ANDERSON
KREIGER

MEMORANDUM

To: Phyllis Marshall, Interim Town Administrator

Cc: Ellen O'Brien Cushman, Town Clerk

From: George A. Hall, Jr.

Re: Open Meeting Law: "Working Groups" and Subcommittees

Date: October 13, 2017

In view of the Open Meeting Law (OML) complaint now pending in the before the Attorney General's (AG's) office relative to the meetings of "working groups" in connection with the Belmont Day School project, I have been asked for further clarification on when two or more members of a board or committee, not constituting a quorum, may meet to discuss a matter pertaining to that board's business without being considered a "subcommittee" subject to the OML. I am responding to that request in a more formal memo to you, because there appear to be a number of committees where this kind of activity occurs, with more or less regularity, and because the Selectmen and the Town Clerk's office have received several inquiries about that practice.

Definition of a "Subcommittee"

The OML defines a "public body" subject to the OML as "a multiple-member board, commission, committee or subcommittee within the executive or legislative branch or within any county, district, city, region or town, *however created, elected, appointed or otherwise constituted*, established to serve a public purpose … [emphasis supplied]."[1] In Nigro v. Conservation Commission of Canton, 17 Mass. App. Ct. 433, 434 (1984), the Appeals Court held that a 3-member subcommittee of the 7-member Canton Conservation Commission, engaged in making findings of fact and formulating recommendations to the full Commission on a matter pending before it, was subject to