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November 14, 2011

OML 2011 - 47

George A. Hall, Jr.
Anderson & Kreiger LLP
One Canal Park, Suite 200
Cambridge, MA 02121

RE: Open Meeting Law Complaint

Dear Attorney Hall:

This office received a complaint from Mr. William Gottlieb, dated November 10, 2010, alleging that the Ipswich Finance Committee (the "Committee") violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. Specifically, the complaint alleges that the Committee "is consistently entering executive session to discuss 'real estate and litigation'" in violation of the Open Meeting Law. The complaint was originally filed with the Committee on or about October 8, 2010. The Committee responded to the complaint in a letter dated October 18, 2010. We appreciate the patience of the parties as we considered difficult legal questions in resolving this complaint.

We find that the Committee did not violate the Open Meeting Law by meeting in executive session to discuss litigation strategy with respect to the Committee's litigating position within ongoing litigation involving the Little Neck property in Ipswich. In reaching this determination, we reviewed the October 8, 2010 and November 10, 2010 complaints, and the Committee's October 18, 2010 response to the initial complaint. We reviewed minutes from the Committee's open and executive sessions on June 8, 2010, July 13, 2010, and August 10, 2010, and the open session on September 22, 2010. We interviewed Committee Chair Jamie Fay by telephone on February 8, 2011. Finally, we interviewed Ipswich Board of Selectman Chair Charles Surpitski and Ipswich School Committee Chair Dr. Hugh O'Flynn respectively, by telephone, on August 24 and 25, 2011.

FACTS

In 1660, William Payne left in his will an area of land in Ipswich known as Little Neck "unto the free scoole of Ipswich...to bee and remain to the benefit of the said scoole of Ipswich for ever as I have formerly Intended and therefore sayd land not to be sould or wasted." In that

will, Mr. Payne named certain individuals to be feoffees—or trustees—of the land. Over time, the trust was modified so that the Feoffees now include four individuals appointed for life and three members of the Ipswich Board of Selectmen. On December 17, 2009, the Feoffees filed a lawsuit against the Ipswich School Committee seeking, among other things, that “the Feoffees be permitted to sell the land known as Little Neck in Ipswich, Massachusetts on such terms as are set forth in a settlement agreement between the Feoffees and the [Little Neck Legal Action Committee].”¹ Following the court complaint, the Town of Ipswich passed an article at its May 11, 2010 Town Meeting to:

Request that the School Committee continue its action in Probate Court seeking to modify the Trust establishing the Feoffees of the Grammar School as the governing board of the Trust to establish a publically appointed board to replace the current privately appointed board which includes three selectmen serving *ex officio*; and further, to encourage resolution of the Feoffees litigation with Little Neck residents that fully protects the interests of the Ipswich Public Schools and the Town of Ipswich; and further, to request that the School Committee proceed in consultation with other Town bodies including the Board of Selectmen and the Finance Committee.

Following the Town Meeting directive, the School Committee, the Board of Selectmen, and the Finance Committee began meeting in executive session to discuss litigation strategy as a “Tri-Board”. The Committee was unable to provide us with copies of the executive session minutes from the Tri-Board meetings prior to August 2010.² However, we interviewed Committee Chair Jamie Fay, Ipswich Board of Selectman Chair Charles Surpitski and Ipswich School Committee Chair Dr. Hugh O’Flynn regarding those meetings. Committee Chair Fay asserts, and School Committee Chair O’Flynn confirmed, that during the meeting the Finance Committee was directed by a consensus of the three boards to pursue an independent appraisal as part of the litigation strategy. Board of Selectmen Chair Surpitski did recall discussion at the Tri-Board meeting of an appraisal, but did not recall a specific vote or direction to the Finance Committee regarding an independent appraisal. The difference in recollection between these three individuals illustrates the need for public bodies to take and approve complete and accurate minutes of all their meetings.

The Finance Committee met in executive session independent of the Tri-Board on several occasions. The Finance Committee met in executive session on June 8, 2010 to discuss “Land acquisition, the Feoffee Appraisal and litigation”; on July 13, 2010 to discuss “Real Estate & Litigation”; and on August 10, 2010 to discuss “Real Estate and Litigation.”

The Finance Committee exists pursuant to the By-Laws of the Town of Ipswich. It is the charge of the Finance Committee to “to investigate cost, maintenance, and expenditure of the different departments of the town service.” Ipswich Town By-Laws, § 29(2)(a).

