

Conservation Board Meeting Minutes

Monday, November 13, 2017 – 5:30 pm Planning & Zoning
Conference Room – City Hall Lower Level 149 Church Street

Attendance

Board Members: Zoe Richards (ZR), Miles Waite (MW), Jeff Severson (JS), Matt Moore (MM), Scott Mapes (SM), Stephanie Young (SY), Ellen Kujawa (EK)

Absent: Don Meals (DM), Sean Beckett (SM)

Public: Roger Lebovitz

Staff: Scott Gustin (Planning & Zoning), Kim Sturtevant (City Attorney's Office)

MM, Chair, called the meeting to order at 5:31 p.m.

I. Consideration of Open Meeting Law Complaint

MM said that JS is the complainant. He said that JS emailed him on his city email in October, and he's been remiss in not checking or using that email. He apologized for being lax in use of this email account. The first he knew of the matter was just before last week's meeting.

Kim Sturtevant said that she's put together a memo laying out the process for the Board to make a decision. Staff looked into the facts over the past week, and they are outlined in the memo that she handed out. Attorney Sturtevant overviewed her memo as to the facts and action that may be taken by the Board.

If the Board decides there is no violation, then the Board is done. If the Board decides there is one, then they should set a meeting to address it with a remedy.

SM stated that the subject agenda noted the library closing time. Presumably, we would not have had a meeting there if it conflicted with the open meeting law. Attorney Sturtevant, it's for the Board to determine if that resulted in denied access.

SY, is the standard knowingly and intentionally? Attorney Sturtevant stated that comes later if found to be a violation.

MM, is the Board member who complained allowed to vote? Attorney Sturtevant stated that the concern would be a potential conflict of interest with prejudgment. MM, does bias necessarily constitute a conflict of interest? Attorney Sturtevant, yes. Conflicts can be personal, financial, or bias. The Board's bylaws articulate conflicts of interest.

JS, could you outline conflicts of interest? Attorney Sturtevant, prejudgment of the case in this instance.

MM said he would ask Board members to note conflicts of interest. We need to have a quorum (5) to make a decision tonight. MW said he does not feel conflicted as to deciding on the matter tonight. EK, SM, SY, and MM agreed. JS said he does not believe he has as conflict of interest – he has an interest. **In order to recuse himself on the basis of bias, he He** needs a better understanding of **whether the act of making an Open Meeting Law complaint of what** may constitute a legal bias. He feels confident in his ability to understand the law. SY pointed out JS's opening assertion of an open meeting law violation – not simply a potential problem. MM, do you believe there's been a violation? JS, yes. SM, I look at regardless of how JS may vote, would that represent a conflict that may unduly sway the board? He's not representing a client tonight. He's got a strong position but that does not conflict him from a vote. This is more of a procedural item tonight. It doesn't offend me if he represents a certain position.

MM, are you involved with a group opposing the development? JS, that's not before the Board tonight. MM, it would be useful for the Board to know if you're involved with a group actively opposing the project. JS repeated that he feels he has no conflict of interest.

SY, but it seems that you've already determined that there's a violation. Attorney Sturtevant, the bylaws note a bias or appearance of bias. The Board's bylaws allow the Board to recuse the member.

JS, what type of conflict of interest do I have in raising the issue? MM, you've gone beyond simply raising the issue. You've asserted a conclusion. MW, JS has asserted a cure. MW **feels stated that JS has there's** a hidden agenda, and that **there's JS has** bias.

MM, are you part of an organization formed to oppose the project? JS, I raised a complaint of an open meeting law violation. MM, wants to make sure proper procedure is followed at this meeting so that it can withstand public scrutiny.

ZR, what do people think about the instruction provided on the subject agenda?

MW noted the new facts provided by the Attorney's Office.

MM, let's decide on recusal. We have the ability to recuse one of our members. He's offering that opportunity right now. JS made a motion that MW recuse due to bias, **based on MW stated opinion that JS has a hidden agenda in making an Open Meeting Law complaint. MW's speculation about JS' alleged motive for making the complaint demonstrates a bias and pre-judgment about the validity of the complaint.** No second. Motion failed.

