



THE COMMONWEALTH OF MASSACHUSETTS
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OML 2020 – 138

Mark R. Reich, Esq.
KP Law, P.C.
101 Arch Street, 12th Floor
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By e-mail only: [REDACTED]

RE: Open Meeting Law Complaint

Dear Attorney Reich:

This office received a complaint from Patrick Higgins on September 22, 2020, alleging that the Somerset Planning Board (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25.¹ The complaint was originally filed with the Board on September 4, and you responded, on behalf of the Board, by letter dated September 22. The complaint alleges that the Board violated the Open Meeting Law by failing to announce the name of each member who was participating in the September 1 meeting remotely.

Following our review, we find that the Board violated the Open Meeting Law in the way alleged. In reaching this determination, we reviewed the complaint, the Board’s response to the complaint, and the complaint filed with our office requesting further review. We also reviewed the notice and video recording of the Board’s September 1 meeting.²

FACTS

We find the facts as follows. On March 10, Governor Charles Baker declared a state of emergency in response to the public health emergency created by the outbreak of the 2019 novel Coronavirus (“COVID-19”). See Exec. Order No. 591 (Mar. 10, 2020). On March 12, Governor Baker issued an executive order temporarily suspending certain provisions of the Open Meeting

¹ All dates in this letter refer to the year 2020.

² A video recording of the Board’s September 1 meeting is available at http://www.somersetaccesstv.org/satv/?page_id=531.

Law during the state of emergency. See Order Suspending Certain Provisions of the Open Meeting Law, G.L. c. 30A, § 20 (Mar. 12, 2020) (the “Executive Order”). The Executive Order temporarily suspends the requirements under the Open Meeting Law and the Attorney General’s Open Meeting Law regulations that a quorum of a public body, including the chair, be physically present at the meeting location and allows all members of a public body to participate in a meeting remotely. All other provisions of the law and regulations regarding remote participation remain in effect.

On August 28, the Board posted notice of a meeting to be held on Tuesday, September 1 at 6:00 P.M. The notice listed one topic - a public hearing regarding a petition from Brayton Point LLC for construction of a 5,000 square foot building and 3,000 square foot house on Brayton Point Road in Somerset. The notice included the location of the meeting as “Virtual – Zoom Meeting” which could be “seen Live on Channel 15 on Comcast” or “Video on Demand <http://www.somersetaccesstv.org>.” In order to participate in the hearing, a member of the public had to contact an identified individual at Somerset Access TV to receive the specific Zoom log-in access information.

The September 1 meeting was held as planned and four of the five Board members participated remotely via Zoom. The meeting was broadcast on television and online. Each Board member appeared in an individual tile on the Zoom platform. In addition to the Board members’ tiles, there were nine to ten separate individual virtual tiles on display at the beginning of the meeting, including ones for the petitioner, Brayton Point LLC, its engineer, and several members of the public who wished to speak during the hearing. The name of each Board member, as well as those individuals who participated in the public hearing, was listed in the lower left corner of their individual virtual tile and, although in small type, appeared legible.

DISCUSSION

The Open Meeting Law was enacted “to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based.” Ghiglione v. School Committee of Southbridge, 376 Mass. 70, 72 (1978). At the core of the Open Meeting Law is the requirement that meetings of public bodies be open and accessible to the public. G.L. c. 30A, §20(a) (except when meeting in executive session, “all meetings of a public body shall be open to the public.”). Generally, access to a meeting must include the opportunity to be physically present, as well as to see and hear what is being discussed by the members of the public body. See OML 2020-100; OML 2017-135; OML 2016-54.³

The Executive Order suspends the requirement that meetings be physically accessible to members of the public, and further temporarily suspends the requirements under the Open Meeting Law and the Attorney General’s Open Meeting Law regulations that a quorum of a public body, including the chair, be physically present at the meeting location and allows all members of a public body to participate in a meeting remotely. See OML 2020-82. All other provisions of the law and regulations regarding remote participation remain in effect, including

³ Open Meeting Law determinations may be found at the Attorney General’s website, <https://www.mass.gov/the-open-meeting-law>

the requirement that “[a]t the start of the meeting, the chair shall announce the name of any member who will be participating remotely. This information shall also be recorded in the meeting minutes.” 940 CMR 29.10(7)(b).

On September 1, the Board held a meeting in which four of the five members participated remotely via Zoom. The chair of the Board did not announce the names of the four members who were participating remotely at the beginning of the meeting. We acknowledge that each Board member’s name was displayed at the bottom of their individual virtual tile and that this may relieve the chair of the requirement to announce each member’s name at the start of the meeting. See, e.g., OML 2016-155 (where a public body regularly records or broadcasts its own meetings, it may satisfy the requirement of notification by prominently displaying a sign at the meeting location that informs attendees about the recording and thus relieve the chair from making a verbal announcement at the start of the meeting); OML 2013-136 (same). Here, however, the virtual tiles of the four Board members were not the only tiles that the public saw when viewing the September 1 meeting. Rather, there were nine to ten additional individual virtual tiles on display at the beginning of the September 1 meeting as the Board was holding a public hearing, and each additional participant appeared on screen with his or her name displayed. For those members of the public who are not familiar with the Board, it would not have been clear which individuals were members of the Board. Therefore, in the specific circumstances here, we find that the Board violated the Open Meeting Law by failing to announce the names of the members who were participating remotely during the September 1 meeting. See OML 2020-98; OML 2013-112. We acknowledge the Board’s commitment to comply with this procedural requirement moving forward.

CONCLUSION

For the reasons stated above, we find that the Board violated the Open Meeting Law. 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.

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: Patrick Higgins – By e-mail only: [REDACTED]
Somerset Planning Board c/o Secretary Paula Ramos – By e-mail only:
[REDACTED]

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.