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June 20, 2011

OML 2011 – 26

Thomas Fay
Chair
Wayland Board of Selectmen
41 Cochituate Road
Wayland, MA 01778

RE: Open Meeting Law Complaint

Dear Chair Fay,

This office received a complaint from Ms. Linda Segal, dated October 7, 2010, alleging violations of the Open Meeting Law, G.L. c. 30A, §§ 18-25, by the Wayland Board of Selectmen (the "Board"). Specifically, the complaint alleges that the Board violated the Open Meeting Law when a "quorum of the Wayland Board of Selectmen gathered in the Selectmen's Meeting Room at 6:53 p.m. on Thursday, July 8, 2010 and engaged in substantive communication on public business within the Board's jurisdiction but outside of a posted meeting." The complaint was originally filed with the Board on August 5, 2010. The Board's response to the complaint was received by this office on August 17, 2010.

We note that, in addition to the complaint filed by Ms. Segal, our office received several phone calls and emails from Wayland citizens concerned about the events that occurred prior to the Board's July 8, 2010 meeting.

We find that the Board violated the Open Meeting Law by engaging in deliberation prior to the commencement of its July 8, 2010 meeting. We believe this to be an intentional violation of the Open Meeting Law, and will refer this matter to a hearing pursuant to 940 CMR 29.07(3) to determine whether the violation was intentional and if the Board should be assessed a fine.

In making this determination, we reviewed the August 5, 2010 complaint filed with Board, the August 17, 2010 response by the Board, and the October 7, 2010

complaint filed with our office. We reviewed emails provided to our office by the Board in response to our requests dated October 8, 2010 and October 14, 2010. We also reviewed the video recording of the July 8, 2010 meeting. We reviewed the minutes of the Board meetings held on June 21, June 28, July 8, and August 16, 2010. We reviewed Ms. Segal's July 20, 2010 letter to the Board, and Town Administrator Fred Turkington's July 28, 2010 email response. We reviewed the Certificates of Receipt of Open Meeting Law Materials signed by the Board members. Finally, we interviewed by phone the four members of the Board who participated in the discussion prior to the meeting on July 8, 2010. We appreciate the full cooperation of the members of the Board in responding to our requests for documentation and in speaking with our office over the phone.

FACTS

The Wayland Board of Selectmen has the authority to appoint individuals to various boards and commissions throughout the town. The Board typically invites candidates for appointment to town commissions to Board meetings for interviews. Following the interviews, the Board members discuss the candidates and vote to fill the open positions. On July 8, 2010, the Board met to consider applicants for positions on a number of town boards, including the Conservation Commission and the Historical District Commission (the "HDC").

The Board had interviewed candidates for both commissions at its June 21, 2010 and June 28, 2010 meetings. In interviews by this office with the Board members, several members stated that they were looking for new appointees with a fresh perspective, particularly on the HDC. The Board members believed that the HDC had taken steps to oppose a controversial development project at Town Center. The Board members had publicly expressed a desire to appoint members to the HDC who would be more amenable to the Town Center project. At its June 21st meeting, the Board interviewed HDC candidates Margery Baston, Diana Warren, Alice Boelter, Kathie Steinberg and Kevin Crowley. Diana Warren and Alice Boelter were candidates for reappointment. At its June 28, 2010 meeting, the Board interviewed candidate Chris Hagger for reappointment to the HDC.

The Board scheduled a regular meeting on July 8, 2010 at 7:00 p.m. to, among other things, discuss and appoint candidates to the Conservation Commission and the HDC. The meeting was broadcast live by the Wayland cable access television station, WayCam. WayCam was broadcasting live at around 6:53 p.m., when members of the Board arrived and began chatting amongst themselves. Four of the five Board members were present, with Selectman Joseph Nolan arriving late to the meeting. From the tape provided by the complainant, it does not appear that the Board members were aware they were being recorded prior to the start of the meeting. The Board members were talking quietly, and not everything they said was audible on the broadcast. A relevant transcript of what occurred appears below, as prepared by the complainant and confirmed by our review of the tape:

Selectwoman Susan Pope: So, who was the other? Kathie?
Selectman John Bladon: Yes.