MM reiterated that he's concerned that JS has already made up his mind. That may open up our decision to questions.

EK, it seems that JS has the appearance of bias.

MW, JS should state if he is now or was previously a member of a group with an interest in the project. JS asked what project MW was referring to. MW – the Burlington Town Center Project.

SM, it's a fair question to know whether JS is associated with a group with an interest in the outcome tonight. He took MW's statement as just his reaction to JS.

JS said he feels he's being singled out for raising a complaint – **He stated that if he were to answer this question, all other Board members should also state individually if they have any bias or interest related to the project or outcome tonight. JS asked if he answers the question, would it satisfy the Board in regard to their concerns in regard to bias?** SM thinks it's a fair question.

JS stated that he has no affiliation with any group that has an interest in the outcome tonight. **JS stated: "I am not now, nor have I previously been, a member of a group with an interest in the Burlington Square Mall Project".**

MM is concerned about bias, but he'll not force the issue.

ZR does not feel confident enough to judge.

SM, his first inclination was that he's not feeling that recusal is absolutely required.

SY stated that she's concerned with the assertions made in JS's letter. It's pretty clear that he thinks there's a violation. How can he assess the matter fairly?

A MOTION was made by SY for JS to recuse. EK seconded.

Discussion: JS, because somebody raises a complaint **that a public meeting did not comply with Vermont's Open Meeting Law**, that does not mean that **individual has** bias. This is not about a good or a bad project. It just raises the issue **of whether the meeting in question was held in compliance with the Open Meeting Law.** ZR, you are bringing it up and trusting your colleagues to do the right thing. MW, you simply see this as a housekeeping issue in the interest of making this a better working board. Is that right? JS does not expect the Board to believe anything. The Open Meeting Law applies to all **public bodies and** boards in Vermont. MM wants to preserve integrity of the meeting. We've never considered recusal of a member. SM noted that JS will have the floor. He'll simply not be able to vote.

JS said he would recuse himself. He will present to the Board but not vote.

SY withdrew her motion.

Roger Lebovitz – member of the public. Mr. Lebovitz said the open meeting law is very important. A locked door is a barrier to openness. He hopes the Board can come up with a cure.

JS referred to his letter. It spells out why he feels there was an open meeting law violation. He referred to the memo from Eileen Blackwood. He looked at the Citizen's Guide to the Open Meeting Law on the Secretary of State's website. Basically, public meetings must be open to the public at all times except for executive session. No action can be taken except at a meeting open to the public at all times. The doors to the building and room must remain open at all times during the meeting except during executive session. ~~He sees an intent of violating the open meeting law on the subject agenda. He does not see that notation make the meeting somehow compliant.~~ JS, the statement that the doors to the Library will be locked at 6 pm was highlighted on the meeting Agenda. The inclusion of a statement, on a public meeting Agenda, that the doors to the building will locked during the public meeting– a violation of Vermont's Open Meeting Law – does not make the meeting somehow compliant with the Open Meeting Law.

ZR, what made you come up with a complaint in October? JS, I was only recently informed, of this in a conversation with someone ~~with professional knowledge~~ about open meeting law, JS, when the January 9, 2017 Burlington Conservation Board meeting was held, none of the Board members, Board staff, city attorney's, other city employees or other individuals recognized that locking the Library doors at 6 pm, where the public meeting was held, violated Vermont's Open Meeting Law. JS, in my recent conversation about the Open Meeting Law, I was informed stated that the doors to a building where a public meeting is held must remain unlocked at all times during the public meeting; otherwise it is a violation of Vermont's Open Meeting Law.

ZR, why did the meeting stick in your memory? JS. I will never forget that meeting. The Burlington Town Center Project is one of the largest projects in Burlington in several decades. The doors to the Library were locked at 6 PM. The meeting was attended by the Burlington Town Center project applicant and his 12 or 13 experts, consultants, and attorneys. There was one Burlington Free Press reporter. No other members of the public were present.

