

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPT.
OF THE TRIAL COURT
C.A. NO 1981cv3254C

WILLIAM P. LEAHY, S.J., JOSEPH QUINN,
and LINDA REILLY, Three Registered Voters
in the City of Newton

Plaintiffs,

v.

NEWTON COMMUNITY PRESERVATION
COMMITTEE,

Defendant.

**VERIFIED COMPLAINT FOR VIOLATION OF THE OPEN MEETING LAW,
DECLARATORY AND INJUNCTIVE RELIEF**

NATURE OF ACTION

1. Plaintiffs William P. Leahy, S.J., Joseph Quinn, and Linda Reilly, three registered voters of the City of Newton (collectively, the "Plaintiffs"), bring this action pursuant to G. L. c. 30A, § 23(f), seeking declaratory and injunctive relief to redress violations by the Newton Community Preservation Committee ("Defendant" or "Newton CPC") of the Open Meeting Law, G. L. c. 30A §§ 18-25 ("OML"), and to prevent future violations. In chief, Plaintiffs complain that on October 10, 2019, Newton CPC unlawfully entered into executive session to discuss whether to fund the Newton Mayor's \$15.74 Million controversial plan to take by eminent domain a portion of a property owned by Boston College ("BC" or the "University"), known and numbered as 300 Hammond Pond Parkway ("HPP Property"), and referred to as Webster Woods. Future executive sessions are scheduled for the same purpose.

2. A Community Preservation Committee's ("CPC") statutory mandate is pursuant to the Community Preservation Act ("CPA"), G. L. c. 44B. CPCs are authorized to use a specially created fund of public money for the acquisition of conservation land. A CPC has no statutory authority in effectuating an eminent domain taking under G. L. c. 79. It does not decide whether or what to take; it has no role in determining how much money is to be awarded in the event of a taking. If the Newton City Council votes to take and the Mayor approves, Newton CPC's only role is to decide whether to use CPA funds to pay all or a portion of the eminent domain award, if requested to do so. A CPC discussion for that purpose should not, and cannot lawfully, be held in a secret executive session.

3. Presented with a request for funding, as happened here, a CPC convenes duly noticed public meetings to consider the merits of funding one project over another in queue within the limits of the CPA monies available. It is intended to be a transparent, public process without executive session which Newton CPC has in fact followed over the years - except in this case. A review of Newton CPC's meetings' agenda and minutes reveals that in the last 5 years, the Newton CPC entered into executive session only when it concerned BC's HPP Property. This elusive practice must come to an end.

4. Time is of the essence. On November 12, 2019, Newton CPC will hold another executive session and at its conclusion, vote whether to use CPA funds for this project rather than other projects seeking CPA funding. The public would be irreparably harmed if Newton CPC votes to fund this purportedly CPA compliant project to the detriment of other projects without full, public disclosure of what was discussed in past executive sessions and all information considered, including all documents reviewed ("Executive Session Materials").

5. Plaintiffs seek a declaration that Newton CPC violated the OML when it entered executive session on October 10, 2019 to discuss whether to fund the Mayor's proposed taking of HPP Property over other projects ("October 10 Meeting"), and seek a preliminary and a permanent injunction enjoining and restraining the Newton CPC from (i) convening any future executive sessions regarding funding of a proposed taking of BC's property, and (ii) holding any future public hearings and deliberations until the minutes of, and all Executive Session Materials considered during the October 10 Meeting's executive session are made public.

PARTIES

6. Plaintiff, William P. Leahy, S.J., resides in the City of Newton, County of Middlesex, Massachusetts, and is a registered voter.

7. Plaintiff, Joseph Quinn, resides in the City of Newton, County of Middlesex, Massachusetts, and is a registered voter.

8. Plaintiff, Linda Reilly, resides in the City of Newton, County of Middlesex, Massachusetts, and is a registered voter.

9. Defendant, Newton CPC, is a municipal public body established under the CPA with a principal place of business and operation at Newton City Hall, 1000 Commonwealth Avenue, City of Newton, County of Middlesex, Massachusetts.

JURISDICTION AND VENUE

10. This Court has jurisdiction pursuant to G. L. c. 30A, § 23(f), G. L. c. 214, §§ 1 and 6, and G. L. c. 231A, § 2. Pursuant to G. L. c. 30A, § 23(f) and G. L. c. 214, § 5, venue is proper in this Court because Newton CPC's principal place of business is at Newton City Hall, Newton, Middlesex County, and where it meets, as it did on October 10, 2019.

BACKGROUND

I. The Community Preservation Act and The Newton CPC.

11. The CPA came into law in 2000 and allows municipalities to levy a surcharge on property taxes and receive state matching funds to achieve the goals and objectives of the CPA namely, affordable housing, historic resources, open space, and recreation land. Among other functions, local CPCs are responsible for studying the needs, possibilities and resources of a city or town regarding community preservation and making recommendations to the legislative body for the acquisition, creation, and preservation of property for the purposes under the CPA. In turn, public officials may request that a CPC fund such acquisitions. G. L. c. 44B, § 5.

12. The City of Newton ("City") adopted the CPA by ordinance in 2001 and formed the Newton CPC. *See* Newton City Ord. §§ 7-80 - 7-89, Exhibit 1 hereto. The Newton Community Preservation Fund is funded by a 1% surcharge on the City's total property tax levy. The surcharge, certain state matching funds, plus any unused funds from prior years carried forward, create the available money for CPA projects in a given year. Eligible CPA projects compete for limited funds. Newton CPC decides which of the many desirable projects fits within the annual budget of available funds and earmarks those for funding. Projects that are not funded remain on the Community Preservation Plan list for future consideration.

13. The Fiscal Year 2020 surcharge netted \$3,568,921 in CPA funds and CPC's available funds for all projects in FY20 is \$14,838,009. Exhibit 10 hereto, p. 3. According to the Community Preservation Plan adopted on April 3, 2018, updated October 23, 2019, there are 28 projects, not including Webster Woods, seeking CPC funding, with an estimated cost of \$41,296,500 (\$57,051,500 less \$15,755,000). Newton Community Preservation Plan, Exhibit 2 hereto, pp. 3-4.

II. City of Newton's Plans to Take Part of the HPP Property.

14. BC, a non-profit, private Jesuit, Catholic university, with a principal place of business in the Chestnut Hill area of Newton, currently owns the HPP Property which consists of 25 acres, of which the front 8± acres are developed. The HPP Property is bordered by conservation land to the north and the Chestnut Hill Mall to the south. Since the time of its purchase in 2016, the University has invested \$6.5 Million to upgrade the property, renovating parts of buildings, replacing a sewer line and making other infrastructure repairs. A landscaping materials storage facility was built by the University in 2019 with significantly improved drainage infrastructure to better protect the undeveloped rear portion. The portion of the HPP Property targeted for acquisition by the City is the rear portion. The University has plans in progress and anticipates future development of the entire HPP Property.

15. The City has shown some interest in acquiring all or portions of the HPP Property for years, threatening but never acting. The City could have, but did not, buy the HPP Property in 2016 when it was sold to BC.

16. In July 2017, then City Councilor (Alderman) and mayoral candidate, now Newton Mayor Ruthanne Fuller, published a campaign position urging the taking by eminent domain of the undeveloped portion of BC's land to stop BC from developing it as part of its campus. Fuller July 2017 Letter, Exhibit 3 hereto. Fuller became the City's mayor in January 2018 ("Mayor Fuller" or "Mayor").

17. Between January 2018 and the summer of 2019, the Mayor's Webster Woods advisory group and citizen organizations advocated for acquisition of the HPP Property. The Mayor met with BC. The Newton CPC held meetings, and when the matter concerned the HPP Property, went into executive session.

18. By September 2019, the public remained in the dark. At the September 10, 2019 meeting of Newton CPC, a citizen observer from the League of Women Voters of Newton asked for more information about the Webster Woods project, “[s]he knew this project would be expensive and was concerned that no information had yet been shared with the public about it.” September 10, 2019 Minutes, Exhibit 4 hereto, p. 3. Newton CPC’s Chair Mark Armstrong admitted that “CPC shared this concern.” *Id.* In response to the Chair’s acknowledged lack of public information, Newton CPC went into executive session. *Id.*

19. Emerging from the cloak of its September 10 executive session, Newton CPC announced that it discussed FY20 priorities with the Newton Planning and Development Board and with Newton Conservation Commission for funding of affordable housing and trails on conservation land. Nothing about the HPP Property or Webster Woods was mentioned in public. *See* September 10, 2019 Minutes, Exhibit 4 hereto, p. 4.

20. Just a few days later, the Mayor publicly announced that she intended to move forward with a taking. Mayor’s September 18, 2019 Letter, Exhibit 5 hereto. On October 3, 2019, the Mayor submitted a funding request to Newton CPC for \$15.74 Million for the taking in fee of a 17.4 acre portion of BC’s property, plus certain related soft-cost expenses. In its funding request, the amount of money to be paid BC in the event of a taking is publicly announced to be \$15.2 Million. Mayor Fuller Funding Request, Exhibit 6 hereto (“Mayor’s Funding Request”).

21. Newton City Ordinance provides:

(a) The Newton [CPC] is hereby established to carry out the functions and duties of such a community preservation committee as provided in General Laws chapter 44B, including,

(3) It is the intent of this ordinance that, to the extent possible, projects using CPA funds seek to leverage other funding sources. CPA funds *shall not* replace existing operating funds only augment them (*emphasis added*).

Newton City Ord. § 7-80 (a)(3), Exhibit 1 hereto.

22. The Mayor's Funding Request to use only CPA funds to pay the costs of taking the Webster Woods portion of the HPP Property violates Newton City Ordinance. Newton City Ord. § 7-80 (a)(3), Exhibit 1 hereto.

23. No other public money is to be used to pay for the proposed taking of the Webster Woods portion of the HPP Property from BC.