Selectman Thomas Fay: Kathie Steinberg, Kevin, Marge...

Selectwoman Pope: ...Boelter...

Selectman Fay: Boelter...Boelter's off

....

Selectman Steve Correia then pulls out a sheet of paper from his briefcase and the four members gather around it.

Selectman Correia: So...we have Margery, Chris, Kevin, Kathie. So...taking her off and her off. You're saying you don't want...

Selectman Fay: No, I'm sorry, I thought Chris had to be off. We had to make a choice....

Selectwoman Pope: No.

Selectman Correia: No, we didn't get... No, originally you're right. We had her person, George. Originally, right, but George said "no."

At about 6:56 p.m. the WayCam broadcast switched to public service announcements, and did not return to the live meeting until about 6:59 p.m., when members of the public were in the room and the Selectmen were preparing to convene the meeting.

In interviews with the Board members present for this exchange, all the members insist that this was not a planned discussion, and that it was a brief and informal discussion of the candidates for the HDC. Each member interviewed stated that they had arrived at the meeting already knowing who they planned to vote for. The discussion started with questions about how many spots they had to fill, and who were the candidates under consideration. According to the Board members, the document that Selectman Correia pulled out of his briefcase that the selectmen reviewed during the discussion was a document listing all the candidates' names, and did not contain information regarding preferences. Rather, it was a reference sheet of the candidates under consideration that night. According to Selectman Fay¹, the conversation began because of confusion about the requirements for appointments to the HDC, such as the statutory requirement that an architect serve on the HDC.

It is not clear what occurred during the four minutes that WayCAM ceased broadcasting. According to Selectman Fay, there was some discussion about the statutory requirements for HDC appointments. Selectwoman Pope said there may have been some further discussion of candidates, and that she may have said that she wanted to appoint a new candidate, Kathie Steinberg.

Later in the night, during the open meeting, the Board discussed the appointments for members of the HDC and the Conservation Commission. Each candidate who was appointed was first nominated by a member of the Board, and there was a brief discussion of the merits of each candidate before a vote for appointment. For the HDC, the Board nominated and appointed Kevin Crowley, Margery Baston, Kathie Steinberg, and Chris Hagger. There was no discussion of the two remaining candidates, Diana

¹ For the purposes of this determination, we will refer to you in the third person.

Warren and Alice Boelter. Diana Warren was a member of the HDC applying for reappointment, and Alice Boelter was an alternate member of the HDC, applying for reappointment. All appointments passed unanimously. In a similar manner, the Board appointed Roger Blackman, Larry Kiernan, Markey Burke, and Ted Harding to the Conservation Commission. All candidates were approved unanimously. There was no discussion of candidate Betty Salzburg.

Selectman John Bladon stated in a phone interview that he had come to the meeting with a different opinion of who to support for at least one of the candidates for HDC. He said he was surprised when Selectman Correia listed a different candidate in the pre-meeting discussion. Selectman Bladon ended up supporting the candidate nominated by Selectman Fay because he did not feel strongly about the choice between the two candidates.

After viewing a home recording of the broadcast, complainant Linda Segal wrote a letter on July 20, 2010 to the Board stating that, "a quorum of the Board of Selectmen gathered in the Selectmen's Meeting Room prior to the 7 p.m. posted start time for the public meeting and engaged in a prolonged conversation apparently on public business within the Board's jurisdiction." The letter then requested the Board to "provide a full, fair, and detailed written explanation of the matters that were discussed by Board members prior to opening the public meeting." In a July 28, 2010 email to Ms. Segal in response to her July 20, 2010 letter, Town Administrator Fred Turkington stated that the Board discussed her request at its July 26, 2010 meeting, and responded that:

