



THE COMMONWEALTH OF MASSACHUSETTS
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Brian W. Riley, Esq.
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By e-mail only: briley@k-plaw.com

RE: Open Meeting Law Complaint

Dear Attorney Riley:

This office received a complaint from Marc Dorwart on October 13, 2020, alleging that the Winchendon Board of Selectmen (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25.¹ The complaint was originally filed with the Board on July 28 and you responded, on behalf of the Board, by letter dated August 11. The complaint alleges that the Board entered into executive session for an improper purpose on July 13 and failed to conduct the procedural requirements prior to convening in such executive session.

Following our review, we find that the Board violated the Open Meeting Law by convening in executive session for an improper purpose but otherwise complied with the required procedural steps prior to convening in executive session on July 13. In reaching this determination, we reviewed the original complaint, the Board’s response to the complaint, and the complaint filed with our office requesting further review. We also reviewed the notice and open and executive session minutes of the Board meeting held on July 13, as well as a video recording of the July 13 meeting.²

¹ Unless otherwise indicated, all dates in this letter refer to the year 2020.

² A video recording of the Board meeting held on July 13 is available at:
<https://www.youtube.com/watch?v=yhSxzdGoXV8&feature=youtu.be>.

FACTS

We find the facts as follows. In December of 2018, Town Administrator Kevin Hickey sent a letter to certain residents who lived on Mellen Road in the Town of Winchendon advising them that the Town had decided to cease recognition of Mellen Road as a public way and therefore the residents would be responsible for the maintenance and repair of the road, despite the Town's maintenance of the road for the past 18 years.

The Board held a meeting on July 13 in which all five Board members participated remotely. After discussing the noticed open session topics, the Board unanimously voted by roll call to enter into executive session "under Exemption No. 6 to consider the purchase, exchange, lease or value of real estate, if the Chair so declares with the subject being Mellen Road." Chair Michael Barbaro declared that an open meeting would have a detrimental effect on the Board's negotiating position and stated that the Board would not reconvene in open session but would adjourn the meeting at the conclusion of the executive session.

During the executive session, the Board discussed crafting a warrant article to be presented at Town Meeting that would provide funding for road improvements to Mellen Road, discussed the amount of funding to include on the warrant article, and discussed establishing boundaries for Mellen Road so as to determine the potential costs to the Town of maintaining the road.

During the Annual Town Meeting held on September 28, Town residents unanimously voted to "transfer from Free Cash the sum of \$106,125 to make road improvements on the unaccepted portion of Mellen Road"; passed over a transfer of funds in the amount of \$4,200 "to make temporary road repairs on the unaccepted portion of Mellen Road"; and unanimously voted "to officially recognize the section of Mellen Road by prescription beginning" at #404, and extending northerly to #215, for the purpose of maintenance and repair.

DISCUSSION

The Open Meeting Law was enacted "to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based." Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72 (1978). The Open Meeting Law requires that all meetings of a public body be conducted in an open session, with some exceptions. G.L. c. 30A, §§ 20(a), 21(a). A public body may enter an executive, or closed, session for any of the ten purposes enumerated in the Open Meeting Law provided that it has first convened in an open session, that a majority of members of the body have voted to go into executive session, that the vote of each member is recorded by roll call and entered into the minutes, and the chair has publicly announced whether the open session will reconvene at the conclusion of the executive session. G.L. c. 30A, §§ 21(a), (b); see also OML 2014-94.³

³ Open Meeting Law determinations may be found at the Attorney General's website, <https://www.mass.gov/the-open-meeting-law>.

Executive session topics must be described, both in the meeting notice and in an announcement during open session, in as much detail as possible without compromising the purpose for which the executive session was called. See G.L. c. 30A, § 21(b)(3); see also District Attorney for the N. Dist. v. Sch. Comm. of Wayland, 455 Mass. 561, 567 (2009) (“[a] precise statement of the reason for convening in executive session is necessary ... because that is the only notification given the public that a [public body] would conduct business in private, and the only way the public would know if the reason for doing so was proper or improper”).

One permissible reason for a public body to convene in executive session is “to consider the purchase, exchange, lease or value of real property if the chair declares that an open meeting may have a detrimental effect on the negotiating position of the public body.” G.L. c. 30A, § 21(a)(6) (“Purpose 6”). Purpose 6, narrowly construed, permits a public body to meet in executive session to protect its negotiating position when seeking to purchase, exchange, or lease real estate, or to discuss the value of real estate where it has a negotiating position relative to that property. See G.L. c. 30A, § 21(a)(6); Allen v. Board of Selectmen of Belmont, 58 Mass. App. Ct. 715, 719-721 (2003); OML 2019-143; OML 2016-50. Purpose 6 is intended to preserve confidentiality in negotiating the value of the property to be purchased, exchanged or leased to avoid putting the public body at a disadvantage in its negotiations for the property. See District Atty. for the Plymouth Dist. v. Board of Selectmen of Middleborough, 395 Mass. 629, 633 n.5 (1985); OML 2019-10; OML 2016-50.