24. On or about October 4, 2019, Newton CPC posted its agenda package for the October 10 Meeting to consider the Mayor's Funding Request. October 10, 2019 Agenda Package, Exhibit 7 hereto ("October 10 Agenda"). The October 10 Agenda gave notice that it would enter into executive session "for the purposes of considering the purchase, exchange, lease or value of Webster Woods and strategy regarding litigation." *Id.*, p. 1.

25. The Newton CPC is only being requested to approve CPA funding. It is not "considering the purchase, exchange, lease" of Webster Woods; that authority lies with the City Council and Mayor. The Newton CPC has no responsibility or authority in a taking by eminent domain; that authority also lies with the City Council and the Mayor under G. L. c. 79. The value of Webster Woods has been determined by third parties, not by the Newton CPC. The amount of money to be paid in just compensation in the event of a taking also lies with the City Council and the Mayor under G. L. c. 79. Newton CPC has no role in litigation.

26. Newton CPC convened the October 10 Meeting. The Mayor made a presentation and then Newton CPC went into executive session. October 10 Meeting Draft Minutes, Exhibit 8 hereto.

27. On October 21, 2019, Joseph Herlihy, Esq., BC's General Counsel, filed and served on the Newton CPC an OML complaint pursuant G. L. c. 30A § 23 ("OML Complaint"). An

Answer or response to the OML Complaint was due on November 8, 2019. OML Complaint, Exhibit 9 hereto.

28. The next scheduled meeting of the Newton CPC has been noticed for November 6, 2019. The only item on the agenda is a public hearing to discuss the Mayor's Funding Request. November 6, 2019 Agenda Package, Exhibit 10 hereto.

29. Newton CPC has also given notice that it will hold a public meeting on November 12, 2019, and scheduled a vote on the Mayor's Funding Request to follow, but only after another executive session. *See* November 12, 2019 Agenda, Exhibit 11 hereto.

30. If the Newton CPC votes to fund the taking of the 17.4 acre Webster Woods portion of the HPP Property from BC on November 12, 2019 while the October 10 Meeting executive session, and the anticipated executive session preceding the vote on November 12, remain shrouded in secrecy, then the public will have been irreparably harmed by being deprived of the benefits of public, open meetings and the opportunity to be heard before the Newton CPC chooses to fund one project over others.

31. Regarding Newton CPC's Answer to the OML Complaint originally due on November 8, 2019, without informing or even copying BC's General Counsel, Newton CPC requested from the Attorney General an extension of time by and through the City Solicitor's Office on October 29, 2019. The AG granted the extension to November 19, 2019 by letter dated October 31, 2019. BC's General Counsel would have been left in the dark by the Newton CPC had he not been sent a courtesy copy by the AG. AG Extension Letter, Exhibit 12.

COUNT I

(Newton CPC's Violation of Open Meeting Law, G. L. c. 30A)

32. Plaintiffs hereby incorporate by reference, as if fully set forth herein, the allegations contained in the preceding paragraphs.

33. Under Massachusetts law, with few exceptions, all meetings of a public body must be open to the public. G. L. c. 30A § 20 (“all meetings of a public body shall be open to the public”). Public bodies may enter a closed, or executive, session only for the limited purposes enumerated in the G. L. c. 30A § 21.

34. Newton CPC purported to enter into executive session “for the purposes of considering the purchase, exchange, lease or value of Webster Woods and strategy regarding litigation.” Exhibit 7. This was pretextual.

35. The City is not considering the purchase, exchange or lease of Webster Woods. Newton CPC has no decision-making role in determining whether to take by eminent domain, no role in the legal procedure required to make a taking, no role in the determination of value of the property taken.

36. Newton CPC is not involved in litigation strategy.

37. Newton CPC’s sole responsibility is to decide whether to honor the Mayor’s Funding Request to use 100% CPA funds to pay for the taking by eminent domain of BC’s property.

38. The amount of money to be paid to BC, \$15.2 Million, in the event of a taking has been publicly announced. It is in the Mayor’s Funding Request. Exhibit 6 hereto, p. 16. The basis for the Mayor’s request – the appraisal summary circulated to the Newton CPC on October 3, 2019 – is publicly known. *Id.*

39. Newton CPC’s deliberations, and consideration of Executive Session Materials provided to the Newton CPC members in executive session, out of public view, concerning whether to take and how much to pay are outside the scope of the Newton CPC’s statutory responsibilities under the CPA, were unlawful and must be made public before a vote on the matter.

40. Therefore, Defendant violated the OML when it entered into executive session on October 10, 2019 for an improper purpose.

COUNT II
(Declaratory Judgment)

41. Plaintiffs hereby incorporate by reference, as if fully set forth herein, the allegations contained in the preceding paragraphs.

42. An actual controversy exists between Plaintiffs, on the one hand, and Newton CPC, on the other hand, as to Newton CPC's right to enter into executive session at the October 10 Meeting and ultimately the right of Newton CPC to vote to fund with those matters considered in secret, including all Executive Session Materials.

43. Plaintiffs seek a declaration of rights by this Court pursuant to G. L. Ch. 231A, § 1 that Newton CPC: (a) deliberated in executive session at the October 10 Meeting concerning the Mayor's Funding Request proposal; (b) had no right under the OLM to conduct those deliberations in secret; (c) has no right to proceed with a vote on whether to commit CPA funds, as requested by the Mayor, without revealing to the public the content of all secret deliberations in executive session on the subject; (d) is obligated under the OML to reveal and make public all Executive Session Materials, including the minutes and other documents evidencing the October 10 Meeting executive session before proceeding to a vote on funding, and (e) must refrain from conducting business in secret before such vote.

COUNT III
(Injunctive Relief)

44. Plaintiffs hereby incorporate by reference, as if fully set forth herein, the allegations contained in the preceding paragraphs.

45. Newton CPC intends to vote to fund the proposed taking on November 12, 2019 at a scheduled Newton CPC public meeting.

46. Plaintiffs have a reasonable likelihood of success on the merits of the claim that the Newton CPC violated the OLM by deliberating in executive session at the October 10 Meeting.

47. Unless this Court issues a temporary restraining order and preliminary injunction ordering that Newton CPC postpone the November 12, 2019 meeting until Newton CPC reveals all Executive Session Materials before proceeding to a vote on CPA funding, Plaintiffs and other members of the public will be irreparably harmed. Among other things, if the vote is taken and CPA funds, or does not fund, the Plaintiffs and other members of the public will have been deprived of an informed opportunity to influence the Newton CPC and the outcome of the vote.

48. Plaintiffs have no adequate remedy at law.

49. The balance of harms strongly favors Plaintiffs.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully requests that this Court:

(1) As to Count I, enter judgment in favor of Plaintiffs that Newton CPC violated the Open Meeting Law, and:

(a) Order that Newton CPC, its members and agents make public forthwith the Executive Session Materials before proceeding to a vote on committing CPA funding concerning the HPP Property taking;

(b) Order that Newton CPC, its members and agents postpone the November 12, 2019 public meeting and the related vote on committing CPA funding concerning the HPP Property taking, and not reconvene it until the Executive Session Materials have been made public; and

- (c) Order that Newton CPC, its members and agents are enjoined from convening an executive session to deliberate on committing CPA funding concerning the HPP Property taking;
- (d) Levy such fines as this Court deems appropriate; and
- (e) Award the Plaintiffs their costs, and reasonable attorney's fees.

(2) As to Count II, in accordance with G. L.c. 231A, § 1, determine the rights of the parties and enter declaratory judgment in favor of Plaintiffs and against CPC declaring and adjudging that Newton CPC:

- (a) deliberated in executive session at the October 10 Meeting concerning the Mayor's proposal that the City take a defined portion of the HPP Property using CPA funds;
- (b) had no right under the OLM to conduct those deliberations in secret;
- (c) has no right to proceed with a vote on whether to commit CPA funds, as requested by the Mayor, without revealing to the public the content of all secret deliberations in executive session on the subject; and
- (d) is obligated under the OML to reveal all Executive Session Materials before proceeding to a vote on funding and must restrain from conducting business in secret before such vote.

(3) As to Count III, in accordance with Mass. R. Civ. P 65, enter a preliminary and permanent injunction ordering:

- (f) That Newton CPC, its members and agents make public forthwith the Executive Session Materials before proceeding to a vote on committing CPA funding concerning the HPP Property taking;

- (g) That Newton CPC, its members and agents postpone the November 12, 2019 public meeting and the related vote on committing CPA funding concerning the HPP Property taking, and not reconvene it until the Executive Session Materials have been made public; and
 - (h) That Newton CPC, its members and agents are enjoined from convening an executive session to deliberate on committing CPA funding concerning the HPP Property taking.
- (4) For recovery of Plaintiffs' cost of suit, including its attorney's fees; and
 - (5) For such other and further relief as the Court deems just.

Respectfully submitted,

WILLIAM P. LEAHY, S.J., JOSEPH QUINN, and
LINDA REILLY, three registered voters in the City
of Newton

By their attorneys,



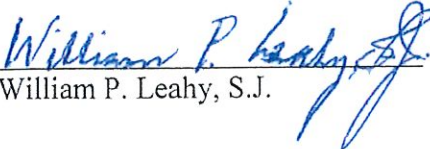
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Dated: November 6, 2019

VERIFICATION

I, William P. Leahy, S.J, a plaintiff in the above-captioned matter, hereby verify under oath that I have read this Verified Complaint for Violation of the Open Meeting Law, Declaratory Judgment and Injunctive Relief and further verify that the allegations of fact stated therein are true to the best of my knowledge.

Signed under the pains and penalties of perjury this 5 day of November of 2019.



William P. Leahy, S.J.