None of the selectmen recall "a prolonged conversation" on Town business that you allege to have occurred prior to the commencement of the July 8, 2010 selectmen's meeting. As you know from your regular attendance at our meetings, as members arrive, they engage in small talk. Most recall asking about their colleague's Independence Day weekend activities. Some recall asking and receiving a reply to general questions as to which boards citizens would be appointed that evening (i.e. Planning Board, Conservation, HDC, ZBA, etc.) and the scheduled date for considering the appointment of the associate member of the Planning Board given that the only applicant was unavailable to attend that evening.

None recall at precisely what point you were present at the meeting, and it is impossible to determine from your letter whether you observed the alleged conversation first-hand or whether it was relayed to you by someone watching the meeting at home on WayCAM. So we reviewed the video-on-demand tape of the meeting on WayCAM in hopes of determining what conversation you reference. It begins when Mr. Correia called the meeting to order a few moments after 7:00 p.m., so there does not appear to be audio or visual evidence of any conversation you have referenced. Do you have such evidence that we can review in order to better understand and respond to your request?

...Absent further explanation from you as to the substance of the alleged prolonged conversation you reference, we do not believe a "meeting" as defined by law was conducted prior to the posted selectmen's meeting on July 8, 2010.

Following this email, Ms. Segal provided the Board with her copy of the video of the meeting, which included the pre-meeting discussion. The video available on the WayCAM website commenced at the start of the meeting, and did not include the pre-meeting discussion. Ms. Segal then filed her Open Meeting Law complaint on August 5, 2010. The Board discussed the complaint at its August 16, 2010 meeting. The minutes of that meeting state that:

[Town Counsel Mark] Lanza saw the video recording of the event, and he observed four selectmen discussing potential appointees to the Historic District Commission. He said there is enough doubt as to whether a quorum existed that he recommends the Board take remedial action to alleviate any issues that may arise. He said the Board interviewed appointees in public session, there was a discussion and a vote in public session, and resumes were previously distributed and reviewed. He suggested that, in the interest of transparency, the conversation alleged on July 8 be repeated now in a public session, with minutes taken in a properly posted public meeting. He said the Board should then submit a notice to the Attorney General that remedial action was taken, with a request that the Attorney General take no further action. The Board recreated the conversation, prior to the opening of the meeting of July 8, 2010, by reading a copy of the full transcript which is attached and made part of this record.

[Selectman] Correia said...it is clear that the four Board members were mistaken in referring to some of the candidates who were being considered for appointment that evening. The comments made during a less than five minute period prior to the formal opening of the July 8th Board of Selectmen meeting should not have occurred until the start of the meeting.

In the Board's August 17, 2010 response to the complaint, the Board writes that "it is apparent that a quorum of the Board briefly discussed potential appointees to fill vacancies on the Historic District Commission ("HDC"). In order to remedy what it viewed as a "technical transgression," the Board repeated its discussion of the potential appointees to the HDC in open session at a duly posted meeting of the Board held on August 16, 2010." The Board further states that, "[e]ven though it may not have been necessary, the Board has taken this remedial action as a cautionary measure and for transparency purposes...the vacancies on the HDC were filled by a vote of the Board in open session during its July 8, 2010 meeting. The vote to make the appointments was preceded by a discussion of the [sic] each of the appointees. Therefore, any technical violation of the law that may have occurred by the July 8, 2010 pre-meeting discussion of the candidates for appointment to the HDC was cured by the discussion and vote during the Board's July 8, 2010 meeting."

In reviewing emails provided by the Board and interviewing the Board members, we find no evidence of any additional discussion between a quorum of the Board

members regarding the candidates, aside from the discussion caught on tape on July 8, 2010 at 6:53 p.m.

