

August 11, 2020

**Brian W. Riley**

BY ELECTRONIC MAIL ONLY ([openmeeting@state.ma.us](mailto:openmeeting@state.ma.us))

Carrie Benedon, Esq.  
Director, Division of Open Government  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108

Re: Town of Winchendon – Board of Selectmen  
Open Meeting Law Complaint from Marc Dorwart, dated July 28, 2020

Dear Attorney Benedon:

Please be advised that this office serves as Town Counsel to the Town of Winchendon. The Town’s Board of Selectmen (“Board”) is in receipt of an Open Meeting Law Complaint dated July 28, 2020 from Mr. Marc Dorwart (“Complaint”). A copy of the Complaint is enclosed. The Complaint claims that the Board did not have a proper purpose for the executive session it held on July 13, 2020. It further alleges that the Board did not make a motion to enter executive session; the Chair did not state whether the Board would reenter open session or close the meeting after the executive session; and that the Board “changed” the purpose of entering executive session after announcing it.

The Board denies the allegations of the Complaint. It should first be noted that in light of the State of Emergency existing at this time and the Governor’s Order of March 12, 2020 suspending aspects of the Open Meeting Law, the July 13, 2020 Board meeting was conducted entirely remotely on Zoom. The Board’s videos of remote meetings are located on the Town website at <https://www.townofwinchendon.com/board-selectmen/pages/2020-meeting-videos> and the relevant portion of the July 13, 2020 meeting for the Complaint begins at approximately the 1:55 hour mark near the end of the video.

As shown on this video, the Chair did make a motion to enter executive session under Purpose 6 (“to consider the purchase, exchange, lease or value of real property”), stating that an open meeting could have a detrimental effect on the Town’s position, and after some discussion with attendees, a roll call vote to enter executive session was taken. The Chair also stated that the meeting would not resume after the executive session. There is no basis, therefore, for these aspects of the Complaint.

This leaves the basis for using Purpose 6 as the remaining point of contention. There has been debate over the past two years between the Town and the residents of Mellen Road (specifically “Middle Mellen Road”), stemming from the Board’s determination in 2018 that where

Carrie Benedon, Esq.

August 11, 2020

Page 2

records show that Mellen Road was discontinued as a public way as long ago as 1914, it was neither an obligation or even appropriate for the Town to spend public funds to maintain or plow the roadway. By letter dated April 21, 2020, an attorney retained by some residents of Mellen Road submitted arguments to the Board that, in summary, either the roadway is public now or that the Town is obligated to accept it. A copy of this April 21 letter is enclosed for reference. While this letter makes allegations of damages suffered by abutters, Town Counsel advised the Town Manager that the letter did not rise to the level of “imminently threatened litigation” as interpreted by the Division for utilizing Purpose 3, but it did concern the “value” of Mellen Road for Purpose 6 to apply.

While the Complaint alleges that the Board “changed” the reason for entering executive session, the reason for the session was that the abutters, via the April 21 letter, claim that either 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) or that the Town is obligated to establish the roadway as a public way. Establishment of a public way on private property requires the public authority laying out the way to acquire real property rights within the layout of the way sufficient to provide for the public use. See G.L. c.82, §24. Like any other rights in private property, those rights must be acquired from the relevant property owners by either negotiated sale or exercise of eminent domain. In either case those rights have a monetary value, and the determination of what compensation the Town is willing to pay for those rights, and thus whether the Town is willing or able to lay out a way as public, may be discussed in executive session under Purpose 6. The Chair’s motion identified Mellen Road as the property at issue, and the abutters’ April 21 letter was cited as the reason an open meeting may have a detrimental effect on the Town’s negotiating position. This is all that is required for purposes of a motion to enter executive session under Purpose 6.

While the Board was not discussing purchasing Mellen Road in the typical sense, even if the Board decided to seek to establish Mellen Road as a public way, that is not a requirement to use Purpose 6. See OML 2016-93 (purchase price only one consideration in negotiating over real property “value” where other contingencies exist) and OML 2016-46 (use of Purpose 6 valid after purchase and sale agreement with purchase price executed, based on remaining issues and contingencies).

Carrie Benedon, Esq.

August 11, 2020

Page 3

In summary, the Board submits that its July 13, 2020 executive session was properly noticed, the motion to enter the session met statutory requirements, and the subject matter was appropriate for Purpose 6. The Board submits that no remedial action is needed.

Very truly yours,



Brian W. Riley

BWR/cqm

Enc.

cc: Keith Hickey, Town Manager  
Marc Dorwart



# OPEN MEETING LAW COMPLAINT FORM

Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108

Please note that all fields are required unless otherwise noted.