CIVIL ACTION COVER SHEET	DOCKET NUMBER <u>1981 cv 3254C</u>	Trial Court of Massachusetts The Superior Court
PLAINTIFF(S): <u>William P. Leahy, S.J et al.</u> ADDRESS: <u>140 Commonwealth Avenue Chestnut Hill, MA 02467</u>	COUNTY <u>Middlesex</u>	
DEFENDANT(S): <u>Newton Community Preservation Committee</u>		
ATTORNEY: <u>James D. Masterman # 326000</u> ADDRESS: <u>GREENBERG TRAURIG, LLP</u> <u>One International Place</u> <u>Boston, MA 02110</u>	ADDRESS: <u>Newton City Hall, 1000 Commonwealth Avenue,</u> <u>Newton, Massachusetts</u>	
BBO: <u># 326000</u>		
TYPE OF ACTION AND TRACK DESIGNATION (see reverse side)		
CODE NO. <u>D03</u>	TYPE OF ACTION (specify) <u>Injunction</u>	TRACK <u>F</u>
		HAS A JURY CLAIM BEEN MADE? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
*If "Other" please describe: <u>and declaratory relief</u>		
Is there a claim under G.L. c. 93A? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		Is this a class action under Mass. R. Civ. P. 23? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO
STATEMENT OF DAMAGES PURSUANT TO G.L. c. 212, § 3A		
The following is a full, itemized and detailed statement of the facts on which the undersigned plaintiff or plaintiff's counsel relies to determine money damages. For this form, disregard double or treble damage claims; indicate single damages only.		
TORT CLAIMS (attach additional sheets as necessary)		
A. Documented medical expenses to date:		NA \$ _____ \$ _____ \$ _____ \$ _____ \$ _____ Subtotal (A): \$ _____
1. Total hospital expenses		
2. Total doctor expenses		
3. Total chiropractic expenses		
4. Total physical therapy expenses		
5. Total other expenses (describe below)		
B. Documented lost wages and compensation to date		\$ _____
C. Documented property damages to date		\$ _____
D. Reasonably anticipated future medical and hospital expenses		\$ _____
E. Reasonably anticipated lost wages		\$ _____
F. Other documented items of damages (describe below)		\$ _____
G. Briefly describe plaintiff's injury, including the nature and extent of injury:		TOTAL (A-F):\$ _____
CONTRACT CLAIMS (attach additional sheets as necessary)		
<input type="checkbox"/> This action includes a claim involving collection of a debt incurred pursuant to a revolving credit agreement. Mass. R. Civ. P. 8.1(a). Provide a detailed description of claim(s):		
		TOTAL: \$ _____
Signature of Attorney/ Unrepresented Plaintiff: X <u>[Signature]</u>		Date: <u>11/6/18</u>
RELATED ACTIONS: Please provide the case number, case name, and county of any related actions pending in the Superior Court.		
CERTIFICATION PURSUANT TO SJC RULE 1:18		
I hereby certify that I have complied with requirements of Rule 5 of the Supreme Judicial Court Uniform Rules on Dispute Resolution (SJC Rule 1:18) requiring that I provide my clients with information about court-connected dispute resolution services and discuss with them the advantages and disadvantages of the various methods of dispute resolution.		
Signature of Attorney of Record: X <u>[Signature]</u>		Date: <u>11/6/18</u>

CIVIL ACTION COVER SHEET INSTRUCTIONS

SELECT CATEGORY THAT BEST DESCRIBES YOUR CASE

AC Actions Involving the State/Municipality *

- AA1 Contract Action involving Commonwealth, Municipality, MBTA, etc. (A)
- AB1 Tortious Action involving Commonwealth, Municipality, MBTA, etc. (A)
- AC1 Real Property Action involving Commonwealth, Municipality, MBTA etc. (A)
- AD1 Equity Action involving Commonwealth, Municipality, MBTA, etc. (A)
- AE1 Administrative Action involving Commonwealth, Municipality, MBTA, etc. (A)

CN Contract/Business Cases

- A01 Services, Labor, and Materials (F)
- A02 Goods Sold and Delivered (F)
- A03 Commercial Paper (F)
- A04 Employment Contract (F)
- A05 Consumer Revolving Credit - M.R.C.P. 8.1 (F)
- A06 Insurance Contract (F)
- A08 Sale or Lease of Real Estate (F)
- A12 Construction Dispute (A)
- A14 Interpleader (F)
- BA1 Governance, Conduct, Internal Affairs of Entities (A)
- BA3 Liability of Shareholders, Directors, Officers, Partners, etc. (A)
- BB1 Shareholder Derivative (A)
- BB2 Securities Transactions (A)
- BC1 Mergers, Consolidations, Sales of Assets, Issuance of Debt, Equity, etc. (A)
- BD1 Intellectual Property (A)
- BD2 Proprietary Information or Trade Secrets (A)
- BG1 Financial Institutions/Funds (A)
- BH1 Violation of Antitrust or Trade Regulation Laws (A)
- A99 Other Contract/Business Action - Specify (F)

* Choose this case type if ANY party is the Commonwealth, a municipality, the MBTA, or any other governmental entity UNLESS your case is a case type listed under Administrative Civil Actions (AA).

† Choose this case type if ANY party is an incarcerated party, UNLESS your case is a case type listed under Administrative Civil Actions (AA) or is a Prisoner Habeas Corpus case (E97).

ER Equitable Remedies

- D01 Specific Performance of a Contract (A)
- D02 Reach and Apply (F)
- D03 Injunction (F)
- D04 Reform/ Cancel Instrument (F)
- D05 Equitable Replevin (F)
- D06 Contribution or Indemnification (F)
- D07 Imposition of a Trust (A)
- D08 Minority Shareholder's Suit (A)
- D09 Interference in Contractual Relationship (F)
- D10 Accounting (A)
- D11 Enforcement of Restrictive Covenant (F)
- D12 Dissolution of a Partnership (F)
- D13 Declaratory Judgment, G.L. c. 231A (A)
- D14 Dissolution of a Corporation (F)
- D99 Other Equity Action (F)

PA Civil Actions Involving Incarcerated Party †

- PA1 Contract Action involving an Incarcerated Party (A)
- PB1 Tortious Action involving an Incarcerated Party (A)
- PC1 Real Property Action involving an Incarcerated Party (F)
- PD1 Equity Action involving an Incarcerated Party (F)
- PE1 Administrative Action involving an Incarcerated Party (F)

TR Torts

- B03 Motor Vehicle Negligence - Personal Injury/Property Damage (F)
- B04 Other Negligence - Personal Injury/Property Damage (F)
- B05 Products Liability (A)
- B06 Malpractice - Medical (A)
- B07 Malpractice - Other (A)
- B08 Wrongful Death - Non-medical (A)
- B15 Defamation (A)
- B19 Asbestos (A)
- B20 Personal Injury - Slip & Fall (F)
- B21 Environmental (F)
- B22 Employment Discrimination (F)
- BE1 Fraud, Business Torts, etc. (A)
- B99 Other Tortious Action (F)

RP Summary Process (Real Property)

- S01 Summary Process - Residential (X)
- S02 Summary Process - Commercial/ Non-residential (F)

RP Real Property

- C01 Land Taking (F)
- C02 Zoning Appeal, G.L. c. 40A (F)
- C03 Dispute Concerning Title (F)
- C04 Foreclosure of a Mortgage (X)
- C05 Condominium Lien & Charges (X)
- C99 Other Real Property Action (F)

MC Miscellaneous Civil Actions

- E18 Foreign Discovery Proceeding (X)
- E97 Prisoner Habeas Corpus (X)
- E22 Lottery Assignment, G.L. c. 10, § 28 (X)

AB Abuse/Harassment Prevention

- E15 Abuse Prevention Petition, G.L. c. 209A (X)
- E21 Protection from Harassment, G.L. c. 258E(X)

AA Administrative Civil Actions

- E02 Appeal from Administrative Agency, G.L. c. 30A (X)
- E03 Certiorari Action, G.L. c. 249, § 4 (X)
- E05 Confirmation of Arbitration Awards (X)
- E06 Mass Antitrust Act, G.L. c. 93, § 9 (A)
- E07 Mass Antitrust Act, G.L. c. 93, § 8 (X)
- E08 Appointment of a Receiver (X)
- E09 Construction Surety Bond, G.L. c. 149, §§ 29, 29A (A)
- E10 Summary Process Appeal (X)
- E11 Worker's Compensation (X)
- E16 Auto Surcharge Appeal (X)
- E17 Civil Rights Act, G.L. c. 12, § 11H (A)
- E24 Appeal from District Court Commitment, G.L. c. 123, § 9(b) (X)
- E25 Pleural Registry (Asbestos cases) (X)
- E94 Forfeiture, G.L. c. 265, § 56 (X)
- E95 Forfeiture, G.L. c. 94C, § 47 (F)
- E99 Other Administrative Action (X)
- Z01 Medical Malpractice - Tribunal only, G.L. c. 231, § 60B (F)
- Z02 Appeal Bond Denial (X)

SO Sex Offender Review

- E12 SDP Commitment, G.L. c. 123A, § 12 (X)
- E14 SDP Petition, G.L. c. 123A, § 9(b) (X)

RC Restricted Civil Actions

- E19 Sex Offender Registry, G.L. c. 6, § 178M (X)
- E27 Minor Seeking Consent, G.L. c. 112, § 12S(X)

TRANSFER YOUR SELECTION TO THE FACE SHEET

EXAMPLE:

CODE NO.	TYPE OF ACTION (specify)	TRACK	HAS A JURY CLAIM BEEN MADE?
B03	Motor Vehicle Negligence-Personal Injury	F	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO

STATEMENT OF DAMAGES PURSUANT TO G.L. c. 212, § 3A

DUTY OF THE PLAINTIFF - The plaintiff shall set forth, on the face of the civil action cover sheet (or attach additional sheets as necessary), a statement specifying the facts on which the plaintiff relies to determine money damages. A copy of such civil action cover sheet, including the statement as to the damages, shall be served with the complaint. **A clerk-magistrate shall not accept for filing a complaint, except as otherwise provided by law, unless it is accompanied by such a statement signed by the attorney or self-represented litigant.**

DUTY OF THE DEFENDANT - If the defendant believes that the statement of damages filed by the plaintiff is inadequate, the defendant may file with his/her answer a statement specifying the potential damages which may result if the plaintiff prevails.

