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August 4, 2023

OML 2023 – 128

VIA EMAIL ONLY

Michael A. Bergeron, Esq.
Reservitz Bergeron & Associates
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RE: Open Meeting Law Complaint

Dear Attorney Bergeron:

This office received five complaints from Attorney Margaret Sheehan on behalf of Community Land & Water Coalition and Save the Pine Barrens alleging that the Plymouth Select Board (the “Board”) and the Plymouth Zoning Board of Appeals (the “ZBA”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaints were originally filed with the Board and the ZBA on or about December 6, 2022,¹ December 11, 2022, and January 30, 2023. You responded on behalf of the bodies by letters dated January 3 and March 1, 2023.

Together the complaints allege that with respect to a November 15, 2022, meeting 1) the Board and the ZBA held a joint executive session for an improper purpose; 2) the ZBA did not post notice or create minutes for the executive session; 3) the Board’s meeting notice was insufficiently specific; 4) the Board acted in its capacity as the board of water commissioners without posting notice that it would do so; and 5) the Board’s minutes of the executive session are insufficient.²

¹ There is some dispute about whether the original December 6, 2022, complaint was signed by Attorney Sheehan. The Board asserts that the copy of the complaint filed with the Town Clerk was not signed or dated. On this basis the Board declined to formally address the complaint. If an Open Meeting Law complaint is not signed, then a public body may, under 940 CMR 29.05(1), choose not to address the complaint. Regardless, the Attorney General may review such complaints if filed with our office. See 940 CMR 29.05(1) (explaining that a public body need not address unsigned or anonymous complaints and that the Attorney General will not investigate anonymous complaints).

² The requests for further review raise additional allegations, mostly pertaining to whether the public bodies followed proper procedure when responding to the complaints. We decline to review allegations raised in the requests for further review as they were not raised in a formal complaint filed with the public bodies. See G.L. c. 30A, § 23(b); 940 CMR 29.05(1); OML 2022-53; OML 2019-76; OML 2012-92.

Following our review, we find that the Board and the ZBA violated the Open Meeting Law in all of the ways alleged except with respect to the allegation concerning the Board acting as the board of water commissioners. In reaching this determination, we reviewed the Open Meeting Law complaints, the Board's and the ZBA's responses, the requests for further review, and additional communications from Attorney Sheehan and Attorney Bergeron.³ We also reviewed the Board's notice and minutes for the November 15 executive session. Finally, we communicated by phone with Attorney Bergeron and Derek Brindisi, the Town Manager who presented to the Board and the ZBA during the November 15 executive session.

FACTS

We find the facts to be as follows. The complaints relate to a development project proposed by Claremont Plymouth LLC ("Claremont") and Claremont's request before the ZBA for a special permit. On November 10 the Board posted notice for a meeting to be held on November 15. The notice stated at the top—in large, bolded text—"PLYMOUTH SELECT BOARD" and then provided the date, time, and place of the meeting. The second topic listed on the notice stated, in relevant part:

Executive Session

The Select Board and Zoning Board of Appeals will hold an Executive Session pursuant to Massachusetts General Laws, Chapter 30A, Section 21(a), clause 6, to consider the purchase, exchange, lease, or value of real property; if an open meeting may have a detrimental effect on the bargaining, negotiation, and the chair so declares.

❖ 174 Colony Place, Lot 26-26 and 26-30 on Plat 104

In addition to being posted on the Town's calendar webpage, the notice was also posted to the Board's webpage, but not to the ZBA's webpage. The ZBA did not post its own notice for the November 15 meeting.

The November 15 meeting was held as scheduled. A quorum of the ZBA's voting members, in addition to its two alternate members, attended the meeting. According to the meeting minutes, after calling the meeting to order the chair of the Board declared that discussing the purchase, exchange, lease, or value of real property at 174 Colony Place in open session would have a detrimental effect on "the position of the Town" and the Board voted by roll call to enter executive session. Next, the chair of the ZBA declared that discussing the purchase, exchange, lease, or value of real property at 174 Colony Place in open session would have a detrimental effect on "the position of the Town." Thereafter, the ZBA, including its alternate members, voted by roll call to enter executive session.

