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January 20, 2014

SENT VIA E-MAIL

John DeBenedetti
Chair, Chester Selectboard
Town of Chester

Dear John:

I have reviewed the formal written complaint of Cynthia Prairie, as Publisher of the *Chester Telegraph*, alleging a violation of the Vermont Open Meeting Law ("VOML"). The written complaint was received by Chester on January 12, 2015. Specifically, Ms. Prairie alleges that the Chester Selectboard made improper use of an executive session to discuss matters "dealing with a real estate purchase" pursuant to the authority found in 1 V.S.A. §313(a)(2). Section 313(a)(2) allows a public body to hold an executive session for "the negotiating or securing of real estate purchase or lease options." *Id.*

Ms. Prairie requests that the Chester Selectboard "acknowledge affirmatively that its executive session of 19 November was an intentional and knowing violation of the Open Meeting Law." Ms. Prairie also proposes the adoption of specific measures in the form of "policies and procedures that will ensure that such violation will not occur again."

As requested, I have reviewed the complaint and can provide you with the following observations and opinions.[1]

First, 1 V.S.A. §314(b)(2) provides that "[u]pon receipt of the written notice of alleged violation, the public body shall respond publicly to the alleged violation within seven business days by: (A) acknowledging the violation of this subchapter and stating an intent to cure the violation within 14 calendar days; or (B) stating that the public body has determined that no violation has occurred and that no cure is necessary." Given this directive, it is appropriate that the Selectboard has scheduled the matter for consideration at its meeting of January 21, 2015 so that it can publicly respond to the complaint.

[1] In addition to the complaint, I have also reviewed the approved minutes and agenda from the Chester Selectboard meetings of November 19, 2014 and December 17, 2014, as well as SAPA-TV video recordings of both meetings.

Second, having reviewed the SAPA-TV recordings from the Selectboard meetings of November 19, 2014 and December 17, 2014, it is possible that a technical violation of 1 V.S.A. §313(a) *may* have occurred in the Selectboard's citation of §313(a)(2)(real estate purchase or lease options) as the appropriate exception, instead of the broader exception found in §313(a)(1)(A)(consideration of contracts where premature public knowledge would clearly place the public body or a person involved at substantial disadvantage). It is my opinion that there is *no* reasonable basis to conclude, based on a prior "detailed briefing by a lawyer from the VLCT on how to work within the law," that any violation was "intentional and knowing" as alleged in the complaint.

In my opinion, this is so for a number of reasons. Foremost is the reality that there is nothing simple about conducting public meetings or applying the dictates of the VOML to the multitude of different ongoing factual scenarios that present themselves to public bodies. This does not obviate the obligation to consider and apply the law to the best of a public body's collective ability and it is appropriate that Chester has sought to better inform itself about the law by seeking informative advice from the VLCT. It is, however, a fallacy to think that a seminar on VOML, which often generates more questions than it answers, can leave a participant with a perfect ability to predict how a given exception will be judicially interpreted based on a specific set of facts.

As an example, it is not certain that the interpretation given to 1 V.S.A. §313(a)(2) in the complaint would be judicially adopted under the circumstances presented in this situation. The emphasis on the definition of "negotiate" as requiring a process where both parties "are in the room" while negotiating a real estate purchase is contrary to the apparent purpose of the exception which is to allow for the formulation of "terms and conditions for purchase of real property [without making] the proposed purchase impossible or driv[ing] up the price." *Common Cause v. Nuclear Regulatory Com.*, 674 F.2d 921, 933 (D.C. Cir. 1982)(referencing a discussion of terms and conditions for purchase of real property as being one of the "concrete" examples of the open meetings exception found under the Federal Sunshine Law at 5 U.S.C.S. §552b(c)(9)(B)). *See also, Wilkinson v. Legal Servs. Corp.*, 865 F.Supp. 891, 895 (D. of Col. 1994)(reversed on other grounds). The give and take of a real estate negotiation rarely occurs with two parties in a room and is more often undertaken with the passing of terms through representatives after an opportunity to caucus or receive instructions on how to proceed. Utilizing a means of communication other than in person conversation makes communication no less of an ongoing negotiation in the process of coming to terms on the purchase of real estate.[2]

[2] "Negotiate" is simply defined in *Black's Law Dictionary* (7th Ed. 1999) as "[t]o communicate with another party for the purposes of reaching an understanding."

