

**TOWN OF WINCHESTER  
BOARD OF SELECTMEN'S MEETING**

**Monday, March 29, 2004**

Chairman James A. Johnson, III called the meeting to order at 7:00 PM in the Board of Selectmen's Meeting Room in Town Hall. Present were Vice Chairman Charles E. Nurnberger, Selectmen Priscilla Owen McPhee, Elizabeth M. Cregger and Karl P. Fryzel. Also present were Acting Town Manager Mark J. Twogood and Acting Assistant Town Manager Carolyn Ward.

**OPENING**

Chairman Johnson noted that the WinCam technician had not arrived at this time, so he has no comments at this time.

**CONSENT AGENDA**

**Banner Request:**

**Recreation Department – Jamie McKeown Road Race – June 1 – 5, 2004**

- \* Motion: That the Board of Selectmen approve the Consent Agenda for Monday, March 29, 2004, a banner request from the Recreation Department for the Jamie McKeown Road Race, from June 1 through June 5, 2004.

Nurnberger – Cregger

All in favor.

VOTED.

**TOWN MANAGER FOLLOW UP AND COMMENTS**

Acting Town Manager informed the Board that he and Comptroller Bonner would be meeting with the Board on April 5 to update them on the FY2004 expenditures to date. He noted that the draft flooding and drainage report is at table this evening and will be an agenda topic for the next meeting. Acting Town Manager requested that Board members make their comments available to him prior to the discussion next week.

Responding to the question concerning whether the draft copy of the flooding/drainage report would be available to Town Meeting Members, Acting Town Manager informed the Board that the original intention was to make the report available to those residents who have been victims of flooding. He agreed that making this available as a Town Meeting handout is a good idea.

Chairman Johnson noted that the April 5, 2004 meeting will be the annual reorganization meeting. Also during that week on Wednesday, April 7, 2004 a public hearing in the Town Hall Auditorium will be held on the 75% drawings for the MassHighway renovation proposal for the Cambridge Street intersections.

**Non-Docket Business from the Selectmen**

Selectman Fryzel suggested that a letter be sent to the Town's Legislative delegation concerning the diversion of lottery revenues, which is the subject of the MMA booklet contained in the packet. He explained that if the MMA proposal were to be adopted, the impact on Winchester would be an extra \$50,000 each year for the next five years, and would restore aid that is being diverted. Selectman Fryzel indicated that it is his recommendation that a letter be sent to the

Legislative delegation from the Board urging their support for the MMA measure, restoring the lottery aid to where it is supposed to be.

- \* Motion: That the Board of Selectmen send a letter to the State Legislative Delegation requesting their support for the MMA measure to restore lottery aid to cities and towns.

Fryzel – Nurnberger

All in favor.

VOTED.

Relative to the letter from the resident expressing concern over truck traffic, which has been forwarded to Traffic Advisory, Selectman Fryzel requested that a letter be sent to the resident informing him that his letter has been referred to T.A.C. for a recommendation. Concerning the letter from Winchester Hospital and the request to hold a meeting with representatives from the Hospital with the Selectman that represents that area of Town, Selectman Fryzel requested that the misunderstanding be corrected. Chairman Johnson suggested that a few dates be provided for a convenient time in an April/May time frame for such a meeting to be held. He noted that the meeting would be a duly posted public meeting.

Selectman Fryzel referenced the application for a food vendor license that will be coming before the Board at a subsequent meeting. He noted that there is one item on the application that has not been completed and is necessary in order for the application to be considered complete. Selectman Fryzel noted that the character reference needs to be completed.

Vice Chairman Nurnberger referenced the memorandum from the Acting Assistant Town Manager seeking advice from the Board about whether a staging permit application should be docketed and acted upon by the Board before a sign permit has been approved. He informed his colleagues that he does not feel that any permits should be brought before the Board for action until they are ready. It was the consensus of the Board that this issue should be docketed for discussion. Acting Town Manager noted that issue could be brought back as a business item for action at a subsequent meeting.

### **Comments from the Chair**

Chairman Johnson noted that the agenda for the evening would be brief, i.e., only one business item, the Annual Town Meeting. He informed the audience that the Board has already acted on the Consent Agenda, Town Manager Follow Up and Communications portion of the agenda prior to the arrival of the television camera and the start of the public meeting. He outlined the agenda for the evening.

### **Notification of Other Town Meetings and Hearings**

Chairman Johnson noted that tomorrow, March 30, 2004 is Town Election Day. He urged everyone to participate and vote their conscience, noting that the Town is at a crucial junction in the budget process and input from the residents is important.

Chairman Johnson outlined the meetings to be held in Town Hall in the upcoming week.

