 91-A, each should be rejected.

Final Approval: The City argues that the TRG's lack of formal animating document and lack of authority to take action render it a non-entity not subject to the Right-to-Know law. (Memorandum at 2, 6.) This argument was squarely rejected in *Herron v. Northwood*, 111 N.H. 324 (1971). In that case, the Town of Northwood attempted to close the doors to its budget committee meetings on the premise that the budget committee did not take final action on its budget, but would merely "prepare and submit" the budget for action by the town after further hearings. *Id.* At 326. This Court rebuked that concept, remarking:

> The construction defendant would have us attribute to the "final approval" provision would frustrate the primary purpose of the statute to permit freedom of access to public records and proceedings. Consistent with this purpose, the general term "final approval" must be read to connote finality within the scope of the powers delegated to that board, commission, agency or authority subject to the provisions of the statute.

Id. This is no different than the TRG performing a "sign off" or making its recommendations to the Planning Board as contemplated by the TRG procedures. (Brief Appx. 81.) The TRG's mission is to "review projects that are submitted for review to the Planning Board, including site plans and subdivisions." (Id.) In furtherance of this directive, the TRG members will meet with each other and the applicant at designated times and sign off on the projects. (Id.) So long as a meeting is aimed at achieving that "sign off" there can be no question that the TRG proceedings endeavor to reach finality within the scope of its limited advisory powers delegated by the City Manager. The fact that the TRG does not have a place in the City Charter or specific authority to make decisions, therefore, is of no moment. If the City's proposition were accepted, it would erase the concept of the "advisory committee" from the Right-to-Know law.

"Convenient mechanism": The City argues that the TRG is merely a "convenient mechanism" to bring together a number of government workers whose conversations with applicants would not be subject to the open meetings requirements were they to take place individually. (Memorandum at 4, 7–8.) This argument was addressed in Dr. Martin's initial brief. (*See* Brief at 19–20.) In its Memorandum, the City points to no authority for its proposition that "[j]ust because there are multiple employees meeting with a member of the public, it does not cause that group of employees to morph into a 'public body' as that term is defined in RSA 91-A:1-a, VI." (Memorandum at 4.) Indeed, such is the case with all public bodies. The individuals meet with the public without triggering any requirements, unless enough members assemble so as to carry out their particular function; here, to give advice to the City Manager and the rest of the Planning Board.

Indeed, these are precisely the facts from *Bradbury v. Shaw*, 116 N.H. 388 (1976), which the City has not asked this Court to overturn or even question. There, the Mayor appointed a number of private citizens to interact with businesses in the hopes of spurring development and providing information and assistance to investors. *Id.* At 389. Once they met as a group, however, the Supreme Court found these individuals subject to the open meetings requirement. The City cites no distinction between the TRG and the body at issue in *Bradbury*, and this Court will not find one.

"Appointing authority": The City argues that the TRG is not an "advisory committee," and thus not a "public body" because any advice it dispenses goes to the Planning Board, who is not its "appointing authority" as required by RSA 91-A:1-a, VI. (Memorandum at 5.) However, the City overlooks that its ordinances make City Manager (or designee) an automatic member of the

Planning Board. *See* Code of the City of Rochester § 7-28. Therefore, the TRG is an "advisory committee" because it dispenses advice to its appointing authority, the City Manager, *as well as* the rest of the members of the Planning Board.

It does not follow that the TRG cannot be considered to provide advice to its appointing authority solely because its advice reaches *additional* people beyond its appointing authority.

Service to the Applicant: The City continues its argument that TRG cannot be an "advisory committee" because it serves the public and not the Planning Board. (Memorandum at 5.) This argument was addressed in Dr. Martin's initial brief. (*See* Brief at 18.) Instead of responding to Dr. Martin's textual argument, the City merely restates the opposite conclusion while ignoring that TRG members staff recommendations on projects before Planning Board meetings so that the Planning Board members can review them when they meet. (Brief Appx. 81.) Notably, the City does not supply any authority for its construction of the statute that might support its argument. It does not even supply the Court with a proposed construction of the statute's text.

Nonetheless, adopting the City's analysis invites this Court to engage in a balancing test that is not prompted by the text of statute, precedent, or any other authority. It asks the Court to balance the relative quality of the benefit an advisory committee provides to the populace against that provided to the appointing authority to determine whether the public has the right to oversee the government's actions. Transparency should not depend on the identity of the government service's beneficiary; rather, the need for transparency arises any time the government is engaged in the public's business.

"Absurd" construction: The City argues that including the TRG, or any municipal agency, in the definition of "public body" portends an "absurd" result. It warns that permitting public attendance at the TRG meetings would extend

intrusive transparency into every aspect of municipal activity and "permanently damage and cripple governmental operations." (Memorandum at 9.) Yet, the City does nothing to demonstrate any absurdity in requiring the TRG to comply with the open meetings requirement.