³ For the sake of clarity, we refer to you in the third person.

The minutes of the November 15 executive session—which were approved by the Board on January 10, 2023—have been released to the public. The minutes summarize information provided by Derek Brindisi, the Town Manager, regarding the Town’s water supply, a potential public/private partnership with Claremont for a “booster pump” station, and options the ZBA was considering with respect to the possibility of Claremont making a payment in lieu of building affordable housing units. The minutes also record a vote taken by the Board, acting as the board of water commissioners, “to waive any water, sewer, and building fees for the 174 Colony Place (Lot 26-26 and 26-30 on Plat 104), 5A & 5B, contingent upon the Zoning Board of Appeals approval.” The minutes do not summarize any discussion by members of the Board or the ZBA.

Mr. Brindisi explained in a telephone interview with our office that the primary purpose of the joint executive session was to allow Mr. Brindisi and the ZBA to present information to the Board regarding negotiations the ZBA was engaged in with Claremont about the possibility of Claremont making a payment in lieu of building affordable housing units. Mr. Brindisi explained that he and the ZBA attended the meeting to present this matter to the Select Board so that the Town could respond to Claremont with an acceptable payment amount. Mr. Brindisi further explained that the issue of the Town’s water supply was discussed during the executive session because the proposed development project would place additional demand on the Town’s water supply. Finally, Mr. Brindisi described the executive session as a very interactive discussion, with members of the Board asking many questions and members of the ZBA answering those questions.

DISCUSSION

I. The November 15 Executive Session Was a Joint Meeting of the Board and the ZBA.

The Open Meeting Law defines “meeting” as “a deliberation by a public body with respect to any matter within the body’s jurisdiction.” G.L. c. 30A, § 18. The Law excludes from the definition of “meeting” the “attendance by a quorum of a public body at a meeting of another public body that has complied with the notice requirements of the open meeting law, so long as the visiting members communicate only by open participation in the meeting on those matters under discussion by the host body and do not deliberate.” Id.

The complaints allege that the executive session held on November 15 was a joint meeting of the Board and the ZBA. The ZBA initially asserted that its attendance at the November 15 executive session fell within the exception to the definition of “meeting” for attendance at the meeting of another public body because it was “the Select Board which claimed executive session for the meeting on November 15th[,] . . . the ZBA was not the public body claiming executive session.”⁴ Later, in response to one of the January 30 complaints, the ZBA

⁴ In a separate letter addressed to this office and dated January 27, the ZBA additionally asserted that, because it believes that its participation in the November 15 meeting fell within the exception to the definition of “meeting” for attendance at the meeting of another public body, the Attorney General does not have jurisdiction to review this complaint. We reject this assertion. Determining whether the ZBA’s participation in the November 15 meeting constituted a “meeting” under the Open Meeting Law for which the ZBA should have posted notice and kept

asserted that the language in the Board’s notice “[t]he Select Board and Zoning Board of Appeals will hold an Executive Session . . .” “provides clarity regarding the lawful notice posted for a joint executive session of the two boards.” It is clear from the information before us, including the ZBA’s actions and assertions, that the November 15 executive session was a joint meeting of the Board and the ZBA; therefore, we next consider whether the ZBA adequately posted notice of the meeting.

a. The ZBA Failed to Post Notice for the November 15 Meeting.