**A CIVIL COVER SHEET MUST BE FILED WITH EACH COMPLAINT.
FAILURE TO COMPLETE THIS COVER SHEET THOROUGHLY AND ACCURATELY
MAY RESULT IN DISMISSAL OF THIS ACTION.**

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPT.
OF THE TRIAL COURT
C.A. NO 1981 CV 3254C

WILLIAM P. LEAHY, S.J., JOSEPH QUINN,
and LINDA REILLY, Three Registered Voters
in the City of Newton,

Plaintiffs,

v.

NEWTON COMMUNITY PRESERVATION
COMMITTEE,

Defendant.

PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

Pursuant to Rule 65 of the Massachusetts Rules of Civil Procedure and G.L. c. 30A, Sec. 23(f), plaintiffs William P. Leahy, S.J., Joseph Quinn, and Linda Reilly, each a registered voter in the City of Newton ("Plaintiffs"), move, after hearing convened on short order, for a preliminary injunction against defendant, the Newton Community Preservation Committee ("Defendant" or "Newton CPC"). In support hereof, Plaintiffs rely on their Verified Complaint and Memorandum of Law, each filed herewith and incorporated by reference.

WHEREFORE, Plaintiffs pray that the Court allow this Motion and enter an Order providing relief, as follows (capitalized terms not defined herein shall have the meanings assigned in the Verified Complaint and Memorandum of Law):

- (a) That Newton CPC, its members and agents make public forthwith the Executive Session Materials before proceeding to a vote on committing CPA funding concerning the HPP Property taking;

- (b) That Newton CPC, its members and agents postpone the November 12, 2019 public meeting and the related vote on committing CPA funding concerning the HPP Property taking, and not reconvene it until the Executive Session Materials have been made public; and
- (c) That Newton CPC, its members and agents are enjoined from convening an executive session to deliberate on committing CPA funding concerning the HPP Property taking.

If the Court has a question, Plaintiffs pray that the Court review, *in camera*, the Executive Session Materials before Newton CPC can proceed to a vote on committing CPA funding.

WILLIAM P. LEAHY, S.J., JOSEPH QUINN, and
LINDA REILLY, Three Registered Voters in the
City of Newton,

By their attorneys,



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Dated: November 6, 2019

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPT.
OF THE TRIAL COURT
C.A. NO 1981cv3254C

WILLIAM P. LEAHY, S.J., JOSEPH QUINN,)
and LINDA REILLY, Three Registered Voters)
in the City of Newton,)
)
Plaintiffs,)
)
v.)
)
NEWTON COMMUNITY PRESERVATION)
COMMITTEE,)
)
Defendant.)

[PROPOSED] PRELIMINARY INJUNCTION ORDER

This matter having come before the Court on November __, 2019 on Plaintiffs’ Motion for Injunctive Relief (“Motion”) in the above-captioned matter, and the Court having reviewed the Verified Complaint, the Motion, Plaintiff’s supporting Memorandum, and related exhibits, and having heard argument of counsel for all parties, it is ORDERED AND ADJUDGED as follows:¹

1. Plaintiffs have demonstrated that they are substantially likely to succeed on the merits of their claims;
2. Plaintiffs have demonstrated that there is a significant risk that they will suffer irreparable harm if immediate injunctive relief is denied;
3. Plaintiffs have demonstrated that the balance of hardships as between the parties weighs in Plaintiffs’ favor; and

¹ All capitalized terms in this Order shall have the meanings set forth in the Verified Complaint, unless otherwise noted herein.

4. Plaintiffs have demonstrated that immediate injunctive relief will promote the public interest.

THEREFORE, IT IS ORDERED THAT, Plaintiffs' Motion is granted pursuant to Rule 65 of the Massachusetts Rules of Civil Procedure, and a preliminary injunction is hereby granted, providing:

- A. That Newton CPC, its members and agents are ordered to make public forthwith the Executive Session Materials before proceeding to a vote on committing CPA funding concerning the HPP Property taking;
- B. That Newton CPC, its members and agents are ordered to postpone the November 12, 2019 public meeting and the related vote on committing CPA funding concerning the HPP Property taking, and not reconvene it until the Executive Session Materials have been made public;
- C. That Newton CPC, its members and agents are otherwise enjoined from convening an executive session to deliberate on committing CPA funding concerning the HPP Property taking; and
- D. That Plaintiffs are not required to post a bond or other surety.

SO ORDERED,

MIDDLESEX COUNTY
SUPERIOR COURT JUDGE

Date: November __, 2019

decisions on which public policy is based,” *Ghiglione v. School Committee of Southbridge*, 376 Mass. 70, 72 (1978), and requires that, with a few specific exceptions, all meetings of a public body shall be properly noticed and open to the public. *See* G. L.c. 30A, § 20(a), (b). That was not the case when Newton CPC considered land owned by Boston College, referred to as Webster Woods, now targeted by Newton Mayor Fuller for a taking by eminent domain. Verified Complaint, ¶¶ 20, 24, 26, and Exhibits 6, 7 & 8. In fact, over the last five years, Newton CPC has voted to fund numerous property acquisitions for conservations purposes and has only entered executive session when it concerned the taking of this property from Boston College. Verified Complaint, ¶ 3. This dispute came to a head on October 10, 2019 when Newton CPC entered executive session to discuss whether to fund all the costs associated with the Newton Mayor’s controversial proposal. Verified Complaint, ¶ 26.

A CPC’s statutory mandate is pursuant to the Community Preservation Act (“CPA”), G. L. c. 44B. A CPC may approve expenditures of revenues from a fund of public dollars created by a surcharge on the total property tax levy. G. L. c. 44B, § 7. If the City proceeds with a taking, Newton CPC’s only role is to decide whether to fund the Mayor’s Funding Request to use CPA funds to pay 100% of the costs, a funding request that violates the Newton City Ordinance establishing the Newton CPC.² It has no role in effectuating an eminent domain taking under G. L. c. 79, or in negotiations with BC or in any litigation which may possibly result. Even if this Court were to construe broadly the exceptions to the OML as extending to the City’s negotiating and litigation positions, the City suffers no “detrimental effect” because the amount of money the

²“It is the intent of this ordinance that, to the extent possible, projects using CPA funds seek to leverage other funding sources. CPA funds *shall not* replace existing operating funds only augment them.” (*emphasis added*). Newton City Ord. § 7-80 (a)(3). Verified Complaint, ¶ 21, and Exhibit 1.

City will award BC in just compensation has already been announced publicly as \$15.2 Million. Verified Complaint, ¶ 20 and Exhibit 5 & 6.

Immediate injunctive relief is necessary. Newton CPC is scheduled to vote on the Mayor's Funding Request on November 12, 2019, after another planned executive session. Plaintiffs and the public would be irreparably harmed if the Newton CPC votes on CPA funding having been denied the transparency intended and required by the OML. Verified Complaint, ¶¶ 28-30 and Exhibits 10 & 11.

These issues have been raised with Newton CPC directly. BC's General Counsel filed an OML complaint pursuant G. L. c. 30A § 23. Verified Complaint, ¶ 27 and Exhibit 9. Rather than addressing the matter on its merits, Newton CPC obtained an extension from the Attorney General to November 19, 2019, after the scheduled vote. BC's General Counsel was informed of the requested extension by the AG. Verified Complaint, ¶ 31 and Exhibit 12.

Newton CPC cannot meet its burden that it was entitled to secrecy. Therefore, Plaintiffs respectfully request that the Court grant its request for a preliminary injunction, and ultimately a permanent injunction, ordering that: (i) Newton CPC make public forthwith the Executive Session Materials before proceeding to a vote on committing CPA funding concerning the HPP Property taking; (ii) Newton CPC postpone the November 12, 2019 public meeting and the related vote on committing CPA funding concerning the HPP Property taking, and not reconvene it until the Executive Session Materials have been made public; and (iii) Newton CPC is enjoined from convening an executive session to consider the Mayor's Funding Request.

LEGAL STANDARD

The injunctive relief standard is well settled. The Court may grant injunctive relief when (1) there is a likelihood of success on the merits; (2) irreparable harm will result from denial of the

injunction; and (3) in light of the plaintiff's likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction. *Tri-Nel Mgt., Inc. v. Bd. of Health of Barnstable*, 433 Mass. 217, 219 (2001) (citing *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980)). When, as here, a party seeks to enjoin governmental action, the court must also consider whether the relief sought will adversely affect the public. *See Commonwealth v. Mass. CRINC*, 392 Mass. 79, 89 (1984). Under G.L. ch. 30A, § 23(f), there is a burden shifting. Newton CPC, not Plaintiffs, has the burden to demonstrate that its decision to enter executive session in connection with the October 10 Meeting was authorized by the OML. *Boelter v. Bd. of Selectmen of Wayland*, 479 Mass. 233, 237 n.3 (2018).

Plaintiffs are likely to succeed on the merits. Newton CPC cannot meet its burden. The asserted reasons for entering into executive session are at best, unsupportable, and in actuality, specious. Plaintiffs face an imminent and irreparable injury, which it shares in common with the public's interests. If Newton CPC proceeds with a vote to use CPA funds at the November 12 Meeting, after discussions of the merits and consideration of materials in secret, the Plaintiffs and the public at large would have only select, incomplete knowledge about, or participation in, the considerations underlying governmental action. Therefore, injunctive relief should enter.