DISCUSSION

A. The Board Violated the Open Meeting Law by Deliberating on a Slate of Candidates for Appointment Prior to a Public Meeting

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 Committee of Southbridge, 376 Mass. 70, 72 (1978). The law requires that 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 Open Meeting Law defines a “meeting” as “a deliberation by a public body with respect to any matter within the body’s jurisdiction.” G.L. c. 30A, § 18. A “deliberation” is defined 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; provided, however, that ‘deliberation’ shall not include the distribution of a meeting agenda, scheduling information or distribution of other procedural meeting or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed.” Id.

The Board violated the Open Meeting Law when it discussed candidates for the HDC outside of an open session. Any communication between or among a quorum of the Board with respect to a matter within the Board’s jurisdiction is a deliberation. See G.L. c. 30A, § 18. Here, the members of the Board discussed their preferences for candidates for the HDC before the public portion of the meeting. They were not aware that their conversation was being broadcast live on Wayland local cable television. That taped discussion, however, demonstrates that the Board members arrived at a collective decision on a slate of candidates. Selectman Fay specifically named “Kathie Steinberg, Kevin, Marge.” Selectwoman Pope then asked about Alice Boelter. Fay replied “Boelter’s off,” apparently to general agreement. Selectman Correia then stated “we have Margery, Chris, Kevin, Kathie. So...taking her off and her off.” The candidates appointed to the HDC that night were Margery Baston, Chris Hagger, Kevin Crowley, and Kathie Steinberg. The candidates not appointed were Diana Warren and Alice Boelter. And the successful candidates all shared a “fresh perspective” on the Town Center project. Thus, the Board members’ pre-meeting discussion led to unanimous approval of a slate of candidates, without a subsequent public discussion of the Board members’ preference for Town Center-friendly candidates. There was no discussion of the candidates who were not chosen.

The Board contends that “any technical violation of the law that may have occurred by the July 8, 2010 pre-meeting discussion of the candidates for appointment to the HDC was cured by the discussion and vote during the Board’s July 8, 2010 meeting.” There are two flaws in the Board’s contention. First, this was not a “technical” violation of the Open Meeting Law. The Board decided which candidates would represent the

public on two separate commissions, and it made that decision out of the public eye. This type of violation strikes at the heart of the Open Meeting Law.

Second, to cure a violation of the Open Meeting Law, a public body must take independent, deliberative action, and not merely engage in a ceremonial acceptance and perfunctory ratification of a secret decision. See Pearson v. Board of Selectmen of Longmeadow, 49 Mass.App.Ct. 119, 125, (2000) (citing Tolar v. School Bd. of Liberty County, 398 So.2d 427, 429 (Fla.1981)). Here, the Board did not take any action during the July 8, 2010 open meeting to discuss which candidates were not chosen as they had done in the pre-meeting discussion.

Additionally, the Board was unable or unwilling to acknowledge that the discussion occurred in its July 28, 2010 response to the complainant's letter, just three weeks after the July 8, 2010 meeting. The Board's initial response to the complainant's letter suggested that the discussion did not involve an agreement on a slate of candidates, but that Board members "recall asking and receiving a reply to general questions as to which boards citizens would be appointed that evening." The letter further states that "[a]bsent further explanation from you as to the substance of the alleged prolonged conversation you reference, we do not believe a 'meeting' as defined by law was conducted prior to the posted selectmen's meeting on July 8, 2010." Essentially, the Board was unwilling to acknowledge a violation of the law until confronted with the incontrovertible evidence of the video recording.

We do not find that any improper deliberation occurred prior to July 8, 2010, as has been alleged by the complainant, nor do we find that the Board members planned to arrive early that night to discuss the candidates for appointment. We also did not find evidence that the Board discussed appointments for the Conservation Commission prior to the July 8, 2010 open session, as is alleged in the complaint.

B. The Board's Violation of the Open Meeting Law was Intentional

The Attorney General's Open Meetings regulations define "intentional violation" as an "act or omission by a public body, or a member of a public body, that knowingly violates" the Open Meeting Law. 940 CMR 29.02. Here, the record – particularly the videotape – amply supports the conclusion that the Board members' violation was intentional.

