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OPINION

Requester: West Maui Preservation Association, Inc.
Board: Maui Planning Commission
Date: June 27, 2007
Subject: Right to Present Testimony (S RFO-P 07-23)

REQUEST FOR OPINION

Requester, through its attorney, seeks a determination as to whether the Maui Planning Commission (the "Commission") violated the Sunshine Law, part I of chapter 92, Hawaii Revised Statutes ("HRS"), during its meeting held on March 13, 2007. Although Requester asks that OIP opine on four specific questions, based upon the information provided by Requester and the Commission, OIP does not believe that the issues as framed by Requester need be addressed.¹ Rather, after reviewing the submissions, the question for OIP's consideration is simply whether the Commission denied a member of the public the right to testify during the meeting.

Unless otherwise indicated, this opinion is based solely upon the facts presented in Requester's letters to OIP dated March 15, April 11, and May 3, 2007, the letter from Ms. Colleen M. Suyama, Deputy Director of the Department of Planning,² to OIP dated March 22, 2007, and documents that were provided to OIP under cover of those letters. Those documents include the agenda for the

¹ Requester's allegations about the actions of the Commission's staff are outside of OIP's jurisdiction. Likewise, Requester's complaint about the lack of courtesy that the Commission and/or its staff extended to testifiers is not a Sunshine Law issue except insofar as it relates to the question of whether the Commission deprived a member of the public of the right to testify.

² OIP understands Ms. Suyama, as the Planning Director's designee, served as Commission staff at the meeting and that her response to OIP is made on behalf of the Commission.

Commission's March 13 meeting, a verbatim transcript relating to the Commission's consideration of the relevant agenda item and Ms. Sharyn Matin's oral testimony relating to that item, and a video recording of the meeting.

QUESTIONS PRESENTED

1. Whether a board may restrict public testimony to the subject matter the board intended an agenda item to cover, when the subject matter listed for the item on the filed agenda can reasonably be read to include proffered testimony.
2. Whether the Commission restricted Ms. Matin from presenting testimony relating to an agenda item, in violation of the Sunshine Law.

BRIEF ANSWERS

1. No. A board may not restrict testifiers from testifying on issues that relate to an agenda item, and it must broadly interpret the agenda item for the purpose of determining whether testimony is related to the agenda item. The scope of an agenda item is determined by the language used on the filed agenda, not the board's intent as to the meaning of the agenda item.
2. Yes. The transcript and video recording of the meeting reflect that Ms. Suyama, acting on behalf of the Commission, asked Ms. Matin to limit her testimony to a narrower range of issues than the agenda item reasonably encompassed. Through its accedence to Ms. Suyama's limitation of Ms. Matin's testimony, the Commission violated the Sunshine Law's public testimony requirement. However, the violation does not appear to have been intentional.

FACTS

The Commission's agenda for its March 13 meeting included under the heading "Communications":³

1. MAUI BEACH LIMITED PARTNERSHIP submitting their annual report on the disbursement of the funds in the Settlement Agreement between developer and the WEST MAUI PRESERVATION ASSOCIATION, INC.

The report itself was not a part of the agenda.

³ OIP notes that the agenda's description of the item under the heading "Communications" may be somewhat misleading to the public. OIP strongly recommends that the agenda be written more accurately to convey that the Commission intends to consider the report, instead of the communication transmitting the report, by not placing the item under such a heading.

During the developer's report, the Commission asked Ms. Matin to come up and answer questions about delays in the formation of a nonprofit organization to receive funds from the developer as outlined in the settlement agreement.⁴ Ms. Matin's discussion of that matter was in response to the Commission's request, rather than a presentation of her own testimony. Nonetheless, it appears from the transcript that the Commission was ready to move on to other items after extensively questioning Ms. Matin about the formation of the nonprofit, perhaps under the impression that her testimony was complete. However, Ms. Matin reminded the Commission that she had not yet presented her testimony on the noticed subject matter. The Commission then indicated that she could proceed with her testimony.

After Ms. Matin began to testify concerning the developer's disbursements to meet other requirements of the settlement, Ms. Suyama⁵ interrupted her several times and asked her to limit her testimony to the disbursement of funds in the settlement agreement, which she defined to be "specific monetary requirements that were identified" and "how those monies were being disbursed finally by the developer to the various organizations." Ms. Suyama argued with Ms. Matin about the scope of the agenda item and Ms. Matin ultimately limited the scope of her testimony to the subject matter Ms. Suyama had identified.