ARGUMENT

I. Plaintiffs Have a Substantial Likelihood of Success on the Merits.

Newton CPC gave notice that it would enter into executive session "for the purposes of considering the purchase, exchange, lease or value of Webster Woods and strategy regarding litigation," and did so for those purposes on October 10, 2019. Verified Complaint, ¶¶ 24, 26, and Exhibits 7 & 8. On its face, that would appear to fall under an exception to the OML. A public body may "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,” and “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)(3) & (6). Exceptions to the OML, however, are to be interpreted narrowly to prevent the purposes of the statute from being rendered ineffective. *See District Attorney v. Bd. of Selectmen of Middleborough*, 395 Mass. 629 (1985).

Newton CPC cannot meet its burden to show that its executive session on October 10, 2019 was authorized by an exception under the Open Meeting Law.

a. Newton CPC Has No Role In A Taking By Eminent Domain Under G. L. c. 79.

Newton CPC lacks authority to effectuate an eminent domain taking under G. L. c. 79. Newton CPC does not decide whether or what to take. In Newton, that authority rests with the City Council and the Mayor. G. L. c. 79 § 2. When a taking is made, it is the same “board of officers by whom an order of taking has been adopted,” namely the City Council with the Mayor’s approval, who are charged with recording the order within thirty days in the registry of deeds vesting title in the City. G.L. c. 79 § 3. Furthermore, Newton CPC has no statutory role in awarding or determining how much money is to be paid to the landowner in the event of a taking; again, that is the role of the City Council and the Mayor. G. L. c. 79 § 6. Nowhere in the Chapter 79 statutory framework is there any role of Newton CPC, or any CPC. Newton CPC is only a funding source.

b. Newton CPC Is Not Considering the Purchase, Exchange or Lease of the Webster Woods Portion of BC’s Property and Has No Role in Considering, Determining or Approving Its Value in a Taking.

The difference between a taking by eminent domain and a voluntary, non-compulsory “purchase, exchange or lease” between willing parties, needs little further amplification. *Cf.* G. L.

c. 79A, § 1 (contrasting eminent domain and negotiated sale as two distinct forms of property acquisition by the government). Regardless, in this case, Newton CPC has neither a substantive nor procedural responsibility in the “purchase, exchange or lease” or a taking of the Webster Woods portion of the HPP Property. Even if there could ever be good faith negotiations between a private owner and a taking authority, Newton CPC would not, nor is it, involved in negotiations concerning the threatened taking. It, therefore, has no negotiating position to protect. 2016 Mass. Op. Atty. Gen. No. 47 (Apr. 5, 2016) (finding public body entered executive session improperly under OML § 20(a)(6) where it was not engaged in negotiations with property owner and did not discuss terms that were subject to any negotiations; *see* Opinion attached to this Memorandum).

Because the taking of BC’s property is a matter for the City Council and Mayor, what Newton CPC is “considering” is limited to whether to honor the Mayor’s Funding Request. The Mayor announced that the taking of the Webster Woods portion of the HPP Property is to cost \$15.74 Million, exceeding Newton CPC’s available funds in FY20. Verified Complaint, ¶¶ 13, 20 and Exhibit 6, 7 & 10. That requires Newton CPC to reset its priorities, make budgetary choices and subordinate other meritorious projects to this one disappointing their proponents. Verified Complaint, ¶¶ 13, 20, and Exhibits 4, 6 - 8. When a government authority is deciding how to use millions of dollars in taxpayer money, it is a public process. Those decisions, and the reasons for them, and the documents reviewed informing those decisions must be considered in the sunshine, not in a back room, precisely the reason the OML exists.

Newton CPC may argue that its executive session is to protect against a “detrimental effect” to the negotiation position of the City, in an overly broad extension of the exceptions to the OML. First, in order there to be a detrimental effect on negotiations, the negotiations themselves

must be between equally motivated parties, both free to walk away. In eminent domain, that is not the case. The City is going to take, not enter into a voluntary purchase agreement with BC.

Second, even if a taking were somehow analogous to a voluntary “purchase, exchange or lease,” for OML purposes, the intent to take, the amount of the Mayor’s request for funding, and the amount to be paid to Boston College were publicly announced, widely known and disseminated throughout the city of Newton and beyond, as of the October 10 Meeting. Verified Complaint, ¶¶ 20, and Exhibit 5 & 6. Where the purchase price has already been disclosed, there is no longer any detrimental effect to the City’s negotiating position and the executive session is not justified. 2012 Mass. Op. Atty. Gen. No. 52 (Jun. 25, 2012). *See* Opinion attached to this Memorandum.

c. There is Currently No Pending or Imminent Litigation that Could Justify Newton CPC Entering Executive Session.

The narrow exception in G. L. c. 30A § 21(a)(3) permits an executive session in order to discuss strategy with respect to litigation that is pending, clearly and imminently threatened or otherwise demonstrably likely. There is no litigation pending or threatened, other than in connection with this Open Meeting issue. Even if there is possible litigation arising out of a taking, Newton CPC will not be a party. Any potential future litigation regarding taking of part of the HPP Property would be between the City, the taking authority, and BC, the property owner. Newton CPC has no role in any future litigation strategy.

Newton CPC may argue that its executive session extends to protect against a “detrimental effect” to a litigation position of the City of Newton. Once again, there is no litigation pending or threatened; the prospect of litigation is pure speculation. Regardless, the issue is not whether there is the possibility of future litigation, it is whether revealing the matters discussed in executive session and the Executive Session Materials would have a “detrimental effect.” G. L. c. 30A § 21(a)(3). Where the purchase price has already been disclosed, there is no longer any detrimental

effect to the City's negotiating position and the executive session is not justified. 2012 Mass. Op. Atty. Gen. No. 52 (Jun. 25, 2012).

II. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief.

Plaintiffs, registered voters in the City of Newton, whose interests are aligned with the general public, will suffer irreparable harm if Newton CPC is allowed to proceed with their scheduled vote on November 12, 2019 on the Mayor's Funding Request without a process that is fully transparent and open to the public. Irreparable harm exists where "money damages would not adequately redress any harm the [voters] might suffer prior to a final judgment should they prevail on the merits ..." *Packaging Indus. Group, Inc.*, 380 Mass. at 621. Absent the injunctive relief sought, Plaintiffs will be denied participation in a matter of local governance and of holding local officials accountable for their decision making. This is not a harm that can be remedied purely by monetary compensation. *Cf. Kilcoyne v. Wayland Landfill Review Panel*, 18 Mass. L. Rep. 410 (2004) ("Violations of the open meeting law cause irreparable harm to the public.").

III. Public Interest Strongly Favors Granting Injunctive Relief.

Finally, under the circumstances present in this case, the entry of preliminary injunctive relief will promote the public interest by ensuring that publicity and transparency in government is preserved. It is in the public interest to ensure that all of the City's constituents have access to the decision-making process of their local government. *See Boelter v. Bd. of Selectmen of Wayland*, 479 Mass. 233, 238 (2018); *see also D.A. for N. Dist. v. Sch. Comm. of Wayland*, 455 Mass. 561, 570 (2009) ("It is essential to a democratic form of government that the public have broad access to the decisions made by its elected officials and to the way in which the decisions are reached.") (citing *Foudy v. Amherst-Pelham Regional Sch. Comm.*, 402 Mass. 179, 184 (1988)). The public has a strong interest in fulsome, public deliberations concerning the merits of funding the proposed

taking to the detriment of other eligible projects. All information that the CPC considers in making this decision must be made public.

The necessity of immediate injunctive relief to protect the public interest is further evidenced by the fact that Newton CPC has evaded addressing this issue on the merits until after it votes and the harm a *fait accompli*. On October 21, 2019, BC's General Counsel filed an OML complaint pursuant G. L. c. 30A § 23. Verified Complaint, ¶ 27 and Exhibit 9. On October 29, 2019, Newton CPC, without informing or even copying BC, requested that the Attorney General allow an extension of time to answer. Verified Complaint, ¶ 31 and Exhibit 12. The Attorney General granted Newton CPC's request which now has until November 19, 2019 to answer, one week after the Newton CPC vote whether to use CPA funds for the taking of the Webster Woods portion of HPP Property owned by BC.

CONCLUSION

WHEREFORE, based on the foregoing, Plaintiffs respectfully requests that the Court enter the relief set forth in the Motion for Injunctive Relief, filed herewith.

Respectfully submitted,

WILLIAM P. LEAHY, S.J., JOSEPH QUINN, and
LINDA REILLY, Three Registered Voters in the
City of Newton,