MM, the subject agenda notes instruction to arrive before 6:00 PM. The agenda also contains phone numbers to contact with accessibility/accommodations. MW, it does not specifically deny access after 6:00 PM. SY, nobody came afterward to say they couldn't get in. JS, ~~correct.~~ I was not contacted personally by a member of the public.

MW, it's unfortunate that the doors closed, but that does not prohibit access. MM, do we know that the library was in fact locked? SG, no. MM, there was a staff person at the front desk until at least 7:00 PM and nearby afterwards doing close-down activities. ZR, it seems to be a fair assumption that standard procedure was followed. Attorney Sturtevant, understands that the library employee was at the building until close of the meeting. ZR, what is the open meeting law memo JS is referring to? Attorney Sturtevant, it's a memo from the City Attorney's Office providing guidance.

SM, if there was someone in the building, the locked doors are of no consequence. He takes that as an important fact.

MM, we can find that an inadvertent violation occurred, but we can still ratify and accept the decisions from that evening. We can also decline to have future meetings in the library. ZR, sometimes the problem occurs in City Hall if the custodians lock the doors.

MM, did anybody contact JS about it? MM, Roger, did you try to get in or anyone tell you? Mr. Lebovitz, no.

SM would not judge it on the logistics of getting inside.

MM, it would be different if the complainant showed up and was not allowed to get it in. That's what this is all about. The complainant was at the meeting and participated in the discussion. He's not said that anyone else was precluded from entering. JS said that he ~~can't produce~~ **was not contacted by a member of the public a witness** that says he/she was locked out. **However, anyone who arrived after 6 pm when the doors were locked was precluded from entering and attending the meeting, and anyone who did not attend due to the requirement stated on the meeting Agenda, that they arrive before 6pm when the doors would be locked, was precluded from entering and attending the meeting.** The open meeting law is about open government. ZR can think of inadvertent problems with **numerous other Conservation Board meetings that also violated Vermont's Open Meeting Law.**

SY, it's hard to say that the law was violated with no evidence that someone was precluded from entering, particularly as library staff was present.

EK, we can't prove that there wasn't anyone present. Seemingly it was not provably open.

MW, why could this matter not have been noted during Board comment and try to address it before filing a complaint? **MW stated that JS created this conflict.** JS, objected, and stated: **"I have not created anything".** ~~He's not creating any discomfort.~~

SY, the complaint came out very late after the fact. We're asking the librarian to remember a lot. She's able to provide what she does as a general practice. MM, the meeting could have violated the law but might not have.

ZR, what if we can't decide for sure. Attorney Sturtevant, failure for the Board to decide will be construed as a denial of the violation.

SG noted the reasoning behind the agenda and the change in location. The Board's typical meeting room is bad for large groups. The library space was chosen to better accommodate the public. JS felt that SG did not act intentionally. **JS stated "I think the world of SG. He is probably the- most dedicated public servant that I know, and I am confident that he would never intentionally violate the Open Meeting Law requirements".** ZR, we need to pay attention to keep our meetings as open as possible.

Mr. Lebovitz, intent does not matter. The fact that the doors were locked does matter. We can't prove that no one knocked on the doors, but we should err on side of caution.

A MOTION was made by EK:

Acknowledge violation of the open meeting law.

MM, anyone care to discuss?

No discussion or second. Motion failed.

MM, another motion?

MM to Attorney Sturtevant, what if we say there was a violation but the remedy does not satisfy the complainant or Roger? Attorney Sturtevant, the Board could either ratify or declare as void the 1/9/17 meeting actions and then take action to ensure no future violations. MM, what's the appeal process? Attorney Sturtevant responded that an aggrieved person may take a civil action in court. MM, what if there is no action? Attorney Sturtevant, that's a little fuzzy, but no action would effectively be a denial and seemingly an action could be brought.

ZR stated that she's okay with not making a vote. MW agreed. MM said he'd like to bring closure to the matter.

A MOTION was made by MM:

Based on the facts reviewed and the discussion tonight, there was no violation of the open meeting law.

SECONDED by SM.

Vote: 5-1-0, motion carried.

II. Adjournment

The meeting ended at 6:45 PM.