

BOS

John Murray

From: John Murray  
Sent: Wednesday, November 24, 2004 12:18 PM  
To: All Boards and Committees; All Department Heads  
Subject: FW: Acton/Gen:Open Meeting Law Requirements for Informal Town Meeting

11/29  
7



Informal-Town-Mee  
ting.doc (32 ...

FYI  
John

DORÉ:  
PLEASE NOTE RE: STATE  
OF THE TOWN MEETING.

-----Original Message-----

From: Stephen Anderson  
Sent: Thursday, November 18, 2004 10:40 AM  
To: Don Johnson; John Murray  
Cc: Jonathan Wagner  
Subject: Acton/Gen:Open Meeting Law Requirements for Informal Town Meeting

<<Informal-Town-Meeting.doc>>

Gentlemen:

Attached is my memorandum analyzing the Open Meeting Law Requirements for the upcoming Informal Town Meeting. I conclude that notice of the meeting itself should be filed and posted; that notice of a meeting of the Board of Selectmen should be filed and posted for the same time and place; and that the Board of Selectmen should keep minutes of the Informal Town Meeting.

I also recommend that members and associate members of the Board of Appeals should not attend the Informal Town Meeting because of pending 40B matters. By copy of this email, I am so advising the Chairman of the ZBA.

If you have any questions, please call me.

Stephen D. Anderson  
ANDERSON & KREIGER LLP  
43 Thorndike Street  
Cambridge MA 02141-1764  
Phone: 617-252-6575  
Fax: 617-252-6899  
e-mail: sanderson@andersonkreiger.com  
www.andersonkreiger.com

This electronic message contains information from the law firm of Anderson & Kreiger LLP which may be privileged. The information is intended to be for the use of the addressee only. If you are not the addressee, note that any disclosure, copy, distribution or use of the contents of this message is prohibited.

① CHRISTINE -  
PLEASE BE SURE WE ARE  
POSTED IN ACCORDANCE  
WITH THIS.  
② EVA - PLEASE BE SURE POSTING IS  
COVERED AND PLAN TO HANDLE MINUTE  
③ EVA - PLEASE ALSO SUGGESTION  
ON P.3 OF COUNSEL'S LETTER  
THAT WE HAVE SIGN-IN  
SHEETS. PLEASE MAKE  
NECESSARY PREPARATIONS.

BOS

## MEMORANDUM

TO: Don P. Johnson, Town Manager  
FROM: Stephen D. Anderson, Town Counsel  
DATE: November 18, 2004  
RE: Acton: Open Meeting Law Requirements for Informal Town Meeting

---

You have asked how the Town's upcoming open, informal, informational, unofficial "Town Meeting" should be treated under the requirements of the Open Meeting Law, M.G.L. c. 39, ss. 23A *et seq.* The meeting has been called by the Board of Selectmen and is intended to promote open public discussion of issues important to the Town (such as potential future Proposition 2-1/2 overrides, affordable housing, etc.). You expect that members of the public as well as officials from a number of Town Boards will attend. The Chairman of the Board of Selectmen will chair the meeting and the remaining members of the Board are expected to be in the audience. However no decisions will be made and no votes will be taken at the meeting.

### "Governmental Body"

The Open Meeting Law defines a "Governmental body" as:

every board, commission, committee or subcommittee of any district, city, region or town, however elected, appointed or otherwise constituted ...; provided, however, that this definition shall not include a town meeting.

If this were an official Town Meeting under c. 39, s. 9, the event would not be covered because the definition of a "governmental body ... shall not include a town meeting." Instead, an official Town Meeting is covered by its own statutory requirements. See G.L.c. 39, ss. 9-18.

But this is not an official Town Meeting, so it does not qualify for this exemption from the definition of a governmental body. Instead, as the SJC stated in *Connelly v. School Committee of Hanover*, 409 Mass. 232, 237-238 (Mass., 1991), "the key inquiry" is whether the informal town meeting "is a 'committee ... of ... [the] town'." In this context, the open meeting law "has been applied to committees which are not technically committees of a town, these have all been committees of a "governmental body." *Id.*, citing, *e.g.*, *Gerstein v. Superintendent Screening Comm.*, 405 Mass. 465, 541 N.E.2d 984 (1989) (superintendent search screening committee established by the school committee);

*Nigro v. Conservation Comm'n of Canton*, 17 Mass.App.Ct. 433 (1984) (subcommittee of conservation commission). "The statute is broad enough to treat these as 'committees of a town.'" *Connelly, supra*. See also *Nigro*, 17 Mass.App.Ct. at 434 ("the only way to avoid stripping 'subcommittee' of all meaning in its present context is to read 'Governmental body' to include a 'subcommittee of any board, commission or committee of any city or town' "). Conversely, the statute "does not extend to committees which are not appointed by a 'governmental body,' and not otherwise constituted pursuant to statute, ordinance or by-law, or in some other official way to perform an assignment itself subject to the law." *Connelly, supra*.

