VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 23-CV-00032

Stephen Whitaker v. Central Vermont Public Safety Authority et al

**DECISION ON SECOND MOTION TO DISMISS**

Stephen Whitaker challenges actions of the Central Vermont Public Safety Authority. On May 16, 2023, the court dismissed part of the case, leaving two counts remaining, against the Authority alone. In Count 1, Mr. Whitaker asserts that the Authority violated Vermont's Open Meeting Law (OML) when it failed to record Board meetings held remotely during the COVID emergency; he further asserts that it violated the Public Records Act (PRA) when it failed to provide copies of recordings to him. In Count 3, Mr. Whitaker asserts that the Authority failed to undertake certain mandatory statutory duties. The Authority has now filed a second motion to dismiss.[1] It argues that, after the inception of this litigation, the Authority dissolved itself, and that dissolution moots all remaining claims.[2] *See* 24A V.S.A. ch. 901 § 50 (dissolution). It argues alternatively that it never had the obligation to record remote meetings and that it cannot be compelled to produce recordings made by an unrelated third party. The court grants the motion in substantial part.

*Count 3—mandatory duties*

The Authority's dissolution plainly renders Count 3 moot. Under this count, Mr. Whitaker asks the court to compel the Authority to undertake mandatory statutory duties. All of these duties contemplate the continued existence and operation of the Authority. Mr. Whitaker argues that his claim

[1] More particularly, following the dismissal decision, the Authority switched counsel, and instead of answering, its new counsel filed another motion to dismiss. Rule 12 does not contemplate serial, pre-answer motions. Instead, it contemplates one consolidated motion to dismiss. *See* V.R.C.P 12(g); 5C Wright & Miller, Federal Practice & Procedure: Civil 3d § 1384 ("Simply stated, the objective of the consolidation rule is to eliminate unnecessary delay at the pleading stage. Subdivision (g) contemplates the presentation of an omnibus pre-answer motion in which the defendant advances every available Rule 12 defense and objection he may have that is assertable by motion. The defendant cannot delay the filing of a responsive pleading by interposing these defenses and objections in piecemeal fashion, but must present them simultaneously." (footnote omitted)). Here, however, Mr. Whitaker has not objected to the Authority's procedural informality. Moreover, it would elevate form over substance to deny the motion on this technicality and require the Authority to answer and then assert its arguments in a motion for judgment on the pleadings. Thus, in the interest of judicial economy, the court excuses the informality and proceeds to the substance of the second motion to dismiss.

[2] The Authority represents that its dissolution is subject to a reservation of resources and authority sufficient to enable it to complete this litigation, apparently the only thing left to do in its winding up process. Due to these residua, the Authority's contention that because it does not exist, it has no ability to comply with the PRA is unavailing.

is not moot because the Authority's attempted dissolution was procedurally defective.

The Vermont Supreme Court has described the mootness doctrine as follows:

> In general, a case is moot when "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." "The mootness doctrine derives its force from the Vermont Constitution, which, like its federal counterpart, limits the authority of the courts to the determination of actual, live controversies between adverse litigants." Even if a case originally presented an actual controversy in the trial court, the case must remain live throughout the appellate process for us to examine the issues. Thus, a change in facts or circumstances can render a case moot if this Court can "no longer grant effective relief."

*Houston v. Town of Waitsfield*, 2007 VT 135, ¶ 5, 183 Vt. 543 (citations omitted).

This is not an appropriate case for a collateral debate over the Authority's dissolution process. Rather, the court presumes the process has been untaken as contemplated by statute. *See Bacon v. Bos. & M.R.R.*, 83 Vt. 421, 76 A. 128, 134 (1910) ("Where the regularity of an official act is dependent upon some coexisting or pre-existing act or fact, there is a presumption in favor of the doing of such act or the existence of such fact."). Even if there were some defect in that process, which defect could properly be raised in this case, and Mr. Whitaker could be entitled to some form of relief as a result, that relief presumably would be limited to efficiently curing the procedural defect, not indefinitely reviving an entity that is trying to dissolve. Thus, in either event, there is no point to the relief that Mr. Whitaker seeks in Count 3. Mandamus is not undertaken lightly—it "is an extraordinary writ and invokes a drastic remedy." *Whiteman v. Brown*, 128 Vt. 384, 386 (1970). There is no set of circumstances in which it could be appropriate here. Count 3 is moot.