### **Non-Docket Business from the Selectmen - Continued**

Selectman McPhee informed her colleagues that she would like to read into the public record the finding of the Middlesex District Attorney's Office with regard to the Open Meeting Law. As a point of personal privilege, Selectman Fryzel requested that a copy of the letter be provided to each of the Board members.

Selectman McPhee noted that the letter is addressed to Town Counsel Wade M. Welch and reads as follows:

Dear Attorney Welch:

As you are aware, this office received a complaint dated February 25, 2004 from Ms. Priscilla Owen McPhee, a member of the Board of Selectmen (the "Board"). Ms. McPhee alleged that the Board violated the Open Meeting Law, G.L. c. 39, §§ 23A-24 (the "Law"), on February 9, 2004 when a quorum convened privately during a recess from the open meeting and discussed a public matter. After reviewing minutes from the February 9, February 23, and March 8, 2004 meetings and the videotape of the February 9 meeting, and after speaking with all five members of the Board, I conclude that the Board did violate the Open Meeting Law.

#### FACTS

At the February 9 meeting, Town Manager Brian Sullivan presented a proposed fiscal year 2005 town budget and also discussed the potential override questions for the upcoming town election. At the urging of Selectman Charles E. Nurnberger, the Board discussed issuing a position statement regarding the override. Discussion on the wording of the statement ensued until 10:25 p.m., when Chairman James A. Johnson, III called a recess. During the recess, which lasted roughly fifteen minutes, Board members deliberated outside of the public view, in a serial fashion and in quorums, on the precise wording of the statement, until a consensus was reached. By illustration, a quorum of three initially met in the Boardroom, serial conversations extended that conversation to a fourth Board member, and ultimately a quorum of at least four met again in the Assistant Town Manager's office. When the open meeting reconvened, brief comments were made, and the Board unanimously approved its position statement.

At the February 23 and March 8 open meetings, the Board recognized that its discussions during the recess from the February 9 meeting may have run afoul of the Law. To this end, Board members created a record of the private discussion that occurred during the recess by providing individual summaries of the content of those discussions at the March 8 open meeting, as reflected in the minutes.

#### DISCUSSION

The Open Meeting Law requires that "[a]ll meetings of a governmental body shall be open to the public..." G.L. c. 39 § 23B. The Law further mandates that "[n]o quorum of a governmental body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter..." *Id.* A 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." G.L. c. 39, § 23A.

The Legislature has defined "meeting" broadly, to include "any corporal convening and deliberation of a governmental body" covered by the Law "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." G.L. c. 39, § 23A. "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." Id.; see Ghiglione v. School Comm. of Southbridge, 376 Mass. 70, 72 (1978) (explaining that the Law seeks "to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based").

The Board aptly recognizes that during their recess conversations, members were discussing a public matter, specifically, the language of the position statement regarding the override. Given that the Winchester Board of Selectmen is a five member Board, any initial gathering of two would not be a quorum, and was not a violation. However, as soon as three members gathered in the Boardroom, the discussion became a deliberation of a quorum, one that was conducted in private, beyond public scrutiny, and thus was a violation of the Open Meeting Law. Pearson v. Board of Selectmen of Longmeadow, 49 Mass. App. Ct. 119, 124 (2000) (discussing deliberating quorum and its significance as group action).

The chain of communication expanded in a serial, one-on-one fashion, when a member of the first quorum relayed the content of the conversation to another member. Such private serial or chain conversations which ultimately reach a quorum of the Board, whether in person, on the telephone, or via email, have long been considered to violate the Open Meeting Law. Benevolent & Protective Order of Elks v. City Council of Lawrence, 403 Mass. 563, 564 (1988) (council president met with other members "individually and privately over the telephone and in person"); Middlesex District Attorney's Office, Open Meeting Law Guidelines, at 20-21, Sept. 2003. Finally, when four Board members eventually gathered in the Assistant Town Manager's office, a quorum was formed and the attendant deliberations in private violated the Law.

While it is plain that there was a violation, it also is clear that the Board has gone to great lengths to rectify its error. Such Open Meeting Law violations can be cured "by independent deliberative action taken at" a subsequent, properly noticed meeting. Allen v. Board of Selectmen of Belmont, 58 Mass. App. Ct. 715, 718 (2003) (quoting Pearson, 49 Mass. App. Ct. at 125, where, after the violation, the board "met, *discussed*, and voted" on the proposal in open session). However, the "independent final action in the sunshine [may not be] merely a ceremonial acceptance and a perfunctory ratification of secret decisions." Pearson, 49 Mass. App. Ct. at 125 (quoting Tolar v. School Br. of Liberty County, 398 So.2d 427, 429 (Fla. 1981). As demonstrated in Pearson, the curative actions need to include a summary and discussion of "the course of negotiations," that is, a summary recitation of the content of the private deliberations. Id. at 718-719.