By their attorneys,


James D. Masterman BBO# 326000

James P. Ponsetto BBO # 556144

Gustavo Ribeiro BBO # 698854

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One International Place

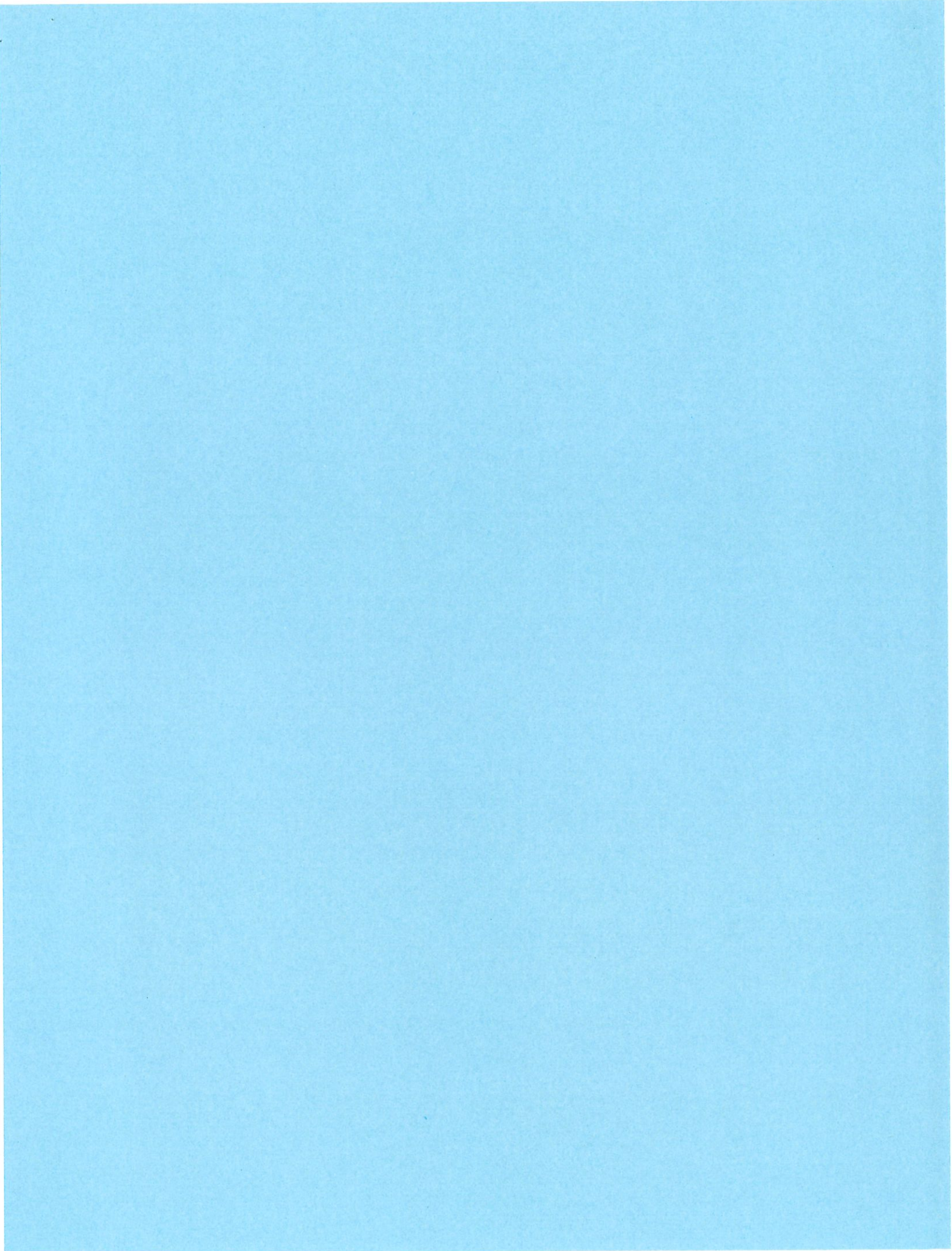
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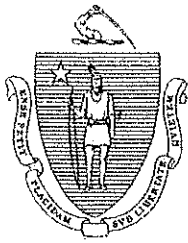
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Dated: November 6, 2019





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ATTORNEY GENERAL

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April 5, 2016

OML 2016 – 47

Alice Pizzi, General Counsel
Soldiers' Home in Holyoke
110 Cherry Street
Holyoke, MA 01040

RE: Open Meeting Law Complaint

Dear Attorney Pizzi:

This office received a complaint from David Bartley, dated November 5, 2015, alleging that the Board of Trustees of the Soldiers' Home in Holyoke (the "Board") violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. Specifically, the complaint alleges that: (i) the Board failed to follow proper procedures for entering executive session during its June 2 and June 23, 2015 meetings, and that (ii) during those two meetings the Board conducted business in executive session that was not appropriate for executive session. The complaint was originally filed with the Board on June 30, 2015. The Board responded by letter dated August 27, 2015, following an extension of time granted by our office.

Following our review, we find that the Board violated the Open Meeting Law in the ways alleged. In reaching this determination, we reviewed the complaint filed with the Board, the Board's response, and the complaint filed with our office. Additionally, we reviewed the executive session minutes of the Board's June 2 and June 23, 2015 meetings. Finally, we spoke with the complainant by telephone on January 5, 2016, and with Board Chair Steven Como by telephone on January 5, 2016.

FACTS

We find the facts as follows. A structure on property located at 193 Fairmont St. in Holyoke encroached on land belonging to the Soldiers' Home. In 2014, the Legislature passed legislation authorizing the Commissioner of the Division of Capital Asset Management to convey the small parcel of land belonging to the Soldiers' Home to the owner of the property at 193 Fairmont St. See St. 2014, c. 238. Division of Capital Asset Management subsequently

requested that the Board complete a form and declare the parcel surplus so that the Division could transfer the land.

The Board held a meeting on June 2, 2015, at which it entertained public comment regarding the status of the land adjacent to the property at 193 Fairmont St. Following some discussion, the Board voted by roll call to enter executive session at the end of the meeting to further discuss the issue. The Chair did not state or identify an executive session purpose to justify the discussion, nor did he state that an open session discussion would have a detrimental effect on the Board's negotiating position. While in executive session, the Board discussed whether to declare the land at issue as surplus land so that it could be conveyed to the property owner of 193 Fairmont St.¹ Board members shared their concerns about the fair market value of the parcel, and wanted more information about the encroachment before making a final decision. Following this discussion, the Board considered a motion to declare the parcel surplus, which failed by a vote of 3-3.

The Board held another meeting on June 23, 2015 and again voted to enter into executive session to discuss the property adjacent to 193 Fairmont St. The Chair did not state or identify an executive session purpose to justify the discussion, nor did he state that an open session discussion would have a detrimental effect on the Board's negotiating position. During the executive session, Board members shared their concern that declaring the entire parcel surplus was more than what was necessary to remove the encroachment. The Board considered another motion to declare the parcel surplus, which again failed by a vote of 3-3. The Board voted one more time on the motion, and this time it failed by a vote of 2-4. Immediately following the executive session, the Board informed the owner of 193 Fairmont St. of its decision not to declare the land surplus.

DISCUSSION

1. The Board Failed to Follow the Proper Procedure for Entering into Executive Session during its June 2 and June 23, 2015 Meetings.

A public body may meet in executive—or closed—session for any of ten enumerated purposes. One such purpose allows a public body to meet in 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”). Prior to entering into executive session, the Chair must state the purpose for the executive session, stating all subjects that may be revealed without compromising the purpose for which the executive session was called. G.L. c. 30A, § 21(b)(3). The chair must also publicly announce whether the open session will reconvene at the conclusion of the executive session. G.L. c. 30A, § 21(b)(4).

Here, the Board Chair failed to state the purpose for the executive sessions prior to the Board entering into the executive sessions. On both occasions, it appears that the Board intended

¹ The Board has publicly released the minutes of its June 2 and June 23, 2015 executive sessions, and provided copies to the complainant on July 23, 2015.

to consider the value of real property. Thus, we infer that the Board intended to enter into executive session under Purpose 6. However, the Chair also failed to state that “an open meeting may have a detrimental effect on the negotiating position of the [Board],” as required by Purpose 6. G.L. c. 30A, § 21(a)(6). These failures violated the Open Meeting Law. In its response to the complaint, the Board acknowledged that the Chair failed to make these declarations prior to entering into executive session.

2. The Board’s June 2 and June 23, 2015 Executive Session Discussions were Not Appropriate for Executive Session.

Purpose 6 permits a public body to meet in 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). While in executive session, the Board discussed the value of a parcel of land and whether or not to declare it surplus for the purpose selling the land to the owner of 193 Fairmont St. The Board contends that it had a negotiating position to protect because it needed to survey the property lines, consider whether a smaller lot could be designated as surplus, and determine whether alternatives were available to the property owner of 193 Fairmont St., such as a local variance or transfer of less than the full parcel.

The Board certainly considered the value of property during the two executive sessions at issue, but did not have a clear negotiating position to protect. See G.L. c. 30A, § 21(a)(6). The Board was not engaged in negotiation with the owner of 193 Fairmont St. over the parcel. Rather, the Board was considering a request by the Division of Capital Asset Management to declare the parcel surplus. During the meetings, the Board discussed the matter with the property owner in open session, entered into executive session to consider designating the parcel as surplus, and then immediately communicated its vote to the owner after making its final decision. The Board did not discuss terms that were subject to any negotiation.² It discussed the need to survey the boundaries of the parcel at issue and voted whether to designate it as surplus. This discussion and vote should have occurred in open session, as doing so would not have harmed the Board’s negotiating position. Because the executive sessions were not proper under Purpose 6, we find that the Board violated the Open Meeting Law.

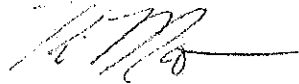
CONCLUSION

We find that the Board violated the Open Meeting Law by failing to follow the proper procedures for entering into executive session during its June 2 and June 23, 2015 meetings, and discussed topics that were not appropriate for executive session during those meetings. We order the Board’s immediate and future compliance with the Law, and caution the Board that a similar, future violation may be considered evidence of an intentional violation of the Law. Because the Board has already publicly released the minutes of its executive sessions, we order no additional remedial action.

² While it is our understanding that the Soldiers’ Home would receive fair market value for the land, this issue was not discussed during either meeting at issue.

We now consider this matter closed. Please be advised that this letter does not resolve any other complaints that may be pending with this office or with the Board. Please feel free to contact our office at 617-963-2540 if you have any questions regarding this letter.

