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November 4, 2015

OML 2015 – 167

Tim D. Norris, Esq.
Collins, Loughran & Peloquin
320 Norwood Park South
Norwood, MA 01062

RE: Open Meeting Law Complaint

Dear Attorney Norris:

This office received a complaint from Meme Luttrell on July 23, 2015, alleging that the Southborough 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 May 4, and you responded on behalf of the Board by letter dated May 21, 2015.¹ In her complaint, Ms. Luttrell alleges that, based on Selectman John Rooney's comment at a Zoning Board of Appeals (ZBA) meeting on April 29, 2015, it appeared that a quorum of the Board had deliberated outside of a meeting.

Following our review, we find that the Board violated the Open Meeting Law by deliberating outside of a meeting. In reaching our determination, we reviewed the initial complaint, the Board's response, and the complaint filed with our office requesting further review. In addition, we reviewed the notices and open and executive session minutes of the Board's meetings held on December 16, 2014 and February 3, 2015, as well as the open session minutes from the ZBA meeting held on April 29, 2015, and the ZBA decision on the application at issue, dated June 8, 2015. Finally, in September 2015, we spoke individually by telephone with three Selectmen: John Rooney, Bill Boland, and Daniel Kolenda.

FACTS

We find the facts as follows. The Board is a five-member public body, thus three members constitute a quorum. In 2014, the owner of an historic property in Southborough

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



commenced discussions with the Board about opening a bed and breakfast on the property. Part of this discussion included negotiations with the Board about obtaining a preservation restriction on the property in exchange for Conservation Preservation Act funds to assist in restoring the property. Concurrently, the property owner submitted an application to the ZBA to obtain a use variance. The Board met in executive session on December 16, 2014 and February 3, 2015, pursuant to G.L. c. 30A, § 21(a)(6), to discuss the status of negotiations with the property owner.² Mr. Rooney, Mr. Kolenda, and Mr. Boland contend that, at some point during these executive session discussions, the Board members expressed their support for the variance, although this discussion is not reflected in the minutes.

On April 29, 2015, the ZBA held a hearing on the variance application. Hours before this meeting, Mr. Rooney called Mr. Boland to confirm that he was comfortable with Mr. Rooney attending the ZBA meeting for the purpose of speaking on the Board's behalf in support of the variance. That same day, Mr. Rooney asked Mr. Kolenda the same question.³ Mr. Rooney then spoke in support of the variance during the hearing. According to the ZBA minutes, "[m]embers of the Board of Selectmen supported the proposal." Although Mr. Rooney recalls being the only Board member present, the ZBA decision indicates that Selectwoman Bonnie Phaneuf also spoke in support of the variance.

DISCUSSION

The Open Meeting Law requires that all meetings of a public body be properly noticed and open to members of the public, unless an executive session is convened. See G.L. c. 30A, §§ 20(a)–(b), 21. The Law's purpose is "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). A "meeting" is defined, in relevant part, as "a deliberation by a public body with respect to any matter within the body's jurisdiction." G.L. c. 30A, § 18. The law defines "deliberation" 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[.]" Id.

Ms. Luttrell alleges that, based on Mr. Rooney's comments during the April 29, 2015 ZBA meeting, a quorum of the Board must have deliberated about the variance application outside of a meeting. Ms. Luttrell alleges that, in voicing his support for the variance, Mr. Rooney explained to the ZBA that he had spoken with Mr. Boland and Mr. Kolenda, who had also expressed their support for the zoning use variance. Mr. Rooney asked his fellow Board members outside of a meeting about whether they would support him speaking on the Board's behalf to the ZBA about the variance application. Although

² Neither the notice nor the minutes identify the name and location of the property to be discussed in executive session. Because it appears that identifying the property to the public would not be detrimental to the Board's negotiating position, we remind the Board that this level of detail should have been included, both on the meeting notice and in the announcement prior to convening in executive session. See OML 2015-140; OML 2014-136.

³ There is a disagreement about whether this conversation occurred by telephone or during the ZBA meeting.

the Board does not have direct authority over the variance application, as the Town's chief executive officer with the authority to negotiate terms of a related preservation restriction for the property, the Board's discussions and public endorsement of the application demonstrate the Board's role in the process.⁴ See OML 2014-63. Additionally, the fact that the Board discussed the variance during an executive session further suggests that it was a matter of public business with its jurisdiction. Because the discussion about the Board's endorsement of the requested variance reached a quorum of the Board outside of a meeting, it constituted an improper deliberation. See G.L. c. 30A, § 18; see also District Attorney for the Northern District v. School Committee of Wayland, 451 Mass. 561, 570-571 (2009) ("Governmental bodies may not circumvent the requirements of the open meeting law by conducting deliberations via private messages, whether electronically, in person, over the telephone, or in any other form."). Accordingly, we find that the Board violated the Open Meeting Law.

Although not raised in the complaint, we also note our concerns about the Board's executive session discussions concerning the proposed preservation restriction. A public body may enter into executive session for any of ten enumerated purposes. G.L. c. 30A, § 21(a). One such purpose allows a public body to enter into executive session 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"). Here, the Board convened in executive session on December 16, 2014 and February 3, 2015 under Purpose 6 to discuss the status of ongoing negotiations with the property owner about a proposed preservation restriction. This is not the type of discussion that falls within Purpose 6, as it does not appear to concern the "purchase, exchange, lease or value" of the property. See OML 2012-180; OML 2013-156. The Board's December 16, 2014 executive session minutes have already been released to the public. We recommend that the Board also release to the public the February 3, 2015 executive session minutes, if it has not already done so.

CONCLUSION

For the reasons stated above, we find that the Board violated the Open Meeting Law by deliberating outside of a meeting. We order immediate and future compliance with the Open Meeting Law and caution that future similar violations may be considered evidence of intent to violate the Law. Additionally, we order the Board to review the Attorney General's Open Meeting Law Training Video #1 (Introduction and Open Meeting Law Definitions) and certify to our office within thirty (30) days of this letter, using the attached form, that it has complied with this order.⁵

⁴ We note that the Board's support of the variance, while influential, did not appear to be the deciding factor in the ZBA's decision to grant the variance.

⁵ The videos may be found at the Attorney General's website, www.mass.gov/ago/openmeeting.

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.

Sincerely,



Hanne Rush
Assistant Attorney General
Division of Open Government

cc: Meme Luttrell
Southborough 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 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.