



**OFFICE OF THE PROSECUTOR
COUNTY OF BURLINGTON, NEW JERSEY**



ROBERT D. BERNARDI
BURLINGTON COUNTY PROSECUTOR

FACSIMILE TRANSMISSION

TO	MR. JOHN PAFF, CHAIRMAN	DATE	AUGUST 5, 2011
FAX #	908-325-0129		
FROM	ROBERT D. BERNARDI, BURLINGTON COUNTY PROSECUTOR		
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MESSAGE:

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CHIEF OF INVESTIGATIONS

August 4, 2011

William John Kearns, Jr.
Kearns, Reale, & Kearns
630 Beverly-Rancocas Road
Willingboro, New Jersey 08046-3718

**RE: ALLEGED VIOLATION OF THE OPEN PUBLIC MEETINGS ACT (OPMA)
EVESHAM TOWNSHIP COUNCIL**

Dear Mr. Kearns:

As you are aware, this Office received a complaint from Mr. John Paff on June 27, 2011 alleging that members of the Evesham Township Council ("Council") violated the Open Public Meetings Act (OPMA) by exchanging email communications during the latter part of March 2011 regarding Evesham Township Ordinance No. 7-4-2011.¹ This ordinance, which amended the Evesham Township Zoning Code and Land Use Code to permit "helistops" as a conditional accessory use in the Industrial Park (IP) zoning districts, and refine the conditional use standards associated therewith, was ultimately adopted by the Council on April 12, 2011 after a second reading and a public hearing.

According to Mr. Paff's complaint, which is based exclusively upon a newspaper article that appeared in the Courier Post on June 21, 2011, the email exchange was prompted by a recommendation from the Evesham Township Planning Board to amend Ordinance No. 7-4-2011. According to Mr. Paff, this could have delayed both consideration of Ordinance No. 7-4-2011 and a controversial "helistop project" which was dependent on the

¹ Evesham Township Ordinance No. 7-4-2011 is entitled "An Ordinance of the Township of Evesham, County of Burlington, State of New Jersey, amending Chapter 160 of the Land Use Code of the Township of Evesham entitled "Zoning" and Chapter 161 of the Land Use Code of the Township of Evesham entitled "Zoning Modification and Additional Requirements" to permit helistops as a conditional accessory use in the IP (Industrial Park) Zoning District in the Land Use Development Ordinance of the Township of Evesham."

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FAMILY UNIT
FAX (609) 265-3184

MEGAN'S LAW UNIT
FAX (609) 265-5789

SEXUAL ASSAULT AND CHILD ABUSE UNIT (SACA)
FAX (609) 265-6180

SPECIAL INVESTIGATIONS UNIT
FAX (609) 265-5145

passage of the ordinance.² Evesham Township officials vehemently deny that the helistop application (PB-11-08) was dependent in any way upon the passage of Ordinance No. 7-4-2011 since the Township Land Use Code had been previously amended in 2010 to permit the construction of helistops in commercial zoning districts.³ Having said that, the alleged motivation of Evesham Township officials involved in this matter is irrelevant for purposes of determining whether they violated the precepts of the OPMA.

In order to evaluate the actions of township officials, it is necessary to understand the posture of Ordinance No. 7-4-2011 at the time of the alleged OPMA violation. Ordinance No. 7-4-2011 was first introduced before Council on March 1, 2011. In accordance with Municipal Use Land Law (N.J.S.A. 40:55D-26), the Evesham Township Planning Board is required to review all proposed development regulations and advise the governing body whether any provisions of the proposed land use regulation are inconsistent with the Township Master Plan. The Planning Board has the authority to make recommendations to the Council concerning any noted inconsistencies, as well as any other matters the Board deems appropriate. In a memorandum dated March 10, 2011, Leah Furey Bruder, PP, AICP of Bach Associates, PC concluded that Ordinance No. 7-4-2011 was not inconsistent with the Township Master Plan, and that the revision to allow helistops in the IP Zone was "practical" given both the physical proximity of IP and C-1 zoning districts, as well as their similar uses. She also noted that such conditional permitted accessory use was already permitted in C-1 zoning districts. On March 17, 2011, the Planning Board voted unanimously to approve Ordinance No. 7-4-2011 but recommended that Council amend it to make clear that the helistop could not be used to facilitate a taxi service.