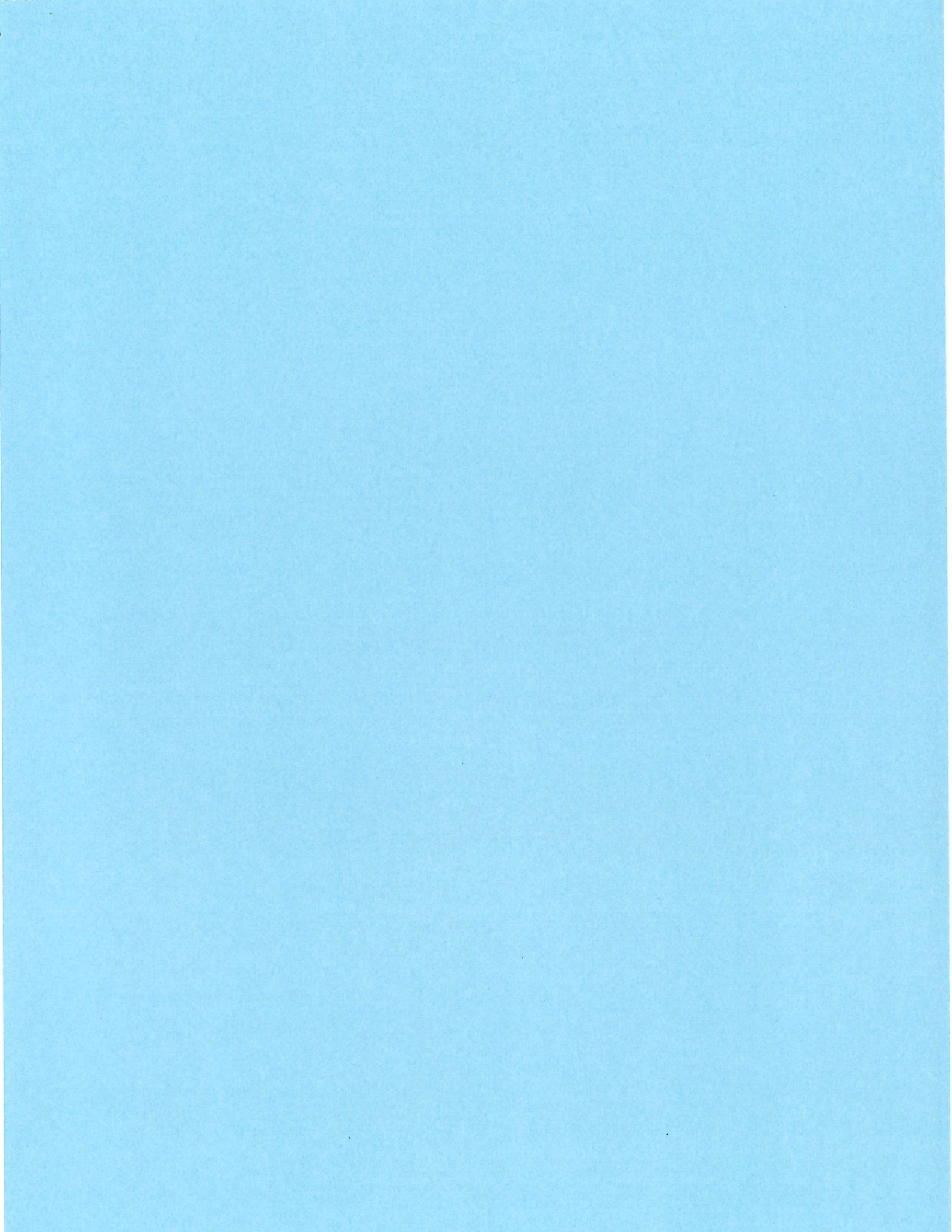
Sincerely,

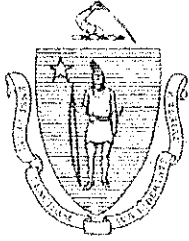


Kevin W. Manganaro
Assistant Attorney General
Division of Open Government

cc: David Bartley, Esq.

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.





THE COMMONWEALTH OF MASSACHUSETTS
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MARTHA COAKLEY
ATTORNEY GENERAL

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June 25, 2012

OML 2012 - 52

Sanda Barry
Hubbardston Parks Commission
7 Main Street, Unit 3
Hubbardston, MA 01452

Re: Open Meeting Law Complaint

Dear Ms. Barry:

Our office received complaints from Danielle Arakelian, dated June 26, 2011; Jassy Bratko, dated June 23, 2011; and Thomas Bratko, dated June 24, 2011, alleging that the Hubbardston Parks Commission (the "Commission") violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. Specifically, the complaints allege that the Commission violated the Open Meeting Law by failing to list agenda topics with sufficient specificity in its March 14, 2011; March 28, 2011; April 11, 2011; April 25, 2011; May 9, 2011; and May 16, 2011 meeting notices. The complaints further allege that the Commission unlawfully entered executive session during its May 16, 2011 meeting. The complaints were originally submitted to the Commission on June 2, 2011 and June 6, 2011. We received the Commission's response to the complaints on June 22, 2011.

The Open Meeting Law requires that "the complainant shall file a written complaint with the public body, setting forth the circumstances which constitute the alleged violation and giving the body an opportunity to remedy the alleged violation; provided, however, that such complaint shall be filed within 30 days of the alleged violation." G.L. c. 30A, § 23(b). Here, with regard to alleged violations on March 14, 2011; March 28, 2011; April 11, 2011; and April 25, 2011, the complaints were filed more than 30 days after the alleged violations. Because the alleged violations occurred during open session meetings, we find that the complainant could reasonably have known about the Commission's actions on those meeting dates, thus the complaints regarding the March 14, March 28, April 11, and April 25 meetings are untimely. We decline to review those complaints. The remaining complaints are addressed below.



FACTS

Throughout the spring of 2011, the Commission explored the possibility of purchasing land pursuant to the Community Preservation Act¹ to construct new sports courts at the Curtis Recreation Field ("Rec Field"). The Commissioners discussed a four-acre plot of land located at 48 High Street, adjacent to the Rec Field, which had become available for purchase. The Commissioners discussed the purchase price in open session, and discussed the positive and negative aspects of purchasing that property.

The Commission held an open meeting on May 9, 2011. The meeting notice included a topic listed as "CPA proposal," referring to the Community Preservation Act. The land proposal being considered by the Commissioners included purchasing land with funding through the Community Preservation Act. Three Commissioners and an unidentified number of "High Street residents" were present at the meeting. No substantive discussion regarding the project took place, however, because Commissioner Christopher Norcross, who possessed necessary documents, was in another meeting.

The next Commission meeting occurred on May 16, 2011. The meeting notice included a topic listed as "Executive Session: Purpose #6: to consider the purchase of real property." Prior to that evening's executive session, it was established that the purchase price of the land to expand the Rec Field was \$60,000. The minutes do not reflect when or how negotiations resulted in the \$60,000 figure, but both the Arakelian complaint and the minutes from that evening's executive session confirm that agreement had been reached on a purchase price of \$60,000 in open session, prior to the executive session.² During the public portion of this meeting, the Commissioners opened the floor for comments prior to voting to enter executive session. The minutes reflect that High Street residents in attendance questioned the necessity and the legality of the executive session. Commissioner Norcross responded that "[a] decision to move forward to purchase the land needs to be made tonight." The minutes show that at least one commissioner expressed some irritation, stating that "community members [were] continually interrupting discussion and these interruptions are delaying and extending meetings beyond what is reasonable." The commissioner added that the Commission "has heard the input of the High Street residents multiple times and feels that all opinions have been heard and consideration will be made." Another commissioner stated that the executive session was in compliance with Open Meeting Law.

¹ The Community Preservation Act allows communities to create a local Community Preservation Fund to raise money through a surcharge of up to 3% of the real estate tax levy on real property for open space protection, historic preservation and the provision of affordable housing. The act also creates a significant state matching fund, which serves as an incentive to communities to pass the CPA.

² Because the executive session minutes for the May 16, 2011 meeting have not yet been publicly released, to the best of our knowledge, we do not recount their full detail here.

During the executive session, the Commissioners discussed the purchase of the land on High Street, but at no time during the executive session did they engage in discussion that could be characterized as affecting their negotiating position. The minutes of the executive session confirm that the purchase price of \$60,000 had already been decided before the executive session. The Commission discussed whether to go ahead with the purchase and the project, and discussed the potential use of the land.

In the executive session, the Commission voted “to move forward with the application to CPC³ for funds to purchase a lot of land to develop for the expansion and enhancement of the Curtis Recreational Fields.”

DISCUSSION

I. The Commission Violated the Open Meeting Law by Failing to List Topics with Sufficient Specificity in its Meeting Notices.

Public bodies are required to list topics in a meeting notice with “sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting.” 940 CMR 29.03. When planning to discuss a specific piece of property, public bodies should include sufficient information in the meeting notice to identify the property. A specific address is always preferable; however, if the Commission is unable to list a specific address, then it may list bordering streets, intersections, landmarks or other identifying information. See OML 2010-2.⁴

Here, the Commission could have reasonably anticipated that at the May 9, 2011 and May 16, 2011 meetings it would discuss the proposed purchase of land either specifically at 48 High Street, or land located on High Street and adjacent to the Rec Field. The Commission had discussed this specific property throughout the spring of 2011. Despite that, the Commission’s May 9, 2011 and May 16, 2011 meeting notices did not provide sufficient information. Both notices simply referred to the general type of project, rather than identifying the specific property to be discussed, either by address or by identifying landmarks. The Commission, therefore, failed to fully comply with the Open Meeting Law regarding posting its notices.⁵

³ CPC refers to the Community Preservation Committee.

⁴ Open Meeting Law determinations may be found at the Attorney General’s website, www.mass.gov/ago/openmeeting.

⁵ The Town Clerk sent the Commission co-chairs an email on March 20, 2011 informing them of the Open Meeting Law’s notice requirements. It is not clear whether the co-chairs received or reviewed this email. Therefore, we do not find this to be an intentional violation of the Law.

II. The Commission Violated the Open Meeting Law by Entering Executive Session for an Improper Purpose.

Public bodies may enter a closed, or executive, session only for one or more of ten purposes enumerated in the Open Meeting Law. G.L. c. 30A, § 21. One 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). Prior to entering executive session, “the chair shall state the purpose for the executive session, stating all subjects that may be revealed without compromising the purpose for which the executive session was called.” *Id.* at § 21(b)(3).