The Board's discussion and individual recollections, which were put on the record on March 8, provided an appropriate disclosure of the private deliberations that took place on February 9. The Board is to be commended for quickly curing the violation

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on its own initiative. Given that the Board has now approved the March 8 minutes containing the individual recollections of the private discussions, no further action by this office is warranted.

#### CONCLUSION

In summary, the Winchester Board of Selectmen did violate the Open Meeting Law by deliberating privately both in serial conversations and with quorums of the Board during a recess from the open session on February 9, 2004. However, the Board's discussion on the record on March 8, 2004 cured the error.

If you have any questions regarding these matters, or the Open Meeting Law generally, please contact me or any other member of the District Attorney's Open Meeting Law Team at (617)679-6540. We look forward to discussing the Open Meeting Law at the upcoming educational session for Winchester officials and the public scheduled for April 27, 2004.

Signed by Linda M. Gostanian, Assistant District Attorney; cc: Ms. Priscilla Owen McPhee.

Vice Chairman Nurnberger noted that the Attorney General has approved the newsrack bylaw that was approved by Town Meeting. He asked when, where and how the new regulation will be implemented. Acting Town Manager indicated that he will look into this and provide a response at the next meeting.

Selectman Cregger noted that tomorrow, March 30, is Town Election Day. She urged people to get out to vote, reminding the voters of the consequences should the override not be successful. She noted that there will be numerous positions in the School Department that will not be funded, likely resulting in closure of the school libraries. Public Library hours will also be reduced, public safety and D.P.W. all impacted. Selectman Cregger urged a favorable vote on question one.

Selectman Fryzel referenced the letter to the District Attorney thanking her for the prompt and thorough processing of the Open Meeting Law complaint. Selectman Fryzel also expressed appreciation of this quick action by the District Attorney's office.

#### **BUSINESS**

##### **Spring 2004 Annual Town Meeting Warrant**

**Present: Planning Board Chairman Tom Howley; Ken Buckland, Cecil Group**

Acting Town Manager noted that this evening is the last chance that the Board has to make any changes to the Spring 2004 Town Meeting warrant before it goes to the printer on Tuesday. Chairman Johnson explained that the question before the Board this evening is whether the Strategic Planning Article should be a separate article, or heard under Article 1. Selectman Fryzel noted that the Board has three options, i.e., to include as a part of Article 1 reports, which are accepted and placed on file and there is no debate; to remain as Article 3, or could be indefinitely postponed, turning in to a lengthy debate at Fall Town Meeting; the last possibility is Article 25, a report that can be debated as a part of that article. He explained that of the choices, the aforementioned is his least favorite with a decision made at a later time between Articles 1 and 25.

Selectman Fryzel noted that he did attend the community conversation last week, and in attendance were several Town Meeting Members along with other non-Town Meeting Members. There were questions raised relating to the impact any vote would have with respect to Article 3, and whether an affirmative vote would be considered an endorsement, that all ideas are ratified, as well as the financial commitments as a part of that ratification. Sharing some of his colleagues concerns, Selectman Fryzel noted that the Strategic Plan is a very good document and his comments are not in any way suggestive that it is not. Selectman Fryzel suggested that as the document gets more exposure among various boards, committees and public forums as a part of the process to get the plan implemented in parts, no one idea is self-implementing and each idea needs to be more fully vetted by responsible parties and the community as a whole. He explained that implementing one idea could negate other ideas, with choices being made after discussion. Selectman Fryzel informed his colleagues that at this stage, he would prefer not to have the Strategic Plan move forward under Article 3. Selectman Fryzel informed his colleagues that he favors removal of Article 3 from the warrant prior to it being sent out to the printer.

Selectman Cregger indicated that the Strategic Plan report might be better under Article 1 or Article 25, Article 25 perhaps working better because it provides a longer timeframe.

\* Motion: That the Board of Selectmen open the warrant for the Spring 2004 Annual Town Meeting.

Fryzel – Cregger All in favor. VOTED

Vice Chairman Nurnberger commented that removing Article 3 from the warrant this evening provides many weeks for the Board to discuss whether the Strategic Plan Report should be under Article 1 or Article 25. He noted that what the plan represents becomes clearer by the day, i.e., what kind of document this is. Selectman Nurnberger noted that he had a discussion with an individual who called the Strategic Plan a "platform of ideas". He explained that he feels this is a good description of what the document represents, although none of the ideas have been vetted through the appropriate venues. Vice Chairman Nurnberger informed his colleagues that he also favors removal of Article 3 and looks forward to debating and discussing whether the report should be made under Article 1 or Article 25.

Planning Board Chairman Tom Howley indicated that he feels it would be confusing to have the draft report discussed under Article 3, suggesting that this was not what the Steering Committee had intended, likely opening up discussion about what the report is or is not. He indicated that whether the report is heard under Article 1 or Article 25 could be decided at a later time.