Thereafter, on March 18, 2011, Ms. Furey Bruder sent an email to Planning Board Secretary Regina Kinney wherein she articulated the recommendations of the Planning Board to include additional language specifically prohibiting helicopter taxi service from the helistop. On March 22, 2011, this information was emailed by Township Clerk Millie Bonfrisco to various township officials, including all five (5) members of Council. This communication prompted a series of emails between Ms. Bonfrisco, Township Manager Thomas Czerniecki and members of Council spanning approximately twenty (20) hours on March 22 and March 23, 2011. While many of these communications pertain to scheduling issues and are ministerial in nature, at least fourteen (14) relate to the Planning Board's recommendations. Specifically, several Council members specifically discussed the merits of the Planning Board's recommendation to amend Ordinance No. 7-4-2011. For ease of reference, the pertinent emails are reproduced in a chart that also indicates the date/time sent, as well as the author and the intended recipient. (Exhibit "A.")

² The "helistop project" to which Mr. Paff refers involves a Land Development Application (PB-11-08) initially submitted in error on April 26, 2011, and refiled on June 2, 2011, by Connor Strong Companies, LLC. The application was filed with the Evesham Township Zoning Board seeking approval for the construction of a helistop on a portion of an existing parking lot serving Lake Center Executive Park (Block 5, Lot 2.01) located at 401 Route 73 North, Evesham Township. Significantly, this property is located in a Commercial (C-1) zoning district.

³ On August 10, 2010, the Council adopted Ordinance No. 17-8-2010 which amended Section 160-5 of the Land Use Code to include the definition of the term helistop, and Section 161-1 to allow the Planning Board to permit a helistop as a conditional use in connection with and accessory to an industrial or office use in C-1 zoning districts.

On April 12, 2011, almost three (3) weeks after the email exchange, the Council considered Ordinance No. 7-4-2011. After a public hearing, Council voted unanimously to adopt the ordinance on its second and final reading. The final version of Ordinance No. 7-4-2011 does not contain any language prohibiting the use of a helistop in furtherance of a helicopter taxi service as recommended by the Planning Board. Subsequently, on June 2, 2011, Connor Strong Companies, LLC filed a Land Development Application for conditional use and minor site plan approval to permit a helistop on a portion of existing parking serving Lake Center Executive Park (Block 5, Lot 2.01) located at 401 Route 73 North, Evesham Township.⁴ This application was approved by the Planning Board on June 16, 2011 after a public hearing. The construction of a helistop at this location still requires approval from the State Department of Transportation and the Federal Aviation Administration.

The application of the OPMA to emails transmitted by members of a township council is one of first impression in Burlington County. The routine use of technological devices such as Blackberrys and iPhones to communicate almost instantaneously was certainly not contemplated when the OPMA became effective in 1976. Significantly, there have been no amendments to the OPMA since its effective date to specifically address these methods of communication. However, that is not to say that such communications fall outside the breadth of the statute. It is well established that the OPMA "shall be liberally construed in order to accomplish its purpose and the public policy of this State," N.J.S.A. 10:4-21, namely requiring government bodies to conduct their business in public. The OPMA is premised on the notion that the public has a right to be present at all meetings of public bodies and witness all phases of deliberation, policy formulation and decision making. N.J.S.A. 10:4-7.

All meetings of public body shall be open to the public at all times unless the topic of discussion falls into one of nine (9) specific categories, none of which are applicable in this case. N.J.S.A. 10:4-12. Such meetings must be preceded by adequate notice. N.J.S.A. 10:4-9. For purposes of the OPMA a meeting is defined as follows:

Meeting means and includes any gathering whether corporeal or by means of telecommunication equipment, which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon the specific public business of that body. Meeting does not include any gathering attended by less than an effective majority of the members of a public body... (emphasis added).

N.J.S.A. 10:4-8b. Even though the purpose of a meeting is to merely discuss and not vote on public business, the OPMA is still applicable. South Harrison Township Committee v. Board of Chosen Freeholders of the County of Gloucester, 201 N.J. Super. 370 (App Div. 1986).

⁴ The land development application notes that the property located 401 Route 73 North is located in a C-1 zoning district. Significantly, the Township Land Use Code had been previously amended to permit a helistop as a conditional use in such a district by virtue of Ordinance No. 17-8-2010 effective August 10, 2010. Thus, it does not appear that this application was dependent upon the adoption of Ordinance No. 7-4-2011 on April 12, 2011.

Based upon all the available information, I conclude that Evesham Township officials did unwittingly run afoul of the prohibitions contained in the OPMA. There is no doubt that passage of Ordinance No. 7-4-2011 and discussions related thereto constituted "public business" as contemplated by statute. N.J.S.A. 10:4-8c.⁵ Whether township officials knowingly engaged in a "meeting" requires greater analysis. While the OPMA does not specifically address the use of email communications to convene a "meeting," the statute clearly contemplates "any gathering...by means of telecommunication equipment...which is attended by, or open to, all the members of a public body..." N.J.S.A. 10:4-8b.