The Open Meeting Law requires that public bodies post notice of every meeting “at least 48 hours prior to such meeting, excluding Saturdays, Sundays and legal holidays.” G.L. c. 30A, § 20(b). Two or more public bodies may hold a joint meeting; however, each public body participating in the meeting must provide notice pursuant to G.L. c. 30A, § 20. The public bodies must provide independent notice of their meetings, or if posting a single notice, must clearly state that each public body will be meeting. See OML 2021-153; OML 2019-163.⁵ If two or more public bodies plan to hold a joint meeting, for purposes of clarity, all bodies involved should note in their meeting notices that this will be a joint meeting with the other bodies. See OML 2012-6; OML 2011-16. Any notice of a joint meeting must meet all the requirements of the Open Meeting Law and include the public bodies’ names, the date, time, and location of the meeting, and all the topics that the public bodies anticipate discussing. See OML 2013-36.

Here, although the Board’s notice mentioned the ZBA, the notice was clearly for a meeting of the Board and not for a joint meeting. The Board’s name appeared in bold, large font at the top of the notice whereas the ZBA was mentioned approximately a quarter of the way down the first page of the notice in a lengthy sentence describing the anticipated executive session. Finally, the notice was posted on the Board’s individual webpage but not the ZBA’s. Therefore, we find that the Board’s meeting notice did not serve as notice of a joint meeting and that the ZBA was therefore required to post its own notice for the November 15 meeting, which it did not do.

b. The ZBA Failed to Create Minutes for the November 15 Meeting.

The Open Meeting Law requires a public body to “create and maintain accurate minutes of all meetings, including executive sessions, setting forth the date, time and place, the members present or absent, a summary of the discussions on each subject, a list of documents and other exhibits used at the meeting, the decisions made and the actions taken at each meeting, including the record of all votes.” G.L. c. 30A, § 22(a). When public bodies meet jointly, each public body may create its own minutes, or one body may review and adopt the minutes prepared by the other body. See OML 2011-16. The ZBA does not assert or provide any evidence that it created its own minutes for the November 15 meeting or that it adopted the Board’s minutes. Therefore, we

minutes falls squarely within the Attorney General’s mandate to interpret and enforce the Open Meeting Law. G.L. c. 30A, § 23 (“[T]he attorney general shall interpret and enforce the open meeting law,” and “[u]pon the receipt of a complaint by any person, the attorney general shall determine, in a timely manner, whether there has been a violation of the open meeting law.”).

⁵ Open Meeting Law determinations may be found at the Attorney General’s website, www.mass.gov/ago/openmeeting.

find that the ZBA violated the Open Meeting Law by failing to create or adopt minutes for the November 15 meeting.

II. The November 15 Executive Session was Improper with Respect to Discussions Held Under Purpose 6.

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). All meetings of a public body must be conducted in an open session, unless a lawful executive session is convened for one of ten permissible purposes enumerated in the Open Meeting Law. G.L. c. 30A, §§ 20(a), 21(a). These exceptions to the general rule that meetings of a public body be open to the public are narrowly construed. See McRea v. Flaherty, 71 Mass. App. Ct. 637, 641 (2008). One such purpose 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 Allen, 58 Mass. App. Ct. at 720; OML 2016-50; OML 2019-10. General discussions regarding real property or the use of real property, where there is no negotiating position to protect, do not fall within the executive session purpose. See OML 2019-59; OML 2012-98 (“Potential uses for land and whether or not to go ahead with a project are not proper discussions under Purpose 6.”). The public body bears the burden of demonstrating applicability of the claimed executive session purpose. See District Attorney for the N. Dist. v. School Comm. of Wayland, 455 Mass. 561, 566 (2009).

The complaints allege that the November 15 executive session was improper with respect to discussion of the Claremont development project because the discussion did not relate to the Board’s or the ZBA’s purchase, sale, or lease of property. We agree. Based on all of the information before us, including the bodies’ and Town’s own representations, it is clear that the Board and the ZBA were not discussing the purchase, sale, lease, or value of real property, but rather were discussing negotiations with Claremont related to its proposed development project and affordable housing requirements, as well as issues concerning the Town’s water supply. Therefore, we find that the executive session discussion related to 174 Colony Place was entirely inappropriate for executive session.