Under this reading, I conclude that the informal town meeting is a "committee ... of ... [the] town" for purposes of the Open Meeting Law, called by the Selectmen (themselves a "governmental body"), and chaired by the Chairman of the Board.

### **"Meeting" and "Deliberations"**

The Open Meeting Law, M.G.L. c 39, s. 23A, defines a "Meeting" as:

- any corporal convening and deliberation<sup>1</sup> of a governmental body
- for which a quorum<sup>2</sup> is required in order to make a decision
- at which any public business or public policy matter over which the governmental body has supervision, control, jurisdiction or advisory power is discussed or considered;
- but shall not include any on-site inspection of any project or program.

On balance, the informal town meeting will involve deliberations of a governmental body; a simple majority of the informal town meeting would make any decision during the meeting; and public policy matters will be discussed in an advisory manner. Accordingly, it is a "meeting" for Open Meeting Law purposes.

### **Procedural Requirements**

As a practical matter, the informal meeting will be open to the public and will likely receive wide publicity in the local press leading up to the meeting. So the question is not whether the "meeting" should be "open" – it will be. Rather, the question is whether the procedural requirements of the Open Meeting Law must be met and, if so, by which Board or Boards.

Under M.G.L. c. 39, s. 23B, these procedural requirements are that:

---

<sup>1</sup> "Deliberation" is defined as a "verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction."

<sup>2</sup> "Quorum" is defined as "a simple majority of a governmental body unless otherwise defined by constitution, charter, rule or law applicable to such governing body."

- (1) a “notice of every meeting of any governmental body shall be filed with the clerk of the city or town in which the body acts,”
- (2) a copy of the notice “shall ... be publicly posted in the office of such clerk or on the principal official bulletin board of such city or town,”
- (3) the governmental body “shall maintain accurate records of its meetings, setting forth the date, time, place, members present or absent and action taken at each meeting ...,” and
- (4) the records of each meeting “shall become a public record and be available to the public.”

As the informal town meeting is a “Governmental body,” these requirements apply to the informal town meeting itself: notice of that meeting must be filed and posted. Since the informal town meeting was called by the Selectmen and will be chaired by the Chairman of the Board, it falls to the Selectmen to keep the official minutes of the meeting and make them available to the public. As the informal town meeting is open to the public, there are no “members” *per se* to be present or absent; however, a sign-in sheet should be kept as part of the records of the meeting.

### **Meetings within the Meeting**

The Selectmen will be performing an official function at the informal town meeting (*i.e.* keeping and later approving the minutes). As a result, the Selectmen should file and post a notice for the same time and place – much like the Board does for the Annual Town Meeting. The Board need not all sit together on the stage. But posting notice of their “meeting within the meeting” will allow official minutes to be kept and approved and will protect the Selectmen from allegations that they are somehow circumventing the Open Meeting Law.<sup>3</sup>

The informal town meeting need not be filed and posted for other Town board or commission whose members happen to be in attendance *provided that a quorum of the members of any such board or commission do not caucus or deliberate in any way at the informal town meeting*. The other Town boards and commissions should be cautioned not to do so.

### **The ZBA**

One of the issues that will definitely be discussed at the informal town meeting is affordable housing. The Board of Appeals currently has two 40B applications pending and can expect others to be filed soon in light of the Town’s standing with respect to the 40B thresholds. In an abundance of caution, I recommend that the Board of Appeals members and associate members should not attend the informal town meeting – or at

---

<sup>3</sup> After all, the Selectmen could have simply invited the public to a Selectmen’s meeting to discuss the same issues. The Open Meeting Law would clearly apply to such a meeting.

least that portion of the meeting where the agenda concerns affordable housing issues. The Board of Appeals acts in a quasi-judicial capacity in place of all other Boards and Commissions of the Town on 40B applications. With 40B petitions pending and large numbers of the public in attendance, there is simply too large a risk that prejudicial comments may be made that will redound to the detriment of the Board of Appeals and the Town in the 40B hearings.