The complaint challenges the propriety of the Board’s July 13 executive session meeting and alleges that the Board failed to follow the procedural requirements prior to convening in that executive session. Here, the Board properly convened in open session, approved a vote by roll call to enter executive session, and announced that it would not resume in open session but would adjourn following its executive session. Moreover, the Chair’s announcement during the July 13 meeting provided the specific executive session purpose, identified the property to be discussed, and declared that deliberating in open session would have a detrimental effect on the public body’s negotiating position. We find that the Board complied with the required procedural steps prior to convening in executive session on July 13 and therefore did not violate the Open Meeting Law. See OML 2018-73.

We next determine whether the Board convened in executive session for a proper purpose. The Board argues that the executive session was proper because the discussions involved whether Mellen Road “is a public way in which case the Town could be liable for costs of repairs based on the ‘value’ of Mellen Road.” Following our review of the executive session minutes, we find that the Board’s discussions were not appropriate under Purpose 6.

We recognize that designating a road as a public way would require the Town to either purchase the land or take it by eminent domain and therefore could involve discussions by the Board of the value of Mellen Road. See G.L. c. 82, § 24 (within one hundred and twenty days after the termination of the town meeting at which the laying out, alteration or relocation of such town way or private way is accepted by the town, the Board shall acquire such land by purchase or otherwise, or adopt an order for the taking of such land by eminent domain). Here, however, the discussions during the July 13 meeting did not involve the value of property to be purchased because Town Meeting had not occurred and therefore whether to accept Mellen Road as a

public way had not yet been decided. As such, the Board did not, at that time, have a negotiating position to protect with respect to the value of property to be purchased, exchanged or leased. Moreover, the discussions during the July 13 meeting did not focus on the value of Mellen Road in the event that the Board were to proceed with negotiating to acquire that land; rather, the discussions during the July 13 meeting related to the potential costs to the Town for maintaining Mellen Road and whether to support a warrant article which would provide for funding to maintain the road. Since the Board's discussions did not relate to the purchase, exchange, lease or value of real property, we find that the Board entered executive session without a proper purpose on July 13. See OML 2020-14. We therefore find that the Board violated the Open Meeting Law and we order the Board to release to the public the July 13 executive session meeting minutes. The Board may not redact or withhold the minutes in any way. See G.L c. 30A, § 22(f) (the minutes of any executive session may be withheld from disclosure to the public as long as publication may defeat the lawful purposes of the executive session; *provided, however, that the executive session was held in compliance with the Open Meeting Law*); District Atty. for Plymouth Dist. v. Bd. of Selectmen of Middleborough, 395 Mass. 629, 634 (1985) (“We view [the Open Meeting Law] as a statutory public waiver of any possible privilege of the public client in meetings of governmental bodies except in the narrow circumstances stated in the statute.”); OML 2019-164; OML 2017-23; OML 2015-120.

CONCLUSION

We find that the Board violated the Open Meeting Law by meeting in executive session on July 13 without a proper purpose. We order immediate and future compliance with the law's requirements, and we caution that similar future violations could be considered evidence of intent to violate the law. Additionally, we order the Board to publicly release its July 13 executive session meeting minutes. The Board must certify to this office within thirty (30) days of the date of this letter that it has released the executive session minutes. See 940 C.M.R. 29.07(4).

We now consider the complaint addressed by this determination to be resolved. This determination does not address any other complaints that may be pending with our office or the Board. Please feel free to contact our office at (617) 963-2540 if you have any questions regarding this letter.

Sincerely,



KerryAnne Kilcoyne
Assistant Attorney General
Division of Open Government

cc: Marc Dorwart – By e-mail only: marcdorwart@gmail.com
Winchendon Board of Selectmen c/o Linda Daigle, Executive Assistant – By e-mail only:
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This determination was issued pursuant to G.L. c. 30A, § 23(c). A public body or any member of a body aggrieved by a final order of the Attorney General may obtain judicial review through an action filed in Superior Court pursuant to G.L. c. 30A, § 23(d). The complaint must be filed in Superior Court within twenty-one days of receipt of a final order.