Here, the Commission listed in the notice for its May 16, 2011 meeting “Executive Session: Purpose #6: to consider the purchase of real property.” According to the minutes, the Commission first opened the floor for comments prior to voting to enter executive session. High Street residents in attendance questioned the necessity and the legality of the Executive Session. The Commissioners responded with three reasons for entering executive session: (1) because a decision needed to be made that night regarding the CPA application to purchase the land; (2) because community members were too often interrupting open meeting discussions, delaying meetings beyond what was reasonable; and (3) because “the law clearly allows for an executive session in the instance of a purchase of real estate.” None of the Commissioners’ stated reasons accorded with Open Meeting Law, however.

The Commissioners did not specify that entering executive session would have a detrimental effect on their negotiating position with regard to the purchase of property. Here, the Commissioners could not make such a claim because no negotiation remained to be done at the time of this meeting. The complaints and the minutes from the executive session make clear that the purchase price—\$60,000—had already been decided before the Commissioners entered executive session. The Commission did not discuss any other matters with respect to negotiating the purchase of land, rather they discussed the pros and cons of going ahead with the project. They discussed the potential use of the land, and ultimately voted to go forward with the project. This discussion and vote should have been conducted in an open meeting.

In its response to the complaints, the Commission stated that it needed to enter executive session because the Commissioners felt that open discussion would have detrimentally affected the “negotiations of the public body as the body was as a whole not of one mind on the purchase.” When the terms of a land purchase have been negotiated and the only remaining discussion relates to whether or not to enter into the deal, Purpose 6 may no longer be used to justify an executive session. The negotiation has concluded at that point. The Commission should therefore have held this discussion in an open session meeting.

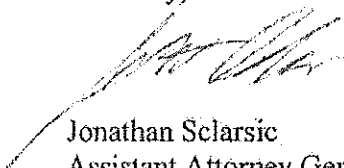
CONCLUSION

We find that the Commission violated the Open Meeting Law by failing to list topics with sufficient specificity in its meeting notices, and by improperly discussing matters behind closed doors that were not appropriate for executive session. We order immediate and future compliance with the Open Meeting Law, and caution that future similar conduct may be considered evidence of intent to violate the Open Meeting Law.

Because the minutes of the May 16, 2011 executive session reflect that the actual purpose for entering executive session was to avoid open discussion of matters required to be conducted in an open meeting, we order the Commission to publicly release the May 16, 2011 executive session minutes, if it has not done so already. The Commission may redact or withhold portions of the minutes if one or more of the exemptions to the Public Records Law, G.L. c. 4 § 7, or the attorney/client privilege applies. See G. L. c. 30A, § 22(f). We decline to take the action requested by complainant Mr. Bratko, namely nullifying the revised CPA application.

We now consider this matter closed. If you have any questions regarding this letter, 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: Danielle Arakelian
Jassy Bratko
Thomas Bratko

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPT.
OF THE TRIAL COURT
C.A. NO 1981cv3254C

WILLIAM P. LEAHY, S.J., JOSEPH QUINN, and LINDA REILLY, Three Registered Voters in the City of Newton,)
)
Plaintiffs,)
)
v.)
)
NEWTON COMMUNITY PRESERVATION COMMITTEE,)
)
Defendant.)

**PLAINTIFFS' MOTION FOR SHORT ORDER OF NOTICE
CONCERNING MOTION FOR INJUNCTIVE RELIEF**

Now come plaintiffs, William P. Leahy, S.J., Joseph Quinn and Linda Reilly, each a registered voter in the City of Newton ("Plaintiffs"), and move for a short order of notice, returnable on November 12, 2019, concerning Plaintiffs' Motion for Injunctive Relief ("Injunction Motion") that seeks to enjoin defendant, the Newton Community Preservation Committee ("Defendant" or "Newton CPC"), after violations of the Opening Meeting Law, G.L. c. 30A ("OML") at a public meeting on October 10, 2019 ("October 10 Meeting"). Without a short order, Newton CPC will vote on the evening of November 12, 2019 concerning a Community Preservation Act ("CPA") funding request despite having held unlawful executive sessions in violation of the OML. In support hereof, Plaintiffs rely on their Verified Complaint for Violation of the Open Meeting Law, Declaratory and Injunctive Relief and Memorandum of Law in support

of the Injunction Motion, each filed herewith and incorporated by reference, and further state as follows:

1. Defendant violated the OML at the October 10 Meeting by conducting discussions in executive session, excluding the public, when considering a CPA funding request by the Newton Mayor concerning a potential eminent domain taking by the City of Newton.

2. There is a scheduled Newton CPC public hearing concerning the proposed funding on November 12, 2019 at 7:00 p.m. ("November 12 Hearing") at which Newton CPC is expected to vote on the funding request, after another unlawful executive session.

3. Newton CPC had an opportunity to address concerns about its executive sessions had they responded timely by November 8, 2019 to a complaint served under the OML ("OML Complaint"). Instead, the Newton city solicitor's office secured an extension to respond to the OML Complaint from the Attorney General until November 19, 2019.

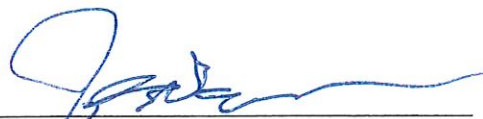
4. By the Verified Complaint and Injunction Motion, Plaintiffs seek a preliminary and a permanent injunction postponing the November 12 Meeting, and enjoining and restraining the Newton CPC from convening any future executive sessions regarding funding of a proposed taking of BC's property, and holding any future public hearings and deliberations until the minutes of, and documents considered during, the October 10 Meeting's executive session are made public.

5. Absent a short order, Plaintiffs will effectively be denied the relief sought by the Verified Complaint and Injunction Motion because Newton CPC will have voted at the November 12 Meeting on CPA funding without the minutes of, and documents considered during, the October 10 Meeting's executive session having been made public. Allowing a short order is consistent with the goals of the OML. *See* G.L. c. 30A, Sec. 23(f) ("the court shall fix [the return], having regard to the speediest possible determination of the cause consistent with the rights of the parties").

WHEREFORE, Plaintiffs pray that the Court allow this Motion and enter an Order providing that a hearing on the Injunction Motion shall go forward on November 12, 2019 at 2:00 pm, prior to the November 12 Hearing. A proposed Order is filed herewith.

WILLIAM P. LEAHY, S.J., JOSEPH QUINN,
AND LINDA REILLY, Three Registered Voters in
the City of Newton,

By their attorneys,



James D. Masterman BBO# 326000

James P. Ponsetto BBO # 556144

Gustavo Ribeiro BBO # 698854

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Dated: November 6, 2019

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPT.
OF THE TRIAL COURT
C.A. NO 19-3254

FILED
IN THE OFFICE OF THE
CLERK OF COURTS
FOR THE COUNTY OF MIDDLESEX
NOV 06 2019
[Signature]
CLERK

WILLIAM P. LEAHY, S.J., JOSEPH QUINN,
and LINDA REILLY, Three Registered Voters
in the City of Newton,

Plaintiffs,

v.

NEWTON COMMUNITY PRESERVATION
COMMITTEE,

Defendant.

PLAINTIFFS' MOTION FOR SHORT ORDER OF NOTICE
CONCERNING MOTION FOR INJUNCTIVE RELIEF

Now come plaintiffs, William P. Leahy, S.J., Joseph Quinn and Linda Reilly, each a registered voter in the City of Newton ("Plaintiffs"), and move for a short order of notice, returnable on November 12, 2019, concerning Plaintiffs' Motion for Injunctive Relief ("Injunction Motion") that seeks to enjoin defendant, the Newton Community Preservation Committee ("Defendant" or "Newton CPC"), after violations of the Opening Meeting Law, G.L. c. 30A ("OML") at a public meeting on October 10, 2019 ("October 10 Meeting"). Without a short order, Newton CPC will vote on the evening of November 12, 2019 concerning a Community Preservation Act ("CPA") funding request despite having held unlawful executive sessions in violation of the OML. In support hereof, Plaintiffs rely on their Verified Complaint for Violation of the Open Meeting Law, Declaratory and Injunctive Relief and Memorandum of Law in support

ACTIVE 46855019v1

2019 November 6
After review motion allowed
hearing to commence November 8, 2019
12:00 in Room 610
[Signature]

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPT.
OF THE TRIAL COURT
C.A. NO 19-3254

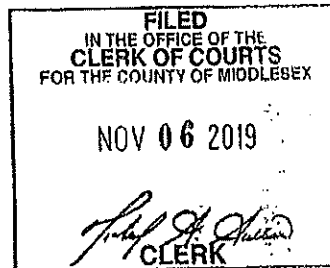
WILLIAM P. LEAHY, S.J., JOSEPH QUINN,
and LINDA REILLY, Three Registered Voters
in the City of Newton,

Plaintiffs,

v.

NEWTON COMMUNITY PRESERVATION
COMMITTEE,

Defendant.



Middlesex, ss. Superior Court
The within matter is set down for hearing on
November 8th 2019, in courtroom
610 at 2:00 PM
[Signature]
Assistant Clerk
Hogan

PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

Pursuant to Rule 65 of the Massachusetts Rules of Civil Procedure and G.L. c. 30A, Sec. 23(f), plaintiffs William P. Leahy, S.J., Joseph Quinn, and Linda Reilly, each a registered voter in the City of Newton ("Plaintiffs"), move, after hearing convened on short order, for a preliminary injunction against defendant, the Newton Community Preservation Committee ("Defendant" or "Newton CPC"). In support hereof, Plaintiffs rely on their Verified Complaint and Memorandum of Law, each filed herewith and incorporated by reference.

WHEREFORE, Plaintiffs pray that the Court allow this Motion and enter an Order providing relief, as follows (capitalized terms not defined herein shall have the meanings assigned in the Verified Complaint and Memorandum of Law):

- (a) That Newton CPC, its members and agents make public forthwith the Executive Session Materials before proceeding to a vote on committing CPA funding concerning the HPP Property taking;