To begin with, the Open Meeting Law requires that, within two weeks of qualification for office, each Board member certify that they have received of a copy of the law as well as relevant regulations and educational materials prepared by the Attorney General. G.L. c. 30A, § 20(g). That certification "shall be evidence that the member of a public body has read and understands the requirement of the open meeting law and the consequences of violating it." G.L. c. 30A, § 20(g). We note that on July 8, 2010 – the very day of this violation – the Wayland Town Clerk distributed a memorandum to the Board members attaching a letter regarding the changes in the Open Meeting Law, as well as the Attorney General's Open Meeting Law Guide and the Certificate of Receipt of Open Meeting Law Materials. Thus, each of the Board members who participated in

the discussion had just been reminded of their obligations under the law, as required by the Attorney General's regulations,² and had to be aware of their obligation to refrain from discussing Board business outside of a public meeting.

Moreover, each of the participating members knew that the Board was going to vote on the appointment of HDC members that night, and they knew at the time the deliberation occurred that the meeting was not yet open to the public. Nonetheless, they came to an agreement on the slate of candidates they would approve – in hushed voices and in an empty room – outside of public view. This is not a mere technical violation, but a violation of a bedrock principle of government transparency. While the Board members may not have arrived on the evening of July 8th with the intention of discussing candidates for appointment prior to the public meeting, they should have been aware of their obligation under the Open Meeting Law to refrain from such discussion. None of the members present stopped the discussion or chose to leave. Thus, we conclude that the Board intentionally agreed on a slate of candidates for appointment, outside the view of the public, in violation of the Open Meeting Law. Given this record, a hearing is appropriate to determine whether the Board's intentional violation should be subject to a fine.

CONCLUSION AND ORDER

We find that the Board violated the Open Meeting Law by deliberating on a slate of candidates for appointment prior to a public meeting. Because we believe this violation was intentional, we refer this matter for a hearing pursuant to 940 CMR 29.07(3), and recommend that the Board be assessed a fine of \$1,000 pursuant to G.L. c. 30A, § 23(c) ("Upon the finding of a violation, the attorney general may issue an order to . . . impose a civil penalty upon the public body of not more than \$1,000 for each intentional violation").³ We invite counsel for the Board to contact this office to discuss the hearing process. We also order the Board to take the following remedial actions:

1. Immediate and future compliance with the Open Meeting Law, G.L. c. 30A, §§18-25; and
2. Attendance at a training on the Open Meeting Law and certification to this office that every member of the Board has attended that training. The trainings are to be conducted by an attorney or organization familiar with the requirements of the Law and approved by this Office. This training is ordered

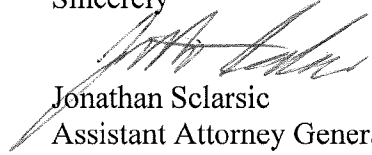
² We note that Selectman Fay signed the Certificate of Receipt of Open Meeting Law Materials on July 23, 2010; Selectman Bladon on August 23, 2010. Selectmen Nolan and Correia signed an acknowledgement under the prior Open Meeting Law statute in April 2008. Selectwoman Pope signed an acknowledgement under the prior Open Meeting Law statute in April 2009. There is no current Certificate of Receipt of Open Meeting Law Materials on file for Selectmen Nolan, Correia, and Pope.

³ In a recent decision, the Hampshire Superior Court fined the South Hadley School Committee \$5,000 for intentional violations of the Open Meeting Law. Gelinas v. Town of South Hadley, C.A. No. 10-129, (Mass. Superior Court, filed May 23, 2011).

in addition to any future remedial actions ordered as the result of a hearing.

If you have any questions regarding this decision, 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: Linda Segal
Mark Lanza, Wayland Town Counsel