A review of the minutes from December 17, 2014 and the SAPA-TV recording of the same date, make it clear that active, but not final, discussions were under way in connection with the purchase of real property. It is equally clear that the person conducting those negotiations on behalf of Chester was seeking guidance from the Selectboard. This seems consistent with the purpose of the exception as drafted in §313(a)(2). Regretfully, we have no controlling Vermont case law to refer to. The one case which has cited the exception did not decide the issue and the facts of the case are distinct from the current situation in that the municipality in question actually used the executive session to approve the purchase on already negotiated terms. *See, Valley Realty & Development, Inc. v. Town of Hartford, et. al.*, 165 Vt. 463, 466, ft. nt. 3, 685 A.2d 292 (1996).

That said, and mindful of the rule of construction that exceptions under VOML must be strictly construed, *Trombly v. Bellows Falls Union High School District No. 27*, 160 Vt. 101, 624 A.2d 857 (1993), the broader exception found at §313(a)(1)(A) for consideration of "contracts" may have served the purposes underlying the executive session better than §313(a)(2) given that a potential "contract" to purchase property was the subject in question. Satisfying the requirements of §313(a)(1)(A) does require that the public body make a finding as part of its motion to enter executive session that "premature public knowledge would clearly place the public body or person involved at a substantial disadvantage." *Id.* In this situation, such a finding could articulate that the Selectboard would be discussing the status of negotiations concerning a real estate purchase with the O'Neil's involving identified property and that premature disclosure of the Selectboard's discussions would place Chester at a substantial disadvantage in the continuing negotiations. In my opinion, and given the information publicly discussed at the December 17, 2014 meeting about the negotiations, such an executive session was fully appropriate under §313(a)(1)(A).

I see nothing that warrants a conclusion that a possible mistake in discerning the applicable exception, where multiple exceptions may indeed apply, is a knowing and intentional violation of the law. Further, I see nothing to "cure" given that: (a) no action was taken by the Selectboard that requires a cure in the form of rescission or ratification under §314(b)(4)(A); (b) a public discussion about the substance of the November 19, 2014 executive session already occurred at the Selectboard meeting of December 17, 2014; and (c) future public discussions of any enforceable written contract to purchase land will need to occur before formal approval of a written contract with a further expectation that any necessary funding or borrowing will likely involve voter approval. Given the circumstances, and in an effort to move forward, it is my recommendation that the Selectboard consider responding to the complaint using the following motion at its upcoming meeting of January 21, 2015:

> The Chester Selectboard hereby acknowledges, that the exception found in §313(a)(1)(A) would have better served the purpose for the executive session on November 19, 2014 to consider the status

of, and provide guidance for, ongoing negotiations with the O'Neils concerning the purchase of real property. In referring to exemption §313(a)(2), the Selectboard did not make a specific finding concerning premature general public knowledge and substantial disadvantage as required in §313(a)(1). The Selectboard operated in good faith and with the belief that the executive session of November 19, 2014 was permitted under §313(a)(2) given the Board's consideration of ongoing real estate negotiations.

The Selectboard further determines that no action was taken as a result of the executive session of November 19, 2014 and therefore no cure by way of ratification or voiding an act of the Selectboard is warranted or necessary under §314(b)(4)(A). Given that the determination to go into executive session by a public body necessarily requires "the exercise of judgment on a case by case basis," *Trombley v. Bellows Falls Union High School District No. 27*, 160 Vt. 101, 105, 624 A.2d 857 (1993), it will be difficult to formulate a specific measure that will provide accurate guidance under any given scenario for identifying a matter which is subject to an exception under VOML and the making of findings under §313(a)(1). The Selectboard will further consider adopting specific measures to assist it and other public bodies in Chester in articulating findings as required under 1 V.S.A. §313(a)(1).

I hope the above addresses the Selectboard's questions and concerns. Please let me know if I can be of any further assistance. This will confirm that I will attend the Selectboard meeting currently set for January 21, 2015. I will plan on arriving at 8:00 p.m.

Sincerely,

ENGLISH, CARROLL & BOE, P.C.

James Carroll
JFC:mc