In this case, all five (5) Council members, as well as other public officials, engaged in an ongoing dialogue via a string of emails over a twenty (20) hour time period. Some of these emails occur within minutes of each other while others are separated by several hours. Further, while some of the emails were sent to specific individuals and then apparently forwarded to multiple recipients, the vast majority were sent to all members of Council as well as other public officials. In short, the emails represent an active dialogue between members of Council that sometimes occurs in almost-real time. If these discussions had occurred in person no one could reasonably dispute that a violation of the OPMA had occurred. In light of the communication technology now available, as well as the legislative admonition to liberally construe the OPMA to accomplish its stated purpose, I conclude that Council members "gathered...by means of communication equipment" for the purpose of collectively discussing "public business."

While I conclude that township officials inadvertently convened a "meeting" for purposes of the OPMA, I find insufficient evidence of any specific intent to violate the statute warranting the pursuit of sanctions by this Office. Significantly, the OPMA authorizes the Attorney General or County Prosecutor to proceed with an action in lieu of prerogative writ in Superior Court and seek the imposition of monetary penalties upon those persons who "knowingly" violate the provisions of the OPMA. In this situation, the County Prosecutor would bear the burden of demonstrating a "knowingly" violation by a preponderance of the evidence. As previously indicated, the advent of email and advance telecommunication technology enables individuals to interact in ways that were once deemed more science fiction than science fact. The use of such technologies by public officials could not have been fully contemplated by the legislature when it enacted the OPMA several decades ago. In addition, there is absolutely no legal precedent addressing this unique issue. Thus, the Prosecutor's Office would be hard pressed to demonstrate to a court of competent jurisdiction that the members of Council knew or should have known that they were engaged in a "meeting" under the OPMA and therefore subject to its mandates.

Further, even assuming the Court were to find a "knowing" violation, the civil penalties are limited to one-hundred dollars (\$100) for a first offense, and between one-hundred (\$100) and five-hundred dollars (\$500) for any subsequent offense. N.J.S.A. 10:4-17. It is axiomatic that effective and fair enforcement of any regulatory scheme depends upon fair notice to those who are subject to its requirements. As indicated above, the state of the law, including a lack of any legal precedent, coupled with the rapid development of telecommunication technology created significant uncertainty about the impact of the OPMA upon the use of emails by public officials. In my view, educating public officials who may have mistakenly violated the provisions of the statute is far more effective than the imposition

⁵ Public business defined to include "all matters which relate in any way, directly or indirectly, to the performance of the public body's functions or the conduct of its business." N.J.S.A. 10:4-8c.

of nominal fines. On the contrary, the litigation of this issue would do little to ensure future compliance and would invariably penalize taxpayers who would bear the burden of the costs of any legal action.

However, Council is now on notice that this Office construes the use of email and similar means of communication (i.e. text messaging, instant messaging, etc.) as a means by which public officials can "meet" under the OPMA. In an effort to ensure that such transgressions do not occur in the future, I direct that you furnish each member of the Evesham Township Council with a copy of this letter. Furthermore, I strongly recommend that you develop written guidelines for the use of email communications between township officials regarding public business in a manner that complies with the OPMA. I recommend that such guidelines include at minimum the following requirements:

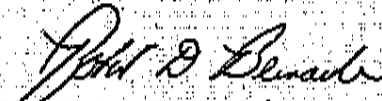
- 1) Email communications should, as far as practicable, not include an effective majority of the governing body and should never include an effective majority of the governing body where discussion of information related to the business of the Township is involved.
- 2) Where email communications do include an effective majority of the governing body, such communications should not include any request for a response. In fact, any email communication should indicate that there should be no email reply or other responsive communication.
- 3) In the rare instance when a response to an email is necessary, such response must not involve any decision-making or deliberative function of the governing body or otherwise address public business as contemplated by the OPMA. Further, the response shall not be made to the entire list of email addressees to avoid even the appearance of impropriety. Utilizing a third party, such as the Clerk, does not change the requirements of the OPMA.
- 4) "Rolling" email conversations must also be avoided. A "rolling" email occurs when one (1) member of the governing body or a third party contacts other members via email individually to successively discuss or gain opinions on an item of Township business. This would apply to other forms of electronic communications as well. However, communications between less than an effective majority of the governing body do not violate the OPMA provided the dialogue does not become a "rolling" discussion that ends up including an effective majority of the governing body.

A copy of the written guidelines should be provided to this Office once completed.

This Office recognizes that the challenges faced by elected officials as they attempt to communicate and effectively represent the public can be daunting. While the use of email and similar means of communication is unavoidable, and often more efficient than more traditional means of communication, Council members must be conscious of the requirements of the OPMA. Full and complete compliance with all provisions of the OPMA is absolutely necessary to avoid the possibility of monetary sanctions and maintain public trust.

