The Commonwealth of Massachusetts

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FOR THE NORFOLK DISTRICT

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Re: Open Meeting Law Inquiry # 07-07

Greetings:

This letter constitutes this Office's response to the Open Meeting Law inquiry originally received from Ms. Bingham, Mr. Grasfield and Ms. Bennett in May, 2007. In resolving this matter, we rely upon the original inquiry (dated May 22, 2007), the June 28, August 6, September 12, October 31, November 8, & November 20, 2007 letters from town counsel, and the June 6, July 9, August 17, November 2, & November 14, 2007 letters from Ms. Bingham and Ms. Bennet (New England PEER). Attachments to these documents have also been considered, and a DVD recording of the May 7, 2007 Town Meeting was reviewed.[1] We further note that a related inquiry relative to the project at issue (OML #07-07A) was made by a resident of Sharon, and that Town Counsel in this matter has appeared on behalf of the Selectmen in that matter.

Initially, we note that the jurisdiction of this Office in this matter is limited to enforcement of the Open Meeting Law, and that the Open Meeting Law by its own terms does not apply to Town Meeting. This Office's decision not to address any other issues that may have been raised or referenced should not be interpreted as endorsing or rejecting any theories advanced on matters outside of the Open Meeting Law.

The May 22, 2007 inquiry alleges the following Open Meeting Law violations:

- On May 7, 2007 at approximately 6:00 p.m. (one hour before a scheduled Town Meeting), the Selectmen held a meeting not in conformity with the Open Meeting Law;

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[1] This Office obtained the DVD from Sharon Community Television, Inc. (SCTV).

- Since January 2006, the Selectmen had been negotiating with proponents of the Brickstone Project (Brickstone) at improperly convened closed sessions;[2]
- Prior to May 7, 2007, Selectmen met with personnel working with the Brickstone developers.

In a June 28, 2007 response, the Selectmen contend that:

- The closed sessions concerning the negotiation of a Memorandum of Understanding relative to the proposed Brickstone Development comported with the Open Meeting Law;
- Any violation of the Open Meeting Law with respect to the closed sessions was cured by public meetings on May 2 & 7, 2007.

I. The May 7, 2007 Selectmen's Meeting Violated the Open Meeting Law

Because Sharon residents were to vote at the May 7, 2007 Town Meeting, non-residents were not permitted in the auditorium during the Town Meeting but were directed to the library where they could observe the meeting by way of live video. According to Town Counsel, any non-resident who specifically asked to attend the Selectmen's meeting in the auditorium would have been permitted to do so. Because audio/video equipment was not operational during the Selectmen's meeting, the Selectman's meeting was not broadcast into the library. Microphones were not used in the auditorium during the Selectmen's meeting.

There appears to have been confusion as to where the meeting was to be held. A print-out of the electronic notice indicates that the May 7, 2007 Board of Selectmen's meeting was to take place at 6:00 p.m. at the High School auditorium. The minutes of the Selectmen's meeting initially indicated that the meeting occurred in the library. A notarized affidavit from a Sharon resident states that he looked for the Selectmen's meeting at the library at 6:00 p.m. and he waited for fifteen minutes before proceeding to the auditorium. Once there, he did not find a meeting being conducted in the auditorium. At approximately 6:20 p.m., another Sharon resident spoke with Town Counsel in the auditorium, and was told that the Selectmen's meeting had not yet occurred. On July 24, 2007, the minutes were amended to reflect that the meeting took place in the auditorium beginning at 6:22 p.m. The meeting ended thirteen minutes later, at 6:35 p.m.

We find that the May 7, 2007 Selectmen's meeting violated the Open Meeting Law in two respects. First, non-residents were denied access to the auditorium where the meeting was held. Although Town Counsel suggests that non-residents should have asked to be admitted to the meeting, nothing presented to this office reflects that non-residents were informed that they could gain access to the auditorium by asking; apparently no specific person was responsible for ensuring that non-residents were able to access the Selectmen's meeting. Nor did the Selectmen post signs advising non-residents that they needed to specifically inform those staffing the doors of their desire to attend the meeting. Further, at least two Sharon residents who wished to attend reported that they were unable to do so.

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[2] Non-public sessions, sometimes called "executive sessions," are referred to herein as "closed sessions."

We find that the Selectmen have failed to meet their burden of demonstrating that the meeting was held in accordance with the Open Meeting Law.