III. The Notice Topic Related to 174 Colony Place Was Insufficient.

The Open Meeting Law requires that public bodies post notice of each meeting and include in that notice a “listings of topics that the chair reasonably anticipates will be discussed at the meeting.” G.L. c. 30A, § 20(b). Public bodies must list topics for discussion with

“sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting.” 940 CMR 29.03(1)(b). Additionally, executive session topics must be described, both in the meeting notice and in an announcement during open session prior to convening in executive 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); OML 2020-43; OML 2015-55. This is particularly important “because [it] is the only notification given to the public that the [public body will] conduct business in private, and the only way the public would know if the reason for [convening in executive session] was proper or improper.” District Attorney for the N. Dist. v. Sch. Comm. of Wayland, 455 Mass. 561, 567 (2009). Here, we find that the notice topic “Executive Session pursuant to [Purpose 6], to consider the purchase, exchange, lease, or value of real property . . . 174 Colony Place, Lot 26-26 and 26-30 on Plat 104” was insufficient because it did not describe the matters to be discussed.

IV. The Board’s Minutes of the November 15 Meeting are Insufficient.

As explained above, public bodies are required to “create and maintain accurate minutes of all meetings, including executive sessions, setting forth . . . a summary of the discussions on each subject [and] a list of documents and other exhibits used at the meeting . . .” G.L. c. 30A, § 22(a). The Open Meeting Law does not define what it means for a document to be “used” at a meeting. We have found that a document is “used” at a meeting when it is, at a minimum, physically present, verbally identified, and its contents are discussed by members of the public body. See OML 2014-146; OML 2019-57; OML 2012-42.

When reviewing minutes for compliance with the Open Meeting Law, we look for substantial compliance with the accuracy requirement. See OML 2017-104; OML 2013-64. By substantial compliance, we mean that the minutes should contain enough detail and accuracy so that a member of the public who did not attend the meeting could read the minutes and have a clear understanding of what occurred. See OML 2019-145; OML 2012-106. Although a transcript of the discussions is not required, and the minutes need not include every remark or opinion presented, minutes must include a substantive summary of the discussion on each topic. See OML 2020-18. The Open Meeting Law requires that meeting minutes include more than a statement that a public body held a discussion about a specified topic; the Law requires that the minutes summarize the discussions that were held. See OML 2019-167; OML 2018-8. Minutes of executive sessions must include the same level of detail as is required for open sessions. See G.L. c. 30A, § 22(a); OML 2020-53.

The complaints allege that the Board’s minutes of the November 15 executive session are insufficient where they do not summarize any discussions by members of the Board or the ZBA. We agree. As described by Mr. Brindisi, the joint executive session was an interactive discussion with members of the Board asking many questions and members of the ZBA answering those questions, yet the minutes summarize none of this discussion. We order the Board, within 30 days of the date of this letter, to amend its minutes of the November 15 executive session to accurately summarize the discussions that occurred.

The complaints additionally allege that the Board’s minutes are insufficient where they do not list any documents used during the November 15 meeting. In response to the complaint,

the Board amended its minutes to include the statement “The Select Board and the Zoning Board of Appeals did not receive any supporting documentation in advance of the meeting.” We find this statement insufficient to address whether there were any documents physically present, verbally identified, and discussed during the November 15 executive session. To the extent any documents were physically present, verbally identified, and discussed during the executive session, we order the Board to amend its minutes to include a list of such documents.

V. The Board Was Not Required to Post Separate Notice of a Meeting of the Board of Water Commissioners Before Taking Action in That Capacity.

