



**COMMONWEALTH OF MASSACHUSETTS
PLYMOUTH DISTRICT**

OFFICE OF THE DISTRICT ATTORNEY

MAIN OFFICE:

32 BELMONT STREET

P.O. BOX 1665, BROCKTON, MA 02303-1665

TEL: (508) 584-8120

FAX: (508) 586-3578

TIMOTHY J. CRUZ
DISTRICT ATTORNEY

June 22, 2005

John W. Giorgio, Esq.
Kopelman & Paige
31 St. James Ave., 7th Floor
Boston, MA 02116-4102

Re: Wareham Conservation Commission

Dear Attorney Giorgio:

The Wareham Conservation Commission violated the Open Meeting Law on May 4, 2005 by conducting the bulk of its deliberations regarding the Onset Bay Marina in private, through whispering, despite the request by the public to speak audibly. The audiotape of the meeting as provided by the Commission demonstrates that the public was not provided its right to hear the Commission's deliberations.

As you know, the Open Meeting Law requires that meetings be open to the public and the definition of meeting includes deliberations by the Commission. G.L. c. 39, § 23A. The audiotape of the May 4th meeting shows that the Commission had at a previous meeting closed the hearing on the Onset Bay Marina so that no more evidence or comment would be permitted. At the May 4th meeting, the Conservation Agent recommended to deny the Marina's application for expansion because of the potential for damage to the environment. One Commissioner, Paul Florindo, then proposed a revised plan so that the environment would not suffer the previously described damage and the marina could still expand in limited form. These comments were made in open to the public, in conformance with the Open Meeting Law.

At that point, the audiotape demonstrates a lengthy whispered discussion approximately 15 to 20 minutes in length, most of which is inaudible. The audible portions demonstrate that the Commission members considered the propriety of the motion from a procedural standpoint, the propriety of re-opening the hearing to include the information from Mr. Florindo and some discussion about the consequences of their decision. Various voices are heard in this recorded conversation and there appears to be a separate whispered discussion by other Commission members as well, the content of which is completely inaudible. During this whispered discussion, a member or member(s) of the public commented that the discussion was inaudible. A Commissioner, apparently Chairman Donald Westgate, stated that it was not necessary for the public to hear the discussion, that they were discussing a matter, batting something back and forth, and trying to come up with something.

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The Commission voted to accept Mr. Florindo's revised plan if the applicant provided it to the Commission by a certain date. This vote was not simply to allow for re-consideration but was in fact a vote to accept the revisions by Mr. Florindo without further hearings if the applicant met these new specifications. Because the decision was made through whispered discussions, the Chairman explained to the public what the Commission had just done in their vote. He was met with public outrage not only over the Commission's vote to accept the revised plan but also because the public was not privy to the deliberations. The Chairman stated that these whispered discussions were simply done in an effort to come to a "final decision."

In its answer to this investigation, the Commission, through counsel and through the Conservation Agent, takes no position on whether a quorum of the Commission heard the whispered comments. Under the Open Meeting Law, the governmental body has the burden to prove that it has complied with the law. G.L. c. 39, § 23B. The Chairman stated, as recorded on the audiotape, that the whispered discussion was undertaken to come up with something and to come to a final decision. Further, the Commission took a substantive vote on an entirely new proposal without any audible discussions, implying that the lengthy whispered discussion or discussions constituted the deliberative process for the Onset Bay Marina hearing. The Chairman's comments and the Commission's vote are substantive evidence that a quorum was privy to the whispered conversations. The Commission has not offered any claim or evidence that a quorum did not hear the whispered conversations.

The Commission contends that the hearing was heated and that the Chairman was subject to undue negative comments. Even when a governmental body may expect negative comments from the public, the Open Meeting Law requires that governmental bodies conduct their deliberations under the glare of public scrutiny. Foudy v. Amherst-Pelham Regional School Commission, 402 Mass. 179, 184 (1988). "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 the decisions are reached.*" *Id.* (Emphasis added). The public has the right to hear the Commission's deliberations. J & C Homes, Inc. v. Planning Board of Groton, 8 Mass. App. Ct. 123, 124-125 (1979) (public had right to hear new conditions imposed on proposed plan). Public observation is the overriding purpose of the law. Board of Selectmen of Marion v. Labor Relations Commission, 7 Mass. App. Ct. 360, 361 (1979). Regardless, in the meeting at hand, the public had remained silent during the entire discussion, including Mr. Florindo's proposal, until the Commission began whispering. Even then, only one or two members of the audience announced that the discussions were inaudible. The Commission did not heed this warning and instead told the audience that it was not necessary for the public to hear this discussion. The audience remained silent for the duration of these whispered discussions and only became critical of the Commission when the Chairman explained what had been done secretly right in the middle of the meeting.

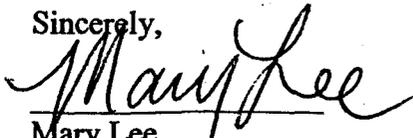
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If a governmental body does not wish to hear the complaints of the public regarding its actions, it has a remedy. The Open Meeting Law provides the presiding officer with the authority to eject any person who speaks without permission. G.L. c. 39, § 23C. "No person shall address a public meeting of a governmental body without permission of the presiding officer at such meeting, and all persons shall, at the request of such presiding officer, be silent. If, after warning from the presiding officer, a person persists in disorderly behavior, said officer may order him to withdraw from the meeting." Id.

Contrary to the Commission's claim, the Commission never explained the content and subject matter of their discussions and never cured the error by an open public discussion. See Benevolent & Protective Order of Elks, Lodge No. 65 v. City Council of Lawrence, 403 Mass. 563, 566 (1988); Pearson v. Board of Selectmen of Longmeadow, 49 Mass. App. Ct. 119, 125, further app. rev. denied 432 Mass. 102 (2000); Allen v. Board of Selectmen of Belmont, 58 Mass. App. Ct. 715, 718 (2003). Instead, the Commission voted and the Chairman simply explained the vote. The public has the right to hear what the Commission discusses at an open session to reach its decision, whether that discussion focuses on the proper procedure to be followed that might allow or prevent a motion from being entertained or whether it focuses on the merits of the motion itself. Apparently, from the audiotape, the Commission discussed both the procedure and substance of Mr. Florindo's proposal.

This office requires that the Commission acknowledge its violation of the law at its next open session by reading this letter aloud. The Commission must also make public the substance of its whispered discussion by including that information as an appendix to the minutes of May 4th. This appendix may be created by memory, notes and/or by the audiotape. When this office receives the minutes of the meeting at which the Commission reads this letter and the minutes of the meeting approving an appendix to the minutes of May 4th detailing the whispered discussion, this matter will be closed. The Commission is reminded that the public must be able to hear the comments of all board members at open sessions. If the Commission does not wish to permit public comment about its decisions at its meetings, the Open Meeting Law permits the presiding officer to silence any person under threat of removal. G.L. c. 39, § 23C. However, the Commission may not whisper its discussions to prevent the public from hearing how it arrives at its decisions.

Sincerely,


Mary Lee
Assistant District Attorney

cc: Wareham Conservation Commission
Joleen Payeur Olsen