*Mootness vis-à-vis the OML and PRA claims*

The Authority argues that the same analysis should apply to Mr. Whitaker's OML claim and, by extension, his PRA claim, both of which preceded the Authority's dissolution. This argument raises the unwelcome specter of the judiciary's sanctioning a dissolution that may have been initiated to avoid transparency obligations under the OML and PRA—not that there is any basis for suspecting that here. The court need not wade into these waters, however, as the claims are easily resolved on their merits.

*Count 1—the OML claim*

The Authority's alternative OML argument is compelling: it was never subject to the obligation to make recordings in the first place. As the court explained in its earlier decision, prior to the pandemic, the OML permitted "one or more" Board members (as relevant here) to attend meetings remotely. The public could still attend in-person, and there was no requirement that such a meeting, or

any meeting, be recorded unless it was one providing a "forum for public comment on a proposed rule"—clearly not the case here. 1 V.S.A. § 312(a)(1), (a)(2)(A). In January 2022, in response to the pandemic, the legislature temporarily modified open meeting procedures to allow for fully remote meetings; it included a provision requiring the recording of some such meetings. 2021, No. 78 (Adj. Sess.), § 2(c). Before Act 78 expired a year later, the legislature adopted 1 V.S.A. § 312A, which essentially makes the same procedures permanently available but only during declared states of emergency. 2021, No. 157 (Adj. Sess.), § 8. The provision requiring recording of fully remote meetings now appears at 1 V.S.A. § 312a(d).

Both Acts enable remote meeting procedures for all "public bodies." The duty to record such meetings, however, extends only to "the legislative body of each municipality and each school board." 2021, No. 78 (Adj. Sess.), § 2(c); 1 V.S.A. § 312a(d). The expressions are not synonymous. Courts presume that the legislature chooses its language "advisedly," and that different expressions are intended to have different meanings. *See Vermont Nat'l Tel. Co. v. Dep't of Taxes*, 2020 VT 83, ¶¶ 26–27, 213 Vt. 421. "Public body" is an extremely broad expression and, for purposes of both Act 78 and § 312a(d), a clear reference to 1 V.S.A. § 310(4). That provision defines "public body" as "any board, council, or commission of the State or one or more of its political subdivisions, any board, council, or commission of any agency, authority, or instrumentality of the State or one or more of its political subdivisions, or any committee of any of the foregoing boards, councils, or commissions." The Authority is an "authority" of its member municipalities, which in turn are clearly "political subdivisions" of the State. Thus, the Authority's Board is clearly a "public body."

"The legislative body of each municipality" is a much narrower expression than "public body." The leading treatise distinguishes between municipalities and quasi-municipalities: "Public corporations are either (1) municipal corporations proper, or (2) quasi-municipal corporations." 1 McQuillin Mun. Corp. § 2:3 (3d ed.). Municipal corporations are "invested with the power of local legislation," *id*. § 2:8, and generally have "the power of local government, as distinguished from possessing powers that are merely executive and administrative in their character," *id*. § 2:9; *see also id*. § 2:10 ("A municipality has the power to adopt and amend local laws for the protection, safety, health and general welfare of its inhabitants, subject to the limitations that they shall not be inconsistent with nor contravene laws of the state, and that they bear a reasonable relation to the objectives sought to be achieved.").

Quasi-municipal corporations, on the other hand, "are created to serve a particular government purpose . . . . They perform ancillary functions in government more easily and perfectly by devoting to

them, because of their character, special personnel, skill, and care and they are an extension of the government that have been created to more efficiently and effectively manage the provision of necessary services to the public. [They] are public in nature, but not, strictly speaking, municipal corporations. They are bodies that possess a limited number of corporate powers and which are low in the scale of corporate existence." *Id*. § 2:17 (footnotes omitted).

According to McQuillin, authorities are "created to perform a special purpose or purposes, or to perform some of the functions of privately-owned public service corporations. Such authorities are generally established by a special act which, among other things, prescribes the organization and structure of the body to be established and its operational methods, and confers appropriate powers." *Id*. § 2:34; *see also id*. ("Such authorities have not been considered to be municipal corporations in the strict sense of that term, although they may be clothed with some of their attributes and be publicly owned and controlled.").