We further note the fact that sound amplification equipment such as microphones were not used during the Selectmen's meeting. At least two residents in the auditorium were unable to discern that a Selectmen's meeting was to be held or was in progress.[3] The DVD of Town Meeting shows a packed auditorium. Presumably, dozens, if not hundreds, of people were in the auditorium at 6:22 p.m. when the Selectmen's meeting began. Absent audio amplification, those present in the auditorium would not have been able to hear the meeting over the noise of citizens arriving in preparation for Town Meeting.

The purpose of the Open Meeting Law is to "eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based." Pearson v. Board of Health of Chicopee, 402 Mass. 797, 799 (1988); Ghiglione v. School Comm. of Southbridge, 376 Mass. 70, 72 (1978). By requiring government committees to conduct their business in public, the statute enables interested citizens to perform a "watchdog" function. See G.L. c. 39, § 23B ("All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided by this section."). While the Open Meeting Law provides no specific decibel level at which a meeting must be conducted, see G.L. c. 39, § 23B; see also Ann Taylor Schwing, Open Meeting Laws 2d § 5.8 (2000), the law would be rendered hollow if those in attendance were unable to hear the proceedings. The public's right to attend and observe a meeting of a governmental body is rendered meaningless if the public is unable to hear the verbal exchange by the members of the governmental body. We find that conducting the Selectmen's meeting without amplification in a large auditorium where dozens, and possibly hundreds, of people were already assembled for a later meeting violated the public's right to attend.

II. The Closed Sessions Violated the Open Meeting Law.

The Selectmen contend that the closed sessions were properly convened under the "real property" exception to the Open Meeting Law. The Open Meeting Law provides, in relevant part, that closed sessions are permitted "[t]o consider the purchase, exchange, lease or value of real property, if such discussions may have a detrimental effect on the negotiating position of the governmental body and a person, firm or corporation." G.L. c. 39, § 23B. The burden for showing the need for a closed session rests on the governmental body. District Attorney for the Northwestern District v. Board of Selectmen of Sunderland, 11 Mass. App. Ct. 663, 666 (1981).

According to Town Counsel, the Developers were aware that

> "adoption of the proposed re-zoning and any other approvals needed for the proposed Development to proceed would require that a significant portion of Rattlesnake Hill be preserved as conservation land. The amount of conservation land and the value therefore of such land the Town would obtain from the Developer was at the heart of the Town's negotiating position relative to the proposed Development. Obviously, a discussion of the amount of land we

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[3] It is unclear whether the two residents remained in the auditorium for the entire Selectmen's meeting. Given their affirmative steps to locate that meeting, we infer that if they were aware it was in progress or expected to begin imminently, they would have remained in the auditorium.

intended to negotiate for necessarily included a consideration of the value of that land."[4]

Significantly, the real estate exception would apply to negotiations about the conservation land, not negotiations about the Brickstone Development. Also significant is the fact that the developers were aware of the amount of conservation land at issue, and the details of the proposed re-zoning and approvals, while the public was not.

According to minutes provided to this Office on June 28, 2007, the Selectmen had forty-two closed sessions between January 2006 and May 2007 to discuss real property known as Rattlesnake Hill. Most of the entries describe the topic as "Brickstone – Rattlesnake Hill" or "Brickstone – Rattlesnake Hill Land Acquisition." Among other things, the entries referenced discussion of firefighting apparatus and salaries to be paid by the developer, the hiring of a consultant, traffic study, and affordable housing. The executive session minutes from August 15, 2006 contain an entry under "Brickstone – Real Property Acquisition . . . other items discussed how to keep options away from public."

The minutes themselves contain far fewer references to conservation land than to the details of negotiations as to the development by Brickstone. Review of the minutes indicates that the rationale for the closed sessions was the discussion of the proposed development rather than discussions of the Town's desire for conservation land. Moreover, the Selectmen fail to explain how public knowledge of the amount of land the Town desired to obtain as conservation land in exchange for the "adoption of the proposed re-zoning and any other approvals needed for the proposed Development" would impair the Town's negotiating position.

Where the minutes reflect negotiations with the developer rather than discussions of conservation land, we find that the Town has failed to establish that the reason for the closed session was proper, and the fact that transfer of conservation land was a part of the development proposal does not justify the closed sessions.[5]

The violations were not cured by subsequent open sessions. As explained above, the May 7, 2007 Selectmen's meeting was not held in conformance with the Open Meeting Law, so it could not have cured the violations.