DISCUSSION

The Sunshine Law requires the Commission to allow any member of the public an opportunity to present oral testimony on any item on its agenda. Haw. Rev. Stat. § 92-3 (1993). The Commission can require that the testimony be related to the agenda item, but it cannot otherwise restrict or censor a person's testimony. WMPA asserts that Ms. Matin was not allowed to testify on information that she believed was required to be included in the report that was being presented to the Commission under the agenda item in question. The issue here, thus, is whether Ms. Matin's proffered testimony was, in fact, related to the agenda item listed.

Because the developer's report was not part of the agenda, the public was only notified of the general subject matter expected to be covered by the report but not the specifics of what the report actually included. Given this notice, the Commission could not restrict public testimony to the items actually presented in the developer's report. Rather, it could only properly limit testimony to the report's

⁴ Although the matter was certainly not the central subject listed on the agenda, it was sufficiently related to the subject matter of the report to allow the Commission to ask questions about it under the report.

⁵ Ms. Suyama is not a member of the Commission, but was acting as Commission staff at the meeting and spoke with the apparent concurrence of the Commission. OIP therefore imputes her actions and intent to the Commission.

announced general subject matter, namely: “the disbursement of the funds in the Settlement Agreement.”

From the transcript and the video recording, it appears that the Commission (as represented by Ms. Suyama) interpreted the agenda item to mean only those disbursements by the developer for which a specific sum was required in the settlement agreement. The Commission’s restriction of Ms. Matin’s testimony was based on an overly narrow reading of the agendaized subject matter.

To carry out the Sunshine Law’s intent, OIP is statutorily required to liberally construe the law’s provisions to favor open meetings and to strictly limit the exceptions to the general rule of open meetings. See Haw. Rev. Stat. § 92-1 (1993).⁶ Consistent with these instructions, OIP must construe the public’s right to “present oral testimony on any agenda item” liberally to favor public testimony. Haw. Rev. Stat. § 92-3. Thus, where it is at least arguable that an agenda item could be read to cover a particular issue, a board must accept proffered testimony on that issue. Further, a board must determine the relevant subject matter based on the specific wording it used on the agenda and may not add additional limitations or phrases after the fact in exercising its power to require that testimony be limited to the agenda item at hand.

Under that standard, OIP cannot conclude that Ms. Matin’s proffered testimony on conditions of the settlement agreement that she believed would require the developer to spend money was unrelated to the subject matter noticed by the agenda item. Clearly, Ms. Matin read “disbursement of the funds in the Settlement Agreement” more broadly than did Ms. Suyama on behalf of the Commission, but Ms. Matin’s reading was not an unreasonable one given the agenda item listed.

At the same time, though, a board does not necessarily violate the Sunshine Law by asking questions of a testifier or letting a testifier know what aspect of an

⁶ The first section of the Sunshine Law states that:

- (1) It is the intent of [the Sunshine Law] to protect the people's right to know;
- (2) The provisions requiring open meetings shall be liberally construed; and
- (3) The provisions providing for exceptions to the open meeting requirements shall be strictly construed against closed meetings.

Id.

agenda item is of particular interest to the board. Indeed, since those who testify generally seek to persuade the board and have a limited time to do so, it is likely that many testifiers would welcome such guidance. Based on both the transcript and the video recording of the meeting, OIP concludes that Ms. Suyama may have intended to guide Ms. Matin toward the issues of particular interest to the board rather than to prohibit her from testifying on the issues she had first raised.⁷ However, Ms. Suyama's instruction regarding the scope of the agenda item did have the effect of restricting Ms. Matin's ability to testify. This restriction violated the Sunshine Law, but it is OIP's opinion that the violation was not intentional.

In summary, the Commission may not restrict testifiers from testifying on issues that fall within the general subject matter of an agenda item. Although the Commission can require that testimony be related to the agenda item, the Commission must interpret the agenda item broadly for the purpose of determining whether testimony is related to the agenda item.

RIGHT TO BRING SUIT

Any person may file a lawsuit to require compliance with or to prevent a violation of the Sunshine Law or to determine the applicability of the Sunshine Law to discussions or decisions of a government board. Haw. Rev. Stat. § 92-12 (1993). The court may order payment of reasonable attorney fees and costs to the prevailing party in such a lawsuit. *Id.*

OFFICE OF INFORMATION PRACTICES

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⁷ WMPA asks OIP to address separately the issue of Ms. Suyama's demeanor toward Ms. Matin during this interchange, which WMPA argues was inappropriately badgering and berating in tone and constituted a tirade. OIP concludes that Ms. Suyama's tone of voice was at most testy, and while that is relevant to the issue of whether Ms. Suyama's statements reasonably had the effect of restricting Ms. Matin's testimony, it does not create a separate issue for OIP's review.