## Your Contact Information:

First Name: Marc

Last Name: Dorwart

Address: [REDACTED]

City: Winchendon

State: MA

Zip Code: 01475

Phone Number: [REDACTED]

Ext. [REDACTED]

Email: [REDACTED]

Organization or Media Affiliation (if any): \_\_\_\_\_

Are you filing the complaint in your capacity as an individual, representative of an organization, or media?

(For statistical purposes only)

Individual

Organization

Media

## Public Body that is the subject of this complaint:

City/Town

County

Regional/District

State

Name of Public Body (including city/  
town, county or region, if applicable):

Board of Selectmen

Specific person(s), if any, you allege  
committed the violation:

Manager Keith Hickey, Chair Mike Barbaro, Vice Chair Richard Ward

Date of alleged violation:

7/13/20

## Description of alleged violation:

Describe the alleged violation that this complaint is about. If you believe the alleged violation was intentional, please say so and include the reasons supporting your belief.

Note: This text field has a maximum of 3000 characters.

At the end of the July 13, 2020 Winchendon BOS meeting, town manager Keith Hickey stated the Select Board would go into executive session for reason #6 as stated in the meeting agenda "Exemption No. 6- To consider the purchase, exchange, lease or value of real estate, if the Chair so declares - Mellen Road".

As Mellen Road is not being purchased, exchanged or leased and there is no presumed reason for its valuation, I challenged the Board to provide a reasonable basis for a closed door meeting. Mr. Hickey stated that I could not do that. I paraphrased from the Attorney General's Open Meeting Law Presentation Handout that states that "a body must be able to demonstrate a reasonable basis for this claim if challenged." Mr. Hickey then stated a new reason for the closed meeting - to discuss a letter sent to the town by an attorney representing a group of residents residing along Mellen Rd. I then quoted the Open Meeting Law Handbook where it states the Executive Session Purpose 6 is "to consider purchase, sale lease or value of real property" which the BOS agenda and Mr. Hickey had already stated to be "Mellen Road."

Mr. Hickey and Chair Mr. Barbaro then again amended their reason for executive session to be the valuation of Mellen Road refusing to demonstrate a reasonable explanation. I asked Mr. Barbaro "who owns Mellen Road?" as any reason for a closed discussion of the value of the road would suggest the Chair would know who owns the road. He refused to answer.

I stated my objection to a closed meeting as the Board provided no demonstration of a legal reason for executive session. Mr. Ward then reached for his keyboard closing the open meeting.

There was no vote to go to executive session. Chair, Mr. Barbaro, did not state all subjects that may be revealed without compromising the purpose for which the executive session was called. The chair did not publicly announce whether the open session will reconvene at the conclusion of the executive session.

The letter from the attorney Mr. Hickey originally stated as being the subject of the executive session does not mention or require a discussion of the value of the real property Mellen Road. The regular formalities required to go in to executive session did not take place. Along with other citizens, I do not feel the body had any intention of complying with the spirit or formality of the open meeting laws. The letter in question lays out several wrong doings and blatant violations of Massachusetts law committed by the town manager and allowed by the BOS body.

What action do you want the public body to take in response to your complaint?

Note: This text field has a maximum of 500 characters.

Immediately and in the future comply with open meeting law.  
Attend formal training on open meeting law.  
Produce the minutes and video of the executive session.  
Nullify in whole any action taken at the meeting.

## Review, sign, and submit your complaint

### I. Disclosure of Your Complaint.

**Public Record.** Under most circumstances, your complaint, and any documents submitted with your complaint, is considered a public record and will be available to any member of the public upon request.

**Publication to Website.** As part of the Open Data Initiative, the AGO will publish to its website certain information regarding your complaint, including your name and the name of the public body. The AGO will not publish your contact information.

### II. Consulting With a Private Attorney.

The AGO cannot give you legal advice and is not able to be your private attorney, but represents the public interest. If you have any questions concerning your individual legal rights or responsibilities you should contact a private attorney.

### III. Submit Your Complaint to the Public Body.

The complaint must be filed first with the public body. If you have any questions, please contact the Division of Open Government by calling (617) 963-2540 or by email to [openmeeting@state.ma.us](mailto:openmeeting@state.ma.us).

By signing below, I acknowledge that I have read and understood the provisions above and certify that the information I have provided is true and correct to the best of my knowledge.

Signed: \_\_\_\_\_

Date: JULY 28 2020

For Use By Public Body  
Date Received by Public Body:

For Use By AGO  
Date Received by AGO: