

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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April 6, 2018

OML 2018 – 49

Mark W. Haddad
Town Manager
Town of Groton
173 Main St.
Groton, MA 01450

RE: Open Meeting Law Complaints

Dear Mr. Haddad:

This office received three complaints from Alan Hoch alleging that the Groton Board of Selectmen (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The first complaint was filed with the Board on November 22, 2017, and alleges that the Board held an executive session on October 23, 2017 that was not legally justified. The Board responded to the complaint by letter dated December 12, 2017, and the complaint was filed with our office on January 11, 2018. The second complaint was filed with the Board on December 8, 2017, and alleges that the town manager facilitated an unlawful deliberation.¹ The Board responded to the complaint by letter dated December 19, 2017, and the complaint was filed with our office on January 11, 2018. The third complaint was filed with the Board on December 11, 2017, and alleges that the Board held an executive session on October 10, 2017 that was not legally justified. The Board responded to the complaint by letter dated December 19, 2017, and the complaint was filed with our office on January 12, 2018.

Following our review, we find that the Board violated the Open Meeting Law by meeting in executive session on two occasions for an unjustified purpose. We find no violation with respect to the remaining allegation. In reaching a determination, we reviewed the original complaints, the Board’s responses to the complaints, and the complaints filed with our office requesting further review. We also reviewed the now public executive session minutes from the Board’s October 10, 2017 and October 23, 2017 meetings. Finally, we spoke with the complainant by telephone on February 22, 2018.

¹ For purposes of clarity, we will refer to you in the third person.



FACTS

We find the facts as follows. The Indian Hill Music School planned to construct a facility in Groton. The Town requires a building permit fee of 1.2% of the cost of construction to allow a project to proceed. During an October 5, 2017 meeting with Town representatives, the School's project manager reportedly informed the Town that it intended to cancel all or part of the project if the Town would not reduce the building permit fee.

On the morning of October 10, 2017, Town Manager Mark Haddad sent an email to the Board members attaching a spreadsheet, with the subject: "Re: Outline of Agenda for Executive Session on Indian Hill _Do Not Reply to All." In the text of the email, he wrote that "In addition to this information, [Board member] Alison [Manugian] has prepared the attached spreadsheet as a way to determine building permit value. I found this to be very helpful and interesting. I look forward to the discussion tonight." The attached spreadsheet included both numerical information comparing construction and permit costs of recent projects in Groton as well as the author's opinions and recommendations. For example, the spreadsheet includes the following: "Since the value based on anticipated construction cost appears to be a more uniform method, I recommend using this for the Indian Hill project," and "given the financial realities of a project of this magnitude, it is understandable that the applicant might prefer to structure these payments over time; this is a more appealing alternative to the Town of Groton as well as it provides a predictable annual revenue, rather than a single large payment."

During an October 10, 2017 Board meeting, the Board entertained a motion by Board member Joshua Degen to enter into executive session, "pursuant to M.G.L. c. 30A, Sec. 21(6) -- to consider the purchase, exchange, lease or value of real estate, as the chair declares that an open meeting would have a detrimental effect on the negotiating position of the public body." Following a roll call vote, the Board entered into executive session by a vote of 4 to 1. During the executive session, the Board discussed the School's request for a reduced permit fee. The Board considered that the permit fee of 1.2% is calculated out of the anticipated construction project cost, however the School had not provided estimated costs. After several motions to resolve the issue failed, the Board voted 3-2 to set the permit fee at \$500,000. The Board then voted unanimously to direct the Town Manger and a Board representative to negotiate with the School for a permit payment of \$500,000 with an interest rate of 1.25% compounded annually.

The minutes also provide the following:

[Board member Becky] Pine – in conjunction with the OML issue discussed at 5pm the shared spreadsheet/email from A. Manugian is an OML concern. Lauren Goldberg (counsel) reviewed J. Petropoulos concern and personal opinions/names etc should be removed in the future. The email and spreadsheet shall be included in the minutes of

this executive session meeting. Consensus of the board is that this is a good remedy and plan should be shared at an open meeting.

The Board met again on October 23, 2017, and voted 4 to 0 to enter into executive session "Pursuant to M.G.L., c. 30A, §21(a)(6) – 'To consider the purchase, exchange, lease or value of real estate, if the chair declares than an open meeting may have a detrimental effect on the negotiating position of the public body.'" In executive session, Town Manager Haddad updated the Board about his discussion with the School concerning the building permit fee. Town Manager Haddad asked the Board to consider approving a \$400,000 building permit fee. The Board then discussed the proposal, though did not vote on it in executive session. The Board then voted unanimously to adjourn the executive session and return to open session. After discussing a few other topics in open session, the Board turned to the School project. Town Manager Haddad asked the Board to approve a \$400,000 building permit fee for the School. Following a brief discussion about the process, the Board voted 4 to 1 to approve the request.