If you have any questions pertaining to this matter, please feel free to contact Assistant Prosecutor Thaddeus E. Drummond who supervises the Special Investigations Unit of the Prosecutor's Office. I urge you to take appropriate steps to ensure full compliance.

Very truly yours,



Robert D. Bernardi
Burlington County Prosecutor

RDB:vdh
w/attachment - (Exhibit A))

cc: Assistant Prosecutor Thaddeus E. Drummond
Thomas J. Czerniecki, Evesham Township Manager
John Paff, Chairman New Jersey Libertarian Party
Open Government Advocacy Project

EXHIBIT A

DATE	TIME	AUTHOR	RECIPIENTS	CONTENT
03/10/2011	11:05 A.M.	Leah Furey Bruder – Bach Associates, PC	Regina Kinney	"Attached is a memo for the Planning Board to go with the "Helistop" Ordinance referred by Township Council. Please confirm that you will forward it to Planning Board members."
03/18/2011	9:20 A.M.	Leah Furey Bruder – Bach Associates, PC	Regina Kinney	"In accordance with the requirements of <u>N.J.S.A. 40:55b-26</u> , the Planning Board Review Ordinance 7-4-2011 at its meeting on March 17, 2011. The Planning Board found that the ordinance is consistent with the Township Master Plan and recommends the Township Council adopt the ordinance, with the recommendation that the ordinance be amended to specifically prohibit helicopter taxi service."
03/22/2011	1:56 P.M.	Millie Bonfrisco	Multiple recipients including all Council Members	"Attached memo received in "this Office" outlining the Planning Board's review and recommendation to amend the Helistop Ordinance. We are scheduled to have a second reading on this ordinance at the April 5 th meeting. (I've also attached a copy of the ordinance as it was introduced.) I ask Mr. Gillespie to review their request and advise whether we would need to re-introduce the Ordinance if Council decides to amend it, or whether that would be non-substantive change."
03/22/2011	2:30 P.M.	Joseph Howarth	Randy Brown	"Can we get an interpretation on the difference of what we approved and what they want?"
03/22/2011	2:35 P.M.	Millie Bonfrisco	Other recipients including all Council Members	"Joe: I think John can probably clarify it for us. From what Regina told me, apparently they asked that it be a little more specific with respect to prohibiting helicopter taxi service."
03/22/2011	2:42 P.M.	Randy Brown	Multiple recipients	"No need to accept the recommendations, this was a silly and rather obscure one! We put this on for second reading in April."
03/22/2011	9:19 P.M.	Kurt Croft	Multiple recipients	"I agree with the mayor. I don't believe too many people will be paying for a helicopter taxi ride to work if that is the concern. Wasn't P.B. presented with a pretty specific timeframe in which the chopper would arrive and depart when the idea was first introduced?"

03/23/2011	5:57 A.M.	Steven Zeuli	Various recipients including all Council Members	"Since the Heliport is in my neck of the woods, I have gotten some concerns from the residents about any increased helicopter traffic. I don't think it would be a bad idea to spell out that taxi service is not permitted."
03/23/2011	7:39 A.M.	Joseph Howarth	Various recipients including all Council Members	"Don't think that will happen. It is one guy that wants to land and take off. He needs to go up and follow the Rt 70 and 73 road."
03/23/2011	7:44 A.M.	Thomas Czerniecki	Various recipients including all Council Members	"I believe we can introduce an ordinance Tuesday that address that specific matter while also moving ahead with adoption original ordinance in its current form."
03/23/2011	8:13 A.M.	Joseph Howarth	Various recipients including all Council Members	"Sounds good to me."
03/23/2011	8:52 A.M.	Millie Bonfrisco	Various recipients including all Council Members	"Tom: introducing another ordinance on the 29 th is a touchy subject...I already advertised the meeting with the Bond Ordinance and the Resolution associated with that...if we are going to introduce another ordinance on that date, I'd need more confirmation immediately in order to re-advertise. However, if you were intending to introduce the new ordinance on April 5 th , I don't think that would be a problem."
03/23/2011	9:23 A.M.	Randy Brown	Various recipients including all Council Members	"I am against any changes to the original ordinance and will not approve any new ordinance on this issue!!!"
03/23/2011	9:45 A.M.	Joseph Howarth	Randy Brown	"I think the real issue is who on the Planning Board took it upon themselves to add to the original."
03/23/2011	9:58 A.M.	Randy Brown	Joseph Howarth	"Got it taken care of."
03/23/2011	8:09 P.M.	Debbie Hackman	Various recipients including all Council Members	"Sounds good to me also."