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August 1, 2013

OML 2013 – 108

Brian Riley, Esq.
Kopelman & Paige, P.C.
101 Arch Street
Boston, MA 02110

RE: Open Meeting Law Complaint

Dear Attorney Riley:

This office received a complaint from Kenneth Swiatek, dated January 22, 2013, alleging that the Williamstown Board of Selectmen (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaint was originally filed with the Board on or about December 10, 2012, and you responded to the original complaint on behalf of the Board by letter dated January 15, 2013.¹ In his complaint, Mr. Swiatek alleges that during the Board’s executive sessions on March 12, 2012 and March 26, 2012, the Board discussed a matter that did not fit within the purpose for which the sessions were convened. Alternatively, Mr. Swiatek alleges that the Board engaged in deliberation outside of a properly posted meeting regarding the same matter.

We reviewed the December 10, 2012 complaint; the Board’s January 15, 2013 response; the January 22, 2013 complaint filed with our office, requesting further review; and the open and executive session minutes from the March 12, 2012 and March 26, 2012 meetings,² as well as the open session minutes from the Board’s November 13, 2012 meeting. Finally, we spoke by telephone with former Chairman Thomas Sheldon.

Following our review, we find that the Board did not violate the Open Meeting Law.

¹ On December 17, 2012, our office granted the Board an extension of time to respond until January 16, 2013.

² We note that the Board released these executive session minutes in their entirety.



FACTS

Based upon our review of the material listed above, the facts are as follows. The Board consists of five members, thus three constitutes a quorum. On August 28, 2011, Tropical Storm Irene damaged areas in the Town, including The Spruces Mobile Home Park ("The Spruces"). On October 18, 2011, Morgan Management, owner of The Spruces, filed suit against the Town and the Commonwealth of Massachusetts concerning The Spruces' financial viability following the storm. Over the following months, Town Manager Peter Frohlin, the Town's Chief Administrative Officer, took the lead on negotiating a potential settlement with Morgan Management and decided to update the Board on a proposed resolution to the lawsuit during its March 12, 2012 meeting.

Prior to holding this and another meeting in March, Chairman Sheldon, Vice-Chair Jane Allen, and Mr. Frohlin met to create the meeting agendas. According to Mr. Sheldon, it is likely they discussed the lawsuit at those meetings because they decided to include it as a topic on the two agendas, however Mr. Frohlin did not disclose the details of the proposed resolution to any other members until the meetings. Aside from the discussion of the meeting agendas, Mr. Sheldon stated that the Board has not discussed the lawsuit outside of a properly posted meeting.

On March 12, 2012, the Board convened in open session. The meeting notice, posted with the Town Clerk on March 8, 2012, listed among the items for discussion the following topic: "Vote to enter executive session to discuss strategy with respect to litigation (Morgan Management v. Town) and not to reconvene in open session." At the end of the open session meeting, Board member Jane Allen made a motion to "enter executive session to discuss strategy with respect to litigation (Morgan Management v. Town) and not to reconvene in open session," which was approved unanimously by roll call vote. During the executive session, Mr. Frohlin presented to the Board a plan to resolve the lawsuit, which would also allow the Town to provide "safe affordable housing out of harm's way for former and current residents of The Spruces." Mr. Frohlin stated that the plan included a Hazard Mitigation Grant Program ("HMGP") application to assist the Town in purchasing The Spruces for \$600,000. The Board gave its unanimous support to proceed with the HMGP application, which was due on April 2, 2012.

The Board discussed the potential settlement in executive session again at its next meeting, on March 26, 2012. The meeting notice, posted with the Town Clerk on March 22, 2012, listed among the items for discussion the following topic: "Vote to enter executive session to discuss strategy with respect to litigation (Morgan Management v. Town) and not to reconvene in open session." At the end of the meeting, Ms. Allen made a motion to "enter into executive session to discuss strategy with respect to litigation (Morgan Management v. Town) and not to reconvene in open session." During the executive session, Mr. Frohlin updated the Board on the plan to resolve the lawsuit. Mr. Frohlin stated that Kevin Morgan of Morgan Management had not yet signed a written agreement to relinquish The Spruces to the Town; a necessary step in the HMGP

application process. The Board urged Mr. Frohlin to speak with Mr. Morgan again to obtain his written acceptance by the end of the week.

The Town submitted the HMGP application on April 2, 2012. Uncertain about whether it would be granted, the Board did not disclose the HMGP application until its November 13, 2012 meeting, after a meeting with federal and state officials indicated that approval was likely. As of today, August 1, 2013, the lawsuit remains pending.

DISCUSSION

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). Public bodies may enter a closed, executive session for any of ten purposes enumerated in the Open Meeting Law, provided that the chair of the public body first announces in open session the purpose for the executive session, “stating all subjects that may be revealed without compromising the purpose for which the executive session was called.” G.L. c. 30A, §§ 21(a), 21(b)(3). One permissible reason for executive session is Purpose 3, “[t]o discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares.” G.L. c. 30A, § 21(a)(3). The mere possibility of litigation is not sufficient to invoke executive session Purpose 3. Litigation must be pending or clearly and imminently threatened or otherwise demonstrably likely. OML 2012-43; OML 2012-5.³

The complainant alleges that during its March 12 and March 26, 2012 meetings, the Board improperly discussed the Town’s purchase of The Spruces in executive session; a topic that was outside the stated purpose for the closed door discussions, namely “to discuss strategy with respect to litigation (Morgan Management v. Town).” The Board’s executive session discussions were appropriate under Purpose 3 because they related to a pending lawsuit filed against the Town.⁴ The Board’s discussion of a grant application to assist with the potential purchase of The Spruces was directly related to a proposed resolution of that lawsuit. The Board did not engage in a substantive discussion about such a purchase, however, since grant approval was a necessary precursor to settlement.⁵ Accordingly, the Board did not violate the Open Meeting Law during its March 12 and March 26, 2012 executive sessions. See OML 2012-43.

In addition, we did not find any evidence that the Board engaged in deliberation outside of a properly posted meeting regarding the lawsuit. While Mr. Sheldon, Ms. Allen

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

⁴ The Board generally followed the requisite procedures for entering executive session; however, we note that the Chair failed to make the statement required under Purpose 3 that an open meeting would have a detrimental effect on the litigating position of the public body. See G.L. c. 30A, § 21(a)(3).

⁵ Although not stated by the Board as a purpose for the executive sessions at issue, we note that another permissible reason for holding an executive session is Purpose 6, “[t]o 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).

and Mr. Frohlin (who is not a member of the Board) likely discussed the lawsuit in the context of adding it as a topic to their meeting agendas, that conversation did not constitute a deliberation under the Open Meeting Law because it occurred between less than a quorum of the Board.

CONCLUSION

For the reasons stated above, we find that the Board did not violate the Open Meeting Law. We now consider the complaint addressed by this determination to be resolved. This determination does not address any other complaints which 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 or believe any facts in this letter to be inaccurate.

Sincerely,



Hanne Rush
Assistant Attorney General
Division of Open Government

cc: Kenneth Swiatek
Williamstown Board of Selectmen

This determination was issued pursuant to G.L. c. 30A, § 23(c). A public body or any member of a body aggrieved by this order 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 this order.