DISCUSSION

I. The Board's October 10, 2017 and October 23, 2017 Executive Session Discussions Were Not Appropriate for Executive Session.

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). Public bodies may enter a closed, executive session for any of ten purposes enumerated in the Open Meeting Law. G.L. c. 30A, § 21(a). The exceptions to the general rule that meetings of a public body shall be open are narrowly construed. See McRea v. Flaherty, 71 Mass. App. Ct. 637, 641 (2008). The public body bears the burden of demonstrating applicability of the relevant exception as the reason for the executive session. See District Attorney for the N. Dist. v. School Comm. of Wayland, 455 Mass. 561, 566 (2009). One such executive session purpose permits a public body 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").

The Board entered into executive session on two occasions to consider a request by the Indian Hill Music School for a reduction in the building permit fee for construction of its new facility in Groton.² The building permit fee is calculated based on anticipated construction costs. In this case, it is not related to the purchase, lease, exchange, or value of real property. Rather, its related to costs of construction. Executive Session 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. G.L. c. 30A, §

² The complaint filed with our office alleges that the Board did not have the legal authority to approve a reduction in the building permit fee. Because this allegation is beyond the scope of the Open Meeting Law, we decline to review it.

21(a)(6); Allen v. Board of Selectmen of Belmont, 58 Mass. App. Ct. 715, 719-721 (2003). While construction costs may be a valid topic of discussion where the discussion implicates the public body's negotiation position with respect to the purchase, exchange, or value of real estate, it was not in these instances. Here, the Board held an interest in the building permit, not the property or buildings themselves. The Board's negotiation with the Indian Hill School for a reduction in the building permit fee was not related to the Board's interest in the School's land or in the construction itself. Rather, the Board considered the request to reduce the building permit fee in its capacity as the issuer of the permit.

II. The Board did Not Intentionally Deliberate When the Town Manager Distributed a Document that Expressed the Opinions of Board Members.

"Deliberation" is defined, in relevant part, as "an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction." G.L. c. 30A, § 18. The definition of "deliberation" excludes "the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed." Id. A one-way communication from one public body member to a quorum on business within a body's jurisdiction is deliberation, even if no other members respond. See OML 2015-33.³ A lawful deliberation may only occur during a noticed meeting. G.L. c. 30A, §§ 18, 20.

On October 10, 2017, the town manager forwarded to the Board a spreadsheet created by one of the Board members for consideration at its meeting that evening. While the spreadsheet mostly contained numerical comparisons, which would be appropriate to distribute prior to a meeting as a report to be discussed, it also included some opinions by the author about how the Town should consider the issue of the building permit. A staff member or other non-public body member cannot lawfully facilitate deliberation. See OML 2014-80; OML 2013-186. Here, the town manager shared a document with the Board that included opinions expressed by a Board member. G.L. c. 30A, § 18. However, it appears that the Board member who created the spreadsheet did so for the benefit of the town manager, and it does not appear that the author intended to distribute the spreadsheet to the Board, nor did she ask the town manager to do so. The town manager should have distributed the spreadsheet at a meeting, or sent by email a version that did not contain any express opinions of the Board-member author. See Boelter v. Board of Selectmen of Wayland, SJC-12353, slip op. (Mass. April 5, 2018). Because the author did not intend to distribute the spreadsheet to the Board, we find no violation of the Open Meeting Law.

CONCLUSION

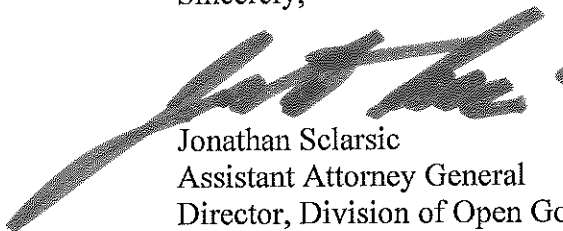
We find that the Board violated the Open Meeting Law by holding discussions in executive session that were not appropriate for executive session. We order the Board's immediate and future compliance, and caution the Board that a future similar violation may be considered evidence of an intentional violation of the law. While the complainant requests

³ Open Meeting Law determinations may be found at the Attorney General's website, www.mass.gov/ago/openmeeting.

that we include an order to nullify the Board's October 23, 2017 decision regarding the building permit fee, we decline to do so because the Board's vote occurred in open session. While the public was not afforded the opportunity to witness much of the Board's deliberations that led to the public vote, we conclude that the Board's act to publicly release the executive session minutes provides an adequate remedy, along with this order of compliance as it applies to future conduct. The complainant may still seek nullification along with three registered voters by filing an action to enforce the Open Meeting Law in superior court. See G.L. c. 30A, § 23(f).

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 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,



Jonathan Scarsic
Assistant Attorney General
Director, Division of Open Government

cc: Groton Board of Selectmen
Alan Hoch

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.