The trial court heard testimony that for a period of time Dr. Martin was attending TRG meetings without permanently damaging or crippling governmental operations. (Tr. 97, 138–39.) Nor has the City used this opportunity to demonstrate any fallout from this Court requiring that the public be permitted to attend meetings of the Industrial Advisory Committee at issue in *Bradbury*. 116 N.H. 388.

Instead of using evidence, the City relies on a footnote to do its arguments heavy lifting. (Memorandum at 8.) It argues that the inclusion of the words "agency" and "authority" in the definition of "public body" is absurd and impractical. However, Dr. Martin is not relying exclusively on those words to find that the TRG is a public body. And, as the footnote explains, the legislature rejected bills that would have removed "agency" and "authority" from the definition of "public body."[1]

But whether the definition of "agency" is meant to be within the definition of "public body" is inapposite, as the TRG is an "advisory committee" to Rochester's Planning Board, which would be a "legislative body, governing body, board, commission, [or] committee, … of any county, town, municipal corporation, … or other political subdivision, or any committee, subcommittee, or subordinate body thereof…." RSA 91-A:1-a VI, (d). This is supported by this Court's finding in *Bradbury v. Shaw* that a similarly composed group working on behalf of the City of Rochester was a "board, commission, agency, or authority"

[1] There is no definition of "municipal public body" as the City and the footnote might suggest. The Right-to-Know law merely classifies "public body" and "public agency" without regard to whether it relates to the State or a municipality. RSA 91-A:1-a.

of the City. 116 N.H. at 390 (tacitly recognizing that the committee at issue was an "advisory committee"). Therefore, the TRG would still fall within the definition of "public body" if the words "agency or authority" were removed so long as words like "board" and "commission" remained. RSA 91-A:1-a, VI(d).

II. FEE STRUCTURE

On this next issue, the City first argues that Dr. Martin does not have standing to press his claim because he was never denied access to records and is thus not "aggrieved" as required by RSA 91-A:7. Contrary to the City's suggestion, whether the City's public records fee schedule "deters" public access is not raised in this appeal. (*See* Memorandum at 9.) The issue presented to this Court is whether Rochester's fee structure reflects its actual costs. Therefore, Dr. Martin is aggrieved if he was subjected to paying an excessive fee. There was no dispute that he had paid the fee requested by Rochester. (Tr. 164.) Clearly, then, if this Court determines that the fee requested by Rochester is excessive, then Dr. Martin is entitled to relief under RSA 91-A:7.

The City's remaining argument is that Rochester's fee structure reflects its actual costs because its City Manager and former Finance Director says so. (*See* Memorandum at 10.) The City maintains that this is a question of pure fact for which the trial court must be afforded deference. Dr. Martin maintains that this Court is tasked with divining the definition of "actual costs," which is a question of law. To the extent this Court believes this issue presents a question of law, Dr. Martin's argument has been briefed. (Brief 21–26.)

To the extent the City is correct that this issue presents a question of fact, the trial court should still be reversed for clear error or want of a factual record. The trial court had a record that included expenses related to the costs of copying. (Tr. 22–25; Brief Appx. 27–62.) Dr. Martin supplied one analysis to determine the actual costs of copies. (Tr. 22–25; Brief Appx. At 11.) Yet the City

supplied no analysis of the costs associated with the leasing agreement, cost of paper, cost of electricity, or other facility-related overhead. At trial and in its Memorandum, the City merely stated a list of possible categories of expenses to include without any helpful analysis.

The lack of analysis is problematic in two ways: first, it does not help the Court understand why certain categories of expenses are properly considered; and second, it leaves the Court guessing as to which numbers add up to the $0.50 rate as opposed to the $0.10 rate. For example, the City cites the "cost to open the building" and the "cost to keep the building climate controlled" as factors in determining the actual costs of making copies. However, it does not explain why that should be true. On the contrary, it is common sense that the City would not save a single cent in climate control costs if a member of the public did not request a copy during a particular month, or even year. So why should that person then be charged for air conditioning a building if he or she wants a copy of a public record? And has the cost of the air conditioning changed once the printer spits out the eleventh page? These questions prompted by the City's argument demonstrates just how unwieldy and vague the City's analysis would be in practice. More importantly, it illustrates how divorced the City's fee structure is from the text and purpose of RSA 91-A's "actual cost" mandate.

On the other hand, Dr. Martin's formula used variable costs that depend upon copies actually being made. Nothing could better reflect the actual costs of making copies. The lack of explanation for rejecting his formula makes the error that much more apparent. In sum, it was clear error for the trial court to ignore the actual costs of making copies when determining whether the City's fee for making copies reflected the actual cost of making copies, as required by statute.

WHEREFORE, Dr. Martin prays this Honorable Court will:

A. Grant the relief requested in his Brief; and

B. Grant any further relief it deems just and reasonable.

Respectfully submitted,

DR. PAUL MARTIN

Dated: 11/13/19

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded this date to all parties receiving notice via the e-filing system.

/s/ Jared Bedrick #20438

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I hereby certify that this document contains 2,344 words, within the 3000-word limit for this type of pleading as determined by N.H. Sup. Ct. R. 16(11).

/s/ Jared Bedrick #20438