Nor could the May 2, 2007 meeting have cured the violations. According to the minutes, the Selectmen reconvened a May 1, 2007 meeting on May 2, 2007.[6] The minutes reflect that "[p]rior to the Selectmen signing the Development Agreement for the Sharon Hills at Rattlesnake Hill project Town Counsel Gelerman reviewed the terms with the board." According to the minutes, after Attorney Geleman's presentation, the board voted unanimously to authorize the chair to sign the Development Agreement.

The minutes reflect only that Town Counsel summarized an agreement that had been previously reached; in fact, it appears that the agreement may even have been reduced to writing

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4 June 28, 2007 letter of Attorney Richard Gelerman.

5 The Town's argument implies that all development proposals could be shielded from public scrutiny whenever the exchange of real property was discussed; this would defeat the purpose of the Open Meeting Law, as closed sessions would be proper merely because the developer also offered to transfer or exchange a piece of real property if the development were to proceed.

6 We assume without deciding that the May 2, 2007 meeting was properly reconvened from a posted May 1, 2007 meeting.

prior to the meeting. Because there was no independent deliberative action at the May 2, 2007 open session, that meeting could not cure the prior violations. See Pearson v. Board of Selectmen of Longmeadow, 49 Mass. App. Ct. 119, 125 (2000).

III. Confidential Communications With Town Counsel Are Not An Independent Ground For Closed Sessions.

By way of a letter dated September 12, 2007, Town Counsel indicates that "many of the executive sessions involved confidential communications between Town Counsel and the Board for the purposes of obtaining legal advice." In support of this proposition, the Town cites Suffolk Construction Co., Inc. v. Division of Capital Asset Management, 449 Mass. 444 (2007). That case held that the public records law does not extinguish the attorney-client privilege to public officers or employees subject to the public records law. Id. at 445.

The Town provides no authority for the proposition that communicating with counsel provides an independent basis for entering into closed session, and this Office is aware of no such authority. The Supreme Judicial Court addressed the issue of whether all discussions between a governmental body and its attorney could be accomplished in closed session and determined that the legislature accounted for the need for confidential communications by enacting certain exemptions, including the real property exemption. The Court did not find that closed sessions were allowed under a blanket "confidential communication" exemption. District Attorney for Plymouth District v. Board of Selectmen of Middleborough, 395 Mass. 629, 633 (1985). We have found that the closed sessions were improperly convened under exemption six. Accordingly, the mere fact that counsel may have been providing legal advice during the closed session does not cure the violation.[7]

Adopting the Town's logic, governmental bodies would be able to properly enter into closed session to discuss any matter so long as town counsel was present to offer legal advice about the issue. This would completely defeat the Open Meeting Law. We further note that one topic of discussion at a closed session was "how to keep options away from public." (August 15, 2006 executive session minutes). Using closed sessions to discuss how options could be kept from the public is contrary to the letter and spirit of the Open Meeting Law.

IV. Remedy

This Office has found that the Selectmen violated the Open Meeting Law dozens of times by meeting in closed session to discuss the Brickstone Development. We have rejected the Selectmen's argument that the May 2, 2007 meeting cured the violation, and have further rejected the argument that the thirteen minute meeting on May 7, 2007 cured the violation. Unfortunately, as is often the case with violations of the Open Meeting Law, little appears available in the way of remedy in this case. While the minutes of the closed sessions have been made public (a remedy often sought by this office), this does not restore the parties to the positions they were in prior to the May 7, 2007 Town Meeting. This Office is not empowered to invalidate the action taken at Town Meeting. See G.L. c. 39, § 23B. Nor does this Office have authority to assess fines without filing a case in the Superior Court.

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[7] We also note that the minutes of the closed sessions indicate that Town Counsel was in communication with the Developers relative to the position of the Selectmen regarding the Brickstone development, suggesting possible waiver of privilege.

By way of resolution of this matter, this Office rules that the Selectmen should publicly acknowledge that this Office has found that the closed sessions regarding the Brickstone Development were a significant violation of the Open Meeting Law. We note that this is not the first time the Sharon Selectmen were found to be in violation of the Open Meeting Law.[8] We caution the Selectmen that future violations may result in our seeking injunctive relief and monetary fines in the Norfolk Superior Court.

Very truly yours,

Tracey A. Cusick

Tracey A. Cusick
Assistant District Attorney

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[8] In 2001, this Office found two separate violations of the Open Meeting Law, and observed that "the initial denial of the facts alleged in the complaint, which the Selectmen subsequently admitted were true, wasted the resources of both this Office and the Town of Sharon." OML 2001-06. In 2005, this Office found that the Selectmen violated the Open Meeting Law by drafting and submitting a letter to a local newspaper. OML 2005-08.