\* Motion: That the Board of Selectmen authorize the removal of Article 3 from the Spring 2004 Annual Town Meeting Warrant.

Nurnberger – Fryzel All in favor. VOTED.

\* Motion: That the Board of Selectmen close the warrant for the Spring 2004 Annual Town Meeting.

Nurnberger – Cregger All in favor. VOTED.

Selectman Cregger referenced a draft at table this evening that was a consequence of last Wednesday's Strategic Plan Steering Committee meeting. She also recalled that there was a promise made to develop an endorsement statement. Selectman Cregger suggested that not

just the Board of Selectmen, but in due course, the other boards, committees and commissions also need to have this form of endorsement. She read the following into the record:

*Preface: The Strategic Plan prepared by the Strategic Plan Steering Committee ("SPSC") is meant to further the Community Vision created through the "Envision Winchester" process. The Plan focuses on the need for revitalization of the community spirit that has enlivened Winchester since its very beginning. This revitalization may take place within policy discussions of existing governmental bodies or regular forums to be developed on topics of public interest, like the alternative concepts found in the Strategic Plan, or in celebratory public events where all citizens may come together like the ENKA fair, Town Day, and the concerts and movies on the Common.*

*The SPSC divided the goals and objectives found in the Community Vision into 6 discrete sections to form the structure of the Strategic Plan.*

- *Outstanding Education*
- *Economic Vitality*
- *Community Infrastructure*
- *Distinctive Landscape*
- *Architectural Heritage*
- *Caring, Connected Community*

*It soon became clear that there were many ideas and concepts that had commonalities across the 6 sections. Some ideas may be considered to be "low hanging fruit;" items that could be implemented quickly with a minimum of time, cost and effort and had been mentioned so many times in so many different contexts that acceptance appears generalized. Other larger concepts and alternative concepts supporting different approaches to the same goal require much more discussion and critical thinking both by existing town boards and commissions and the general public than possible by the SPSC given its time frame and scope of authority.*

*While the warrant article will call for the acceptance of the report, the actions of the Board of Selectmen and other elected and appointed boards are critical to bringing the process called for into being and ultimately to its full fruition. The Board of Selectmen and other elected and appointed boards and commissions should individually endorse the **process** of examining these concepts, and developing those deemed to have broader merit and public acceptance to fuller development. This endorsement will not imply acceptance of any of the individual concepts, but will endorse the process of further examination, broader discussion and ultimate disposition of those concepts as the process both culminates in some instances and proceeds in others.*

*The Strategic Plan is not an end unto itself, but a process for furthering the Community Vision. Accordingly, The SPSC proposes the following Endorsement Statement:*

*The Board of Selectmen endorses the work of the Strategic Planning Steering Committee in developing a framework for discussion and disposition of the*

*concepts contained within the Strategic Plan (the "Plan"). While the Board of Selectmen has not yet endorsed any of the specific concepts outlined in the Plan, the Board commits its energies to work with other Town boards, committees and commissions to promote further discussion of the concepts outlined in the Plan and to sponsor venues for further public discussion of the concepts in order to determine the appropriate disposition of the Plan's various concepts, whether accepting the concept, altering it prior to acceptance or declining to accept the concept after further study and deliberation.*

Selectman Cregger noted that this is an attempt to clarify what the report is and is not, as well as move it along. She explained that the process will continue over several years.

Selectman Fryzel thanked Selectman Cregger for reading this statement into the record, as well as preparing the statement with Mr. Howley. He indicated that he feels this is a step in the right direction and reflects some of the discussion that took place during the community conversation.

Selectman McPhee extended her thanks to the Strategic Planning Committee, indicating that they provided a different way to engage the greater community in the decision making process on both large and small issues. Selectman McPhee noted that it is critically important and she hopes that future boards will consider this to be a living and viable document, not simply rendered to a dusty shelf. She indicated that there has been great support, as evidenced by the community conversations, for this kind of process and should be helpful in the more difficult decision making that boards and committees will have to do.

Chairman Johnson informed his colleagues that he also likes the verbiage in the draft statement.

Ken Buckland, consultant from the Cecil Group, thanked the Board for supporting the committee's efforts, noting that he also feels the committee has done a great job.

## **COMMUNICATIONS AND REPORTS**

The Board acknowledged receipt of the following correspondence:

1. Packet from Mass. Municipal Association – Restoration of Lottery Revenue – Informational Kit

### **Adjournment – 7:50 PM**

\* Motion: That the Board of Selectmen adjourn for the evening.

Fryzel – Nurnberger

By Roll Call: Fryzel, Cregger, McPhee, Nurnberger, Johnson

VOTED.

Respectfully submitted,

Mark J. Twogood, Acting Town Manager