In the classic parlance of McQuillin, the Authority is not a municipality. It is an authority, at most a quasi-municipality. It was organized for a limited administrative or executive purpose: "to provide the member towns in the Authority with an affordable, integrated, efficient system of public safety services (fire, police, ambulance, dispatch) that protects public welfare and provides rapid responses with highly qualified personnel when emergency situations arise." 24A V.S.A. ch. 901 § 1. That limited mission otherwise would be undertaken by each member municipality primarily as an extension of its administrative or executive, not legislative, functions. The legislature appears to have recognized this distinction. It specifically provided: "The Authority shall have the benefit of sovereign immunity to the same extent that a municipality of the State does." *Id*. § 4. Plainly, there would be no need for this provision if the legislature in fact thought that the Authority was a municipality. Even if one were to conclude that the general definition of municipality, 1 V.S.A. § 126, encompasses the Authority, the narrower uses of the expression in 2021, No. 78 (Adj. Sess.), § 2(c), 1 V.S.A. § 312a(d), and 24A V.S.A. ch. 901 § 4 would prevail. *See Town of Brattleboro v. Garfield*, 2006 VT 56, ¶ 10, 180 Vt. 90 ("[W]here two statutes deal with the same subject matter, and one is general and the other specific, the more specific statute controls.").

Again, the duty to record remote meetings extended only to "the legislative body of each municipality and each school board." 2021, No. 78 (Adj. Sess.), § 2(c); 1 V.S.A. § 312a(d). Even if one to were to characterize the Authority as a municipality of some kind, insofar as it is not substantially organized to legislate, its Board is not a "legislative body." Thus, the Authority was not

required to record its remote Board meetings.[3] In short, there is no OML liability.

*Count 1—the PRA claim*

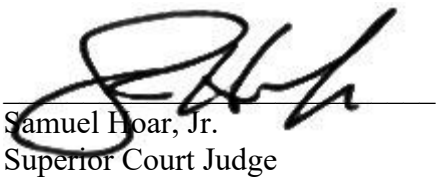
Resolution of the OML issue does not resolve the PRA issue. While Mr. Whitaker's Complaint proceeds from the premise that the Authority did not record its Board meetings—rather, they were recorded by an unaffiliated third party—the court recognized in the first dismissal decision a lack of clarity as to whether, irrespective of any obligation to record meetings, the Authority nevertheless possessed any recordings that had not been provided to Mr. Whitaker. That question remains unanswered. In this motion, counsel for the Authority represented that "video recordings of all but one meeting date raised in his Complaint were provided to Mr. Whitaker, as he requested." Motion to Dismiss at 1 n.2 (filed June 5, 2023). That representation, of course, is incompetent on a motion to dismiss. Moreover, even were the court to accept the representation as established fact, it remains unclear whether the Authority possesses the recording of that one meeting. Thus, counsel's representation does not provide a proper basis for dismissing the PRA claim.

It makes little sense, however, to require further motion practice on the question of what recordings the Authority actually has. What is clear is that if the Authority possesses a recording of a meeting, regardless of how that meeting was recorded, it is required to produce it. Equally, if the Authority does not possess the recording, it is under no obligation to facilitate its production. Accordingly, in the interest of the efficient resolution of this case, *see* V.R.C.P 1, the court will require that the Authority certify that it has provided copies of all meeting recordings in its possession.

**ORDER**

The court grants the motion to dismiss in part and denies it in part. Count 3 is dismissed, as is the Count 1 OML claim. On the Count 1 PRA claim the Authority, within 30 days, shall certify that it has provided copies of all meeting recordings in its possession. Upon the court's receipt of that certification, it will close the case.

Electronically signed pursuant to V.R.E.F. 9(d): 8/14/2023 11:17 AM



Samuel Hoar, Jr.
Superior Court Judge

[3] The court acknowledges that this conclusion is at odds with its earlier observation that "[i]t appears obvious that § 312a(d) imposes on the Board a duty to record remote hearings." Decision on Motion to Dismiss, 3. That observation, unfortunately, flowed from a less careful analysis of the statute than the court has undertaken here. The court therefore declines to apply the "law of the case" doctrine. "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).