¹ The Attorney General in her capacity to oversee public charities was also named as a defendant in the litigation. This fact has no bearing on the Attorney General’s review of this complaint. The Open Meeting Law complaint was investigated by a division within the Attorney General’s Office that is separate from the division representing the Attorney General in the lawsuit.

² We remind the Boards of their obligation under the Open Meeting Law to create and approve minutes of all meetings, and to retain those minutes so that they can be provided upon request within 10 days, once publicly released. See G.L. c. 30A, 22(a), (g)(2).

The Finance Committee argues that it is under a “continuing obligation to review and approve the appropriation of Town funds to pay the Town’s School Committee legal fees incurred as a result of that Probate Court Litigation. In addition, the Town Meeting has directed the School Committee to prosecute its claims for reform of the Trust in the Probate Court ‘in consultation with other Town bodies including the Board of Selectmen and the Finance Committee.’” Furthermore, the Finance Committee states that “[a]t the request of the School Committee and Board of Selectmen, the Finance Committee has undertaken certain legal, financial and real estate appraisal analyses of the proposed settlement agreement.”

DISCUSSION

A public body may enter executive, or closed, session for one of ten enumerated purposes. G.L. c. 30A, § 21. One such purpose is “[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.” *Id.* at § 21(a)(3). Another purpose is “[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.” *Id.* at § 21(a)(6).

The complaint alleges that the Finance Committee has violated the Open Meeting Law by entering executive session to discuss litigation strategy where the Committee is not a party to the litigation and therefore cannot have a litigating position. The complaint similarly alleges that the Committee violated the Open Meeting Law by entering executive session to discuss the value of land, though the Committee is not the party purchasing or selling the land and therefore has no negotiating position to protect.

A public body, generally, may only convene in executive session under G.L. c. 30A, § 21(a)(3) where the body has a bargaining or litigating position to protect. Municipal finance committees are often charged with budgetary oversight. Therefore, a finance committee may enter executive session to consider legal expenditures, but not legal strategy, in connection with a civil action in which a municipal body other than the finance committee is a party. *See Filippone v. Mayor of Newton*, 392 Mass. 633, 625 (1984) (holding that a finance committee could enter executive to consider appropriation of litigation expenses where the mayor was the named party).

Here, the Finance Committee is not a named party to the Probate Court litigation against the School Committee. However, the Town of Ipswich has taken steps to include the Finance Committee in aspects of the litigation strategy beyond its traditional budgetary oversight role. The May 11, 2010 Town Meeting passed an article “to encourage resolution of the Feoffees litigation with Little Neck residents that fully protects the interests of the Ipswich Public Schools and the Town of Ipswich; and further, to request that the School Committee proceed in consultation with other Town bodies including the Board of Selectmen and the Finance Committee.” Although the article did not provide specific guidance as to the role the Finance Committee would play in consultation with the School Committee, it authorized the three Boards to meet in executive session for the purpose of discussing litigation strategy. We credit the recollections of Committee Chair Fay and School Committee Chair O’Flynn that the Finance Committee was given specific litigation tasks by the Tri-Board following the May 11, 2010 direction by Town Meeting, including undertaking “certain legal, financial and real estate

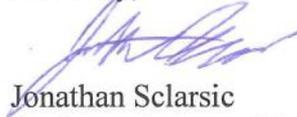
appraisal analyses of the proposed settlement agreement.” Because the Finance Committee was an active participant in the litigation strategy, it was appropriate for it to enter executive session to protect the “litigating position of the public body.” G.L. c. 30A, § 21(a)(3). After reviewing the executive session minutes from June 8, July 13, and August 10, 2010, we believe the Committee discussed only those issues that were within its mandate from Town Meeting and the Tri-Board.

CONCLUSION

We find that the Finance Committee did not violate the Open Meeting Law by meeting in executive session to discuss strategy with respect to litigation or the value of land in connection with the Probate Court litigation involving the Little Neck area. However, we remind the Committee that it may only enter executive session to protect a litigating or bargaining interest where the Committee is either a party to the litigation or sale of land, or is otherwise directly authorized by the municipality to participate in the litigation strategy or bargaining. For future executive sessions, the Committee must clearly identify the authority and purpose for which it enters executive session, and must provide as much detail as possible in the meeting notice without compromising the purpose for entering executive session.

We now consider this matter closed. If you have any questions regarding this determination, or believe any of the facts presented to be inaccurate, please do not hesitate to contact me at the number below.

Sincerely,



Jonathan Sclarsic
Assistant Attorney General
Division of Open Government
Ph: 617-963-2045

cc: William Gottlieb
cc: Jamie M. Fay, Chair, Ipswich Finance Committee