The complaints allege that the Board violated the Open Meeting Law because it did not post notice that it would take action in its capacity as the board of water commissioners during its November 15 meeting. We understand the complaints to assert that when the Board acts as the board of water commissioners pursuant to G.L. c. 41, §§ 69A and 69B, it is acting as a separate and distinct public body and therefore must post additional notice. We disagree. G.L. c. 41, § 69A provides that “[a]ny town establishing a water supply or water distributing system under authority of section thirty-nine A of chapter forty may establish a board of three water commissioners or authorize its selectmen to act as such.” Additionally, G.L. c. 41, § 69B states that “[t]he water commissioners, or the selectmen authorized to act as such, . . . shall have exclusive charge and control of the water department and water system . . .” There is no dispute that the Town elected to authorize the Board to act as the board of water commissioners rather than create a separate board of water commissioners. As such, there is no separate and distinct public body; rather, acting as the board of water commissioners is one of the Board’s responsibilities. Therefore, we find that the Board did not violate the Law when it posted notice of a Board meeting only; however, as explained above, the discussions held and actions taken during the November 15 executive session were not appropriate for executive session.

Finally, we must determine whether the Board’s and the ZBA’s violations were, as the Complainant urges, intentional. See G.L. c. 30A, § 23(c). An intentional violation is an “act or omission by a public body or a member thereof, in knowing violation of [the Open Meeting Law].” 940 CMR 29.02. An intentional violation may be found where the public body acted with deliberate ignorance of the Law’s requirements or has previously been advised that certain conduct violates the Open Meeting Law. Id. We have not previously warned the Board or the ZBA against the violations found here, nor do we find other evidence that would support a finding of an intentional violation by the Board or the ZBA. We therefore decline to find that the violations were intentional.

CONCLUSION

For the reasons stated above, we find that the Board and the ZBA violated the Open Meeting Law as alleged except with respect to the allegation that the Board should have posted notice as the board of water commissioners. We order the Board’s and the ZBA’s immediate and future compliance with the Open Meeting Law and warn that a finding of similar violations in the future may be considered evidence of an intent to violate the Law. Additionally, we order the Board to amend its minutes of the November 15 executive session to include an accurate summary of the discussions held and to include a list of any documents used during the executive

session. We order the ZBA to create minutes for the November 15 executive session, or to review and adopt the Board's minutes once those minutes are amended to come into compliance with the Open Meeting Law and this order. Additionally, we order the Board to release to the public the amended minutes in their entirety with respect to the discussions of 174 Colony Place. We also order the ZBA to release to the public its minutes of the November 15 executive session, in their entirety, whether creating its own minutes or adopting the Board's amended minutes. We order the Board and the ZBA to certify in writing to this office that they have complied with this order within thirty (30) days of receipt of this letter. Additionally, in light of the number and breadth of Open Meeting Law violations found here, we order all members of the Board and the ZBA to attend an Open Meeting Law webinar training presented by our office within ninety (90) days of the Board's receipt of this letter and to certify to our office that they have done so within ninety-five (95) days of receipt of this letter.⁶

The Complainant specifically requests that the Board's vote to waive any water, sewer, and building fees for the proposed development project and the ZBA's vote to approve a special permit for the development project be nullified. It is our understanding that the Board's vote to waive fees was contingent upon the ZBA's approval of the special permit. Because the ZBA's vote to approve the special permit, which did not occur at the November 15 meeting, is not the subject of the complaints addressed here, we decline to nullify these votes.

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

Sincerely,



Elizabeth Carnes Flynn
Assistant Attorney General
Division of Open Government

cc: Plymouth Select Board (via email: selectmen@plymouth-ma.gov)
Plymouth Zoning Board of Appeals (via email: ddecoste@plymouth-ma.gov)
Kelly McElreath, Plymouth Town Clerk (via email: clerk@plymouth-ma.gov)
Attorney Margaret Sheehan (via email: environmentwatchesoutheasternma@gmail.com)

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.

⁶ Information about upcoming Open Meeting Law webinars may be found on the Division's website at <https://www.mass.gov/service-details/open-meeting-law-trainings>.