



THE COMMONWEALTH OF MASSACHUSETTS
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August 30, 2024

OML 2024 – 161

Michael D’Ortenzio, Esq.
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101 Arch Street
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By email only: mdortenzio@k-plaw.com

RE: Open Meeting Law Complaint

Dear Attorney D’Ortenzio:

This office received a complaint from Catherine Foster on March 4, 2024, alleging that the Adams 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 February 3, 2024, and you responded, on behalf of the Board, by email dated February 28, 2024. The complaint alleges that the Board entered executive session for an improper purpose on January 3, 2024, failed to comply with a procedural requirement prior to convening in executive session, and failed to announce that the meeting was being recorded.

Following our review, we find that the Board violated the Open Meeting Law in the ways alleged. 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. In addition, we reviewed the notice and open and executive session minutes of the Board meeting held on January 3, 2024, as well as a video recording of that meeting.¹

FACTS

We find the facts as follows. In 2022, the Town of Adams solicited proposals for the development, construction, and/or operation and management of a 140-site campground and associated facilities through a contract/lease agreement at Greylock Glen, which is located at the base of Mount Greylock.

¹ A video recording of the Board meeting held on January 3, 2024, is available at <https://youtube.com/watch?v=TRBE8ds8ILA>.

During a meeting held on December 14, 2022, the Board met with Shared Estates Asset Fund, a real estate development company, who submitted a proposal for the development of a campground at Greylock Glen. After hearing and discussing the proposal, the Board unanimously approved “the selection of Shared Estates Asset Fund for the lease, development, and operation of a campground at the Greylock Glen per their proposal.”

On December 27, 2023, at 2:40 P.M., the Board posted notice for a meeting to be held on January 3, 2024, at 6:00 P.M. The notice included nine topics, one of which was an executive session pursuant to Purpose 6 “To consider the purchase, exchange, lease or value of real property where an open meeting may have a detrimental effect on the negotiating position of the public body. Review Development Agreement and Sublease Agreement with Shared Estates Asset Fund (SEAF) for campground development at Greylock Glen.”

The January 3, 2024, meeting was held as planned and the Board convened in open session. After discussing the open session topics, Chair Christine Hoyt stated that the Board intended to convene in executive session pursuant to Purpose 6 “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, in order to review Development Agreement and Sublease Agreement with Shared Estates Asset Fund for campground development at Greylock Glen.” Chair Hoyt did not specifically state that having this discussion in open session may have a detrimental effect on the Board’s negotiating position but did announce that the Board would reconvene in open session following the executive session. When asked by a member of the Board to clarify what would be discussed in executive session, Town Administrator Jay Green explained that “this is a landlord and tenant negotiating the terms of a lease” with the Town acting as the landlord. The Board then voted unanimously by roll call to convene in executive session.

Because the Board has not publicly released the minutes of the executive session, we do not recount their content in detail here. However, we note that during the executive session, the Board met with members of the Shared Estates Asset Fund and discussed the terms of a lease and sublease agreement for the development and maintenance of a campground at Greylock Glen. Two hours later, the Board reconvened in open session and voted by majority vote to “approve the development Agreement and Sublease Agreement with Shared Estates Asset Fund (SEAF) for campground development at Greylock Glen.”

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 Board 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, unless an executive session is convened. G.L. c. 30A, §§ 20(a)-(b), 21. 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 2014-94.²

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”). When noticing an executive session pursuant to Purpose 6, a public body must identify the property to be discussed if doing so would not compromise the purpose for which the executive session was called. See OML 2019-101; OML 2013-97; OML 2012-52.

First, we find that the Board failed to comply with one procedural requirement for convening in executive session on January 3, 2024. The Board properly convened in open session, approved a vote by roll call to enter into executive session, and announced that it would resume in open session following its executive session. Moreover, the Board’s announcement included the specific piece of property that would be discussed. However, the Chair failed to make the required statement that holding a discussion in open session may have a detrimental effect on the Board’s negotiating position. G.L. c. 30A, § 21(a)(3). Prior to convening in executive session, Chair Hoyt simply read from the law stating “*if* an open meeting may have a detrimental effect” on the Board’s negotiating position, but failed to specifically declare *that* discussions in open session may have a detrimental effect on the Board’s negotiating position. See OML 2015-13. As such, we are constrained to find a violation of the Open Meeting Law but find that the violation is *de minimis*. See OML 2020-21; OML 2019-34; OML 2016-75.

Next, we review the propriety of the Board’s discussions in executive session during the meeting held on January 3, 2024. 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. Our office has consistently stated that the proper application of Purpose 6 is to protect a public body’s negotiating position vis-à-vis other parties to a transaction. See, e.g., OML 2023-241; OML 2023-81; OML 2022-119; OML 2020-158; OML 2018-73. Therefore, we have explained that it generally is improper to convene in executive session to negotiate with the opposing party to a transaction. See OML 2024-142; OML 2020-57; OML 2020-2. Indeed, the Massachusetts Appeals Court has held that “the purpose of the real property exception—the need for confidentiality in considering the value of property to be purchased, exchanged or leased in order to avoid impairment to the negotiating position of a governmental body—was not met” when representatives of the opposing party to a real estate transaction were present at the executive session. Allen v. Board of Selectmen of Belmont, 58 Mass. App. Ct. 715, 719-20 (2003). That is, when representatives of the party with whom the public body will be negotiating are present, Purpose 6 generally is defeated because there is no need to enter executive session to establish a confidential negotiating position. See OML 2020-157; OML 2012-114.

² Open Meeting Law determinations may be found at the Attorney General’s website, <https://www.mass.gov/the-open-meeting-law>.

Following our review of the executive session minutes, we find that the discussions by the Board during this executive session meeting were not appropriate under Purpose 6. Here, the Board met with members of the Shared Estates Asset Fund and discussed the terms of a lease and sublease agreement for the construction and maintenance of a campground development at Greylock Glen. Because Shared Estates Asset Fund – the party with whom the Board was negotiating – joined the executive session, the executive session purpose was defeated, and we find that the Board violated the Open Meeting Law by holding these discussions in executive session. We remind the Board that the proper application of Purpose 6 is to protect a public body’s negotiating position vis-à-vis other parties to a transaction and not to escape the inconvenience of public scrutiny or opposition. See OML 2022-119; OML 2020-158.

We must determine whether this violation was, as the complainant urges, an intentional one. 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 requirement or has previously been advised that certain conduct violates the Open Meeting Law. Id. The Board was advised by the Attorney General last month, on July 26, 2024, that it is generally improper to convene in executive session to negotiate with the opposing party to a transaction. See OML 2024-142. However, we do not find an intentional violation as the Board was not aware of that decision at the time it convened in executive session on January 3, 2024. See OML 2017-43.

Finally, the complaint alleges that the Board failed to announce that the January 3, 2024, meeting was being recorded. Here, the January 3, 2024, meeting was recorded and broadcast by Northern Berkshire Community Television Corporation and therefore the Chair was required to inform attendees that the meeting was being recorded. See OML 2023-74; OML 2012-24. The Open Meeting Law requires that “[a]fter notifying the chair of the public body, any person may make a video or audio recording of an open session of a meeting of a public body, or may transmit the meeting through any medium, subject to reasonable requirements of the chair as to the number, placement and operation of equipment used so as not to interfere with the conduct of the meeting. At the beginning of the meeting, the chair shall inform other attendees of any recordings.” G.L. c. 30A, § 20(f). The requirement that the chair inform attendees of any recording includes any recording made by members of the public body itself, including those made for public broadcasting or administrative purposes, such as assisting in the drafting of meeting minutes. See OML 2023-111; OML 2019- 129; OML 2016-155; OML 2013-136. Because the Chair did not make such an announcement, we find that the Board violated the Open Meeting Law.

CONCLUSION

We find that the Board violated the Open Meeting Law by discussing an improper topic in executive session under Purpose 6, failing to comply with a procedural requirement prior to convening in executive session, and failing to announce that the meeting was being recorded. 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.

In addition, we order the Board to publicly release the January 3, 2024, executive session minutes. The Board may not redact or withhold these portions of 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 in their entirety ... as long as publication may defeat the lawful purposes of the executive session, but no longer; provided, however, that the executive session was held in compliance with section 21”) (emphasis added)); OML 2014-42. The Board must notify the Attorney General in writing of its compliance with this order within **30 days** of the date of this letter. 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: Catherine Foster – By email only: [REDACTED]
Adams Board of Selectmen c/o Chair John Duval – By email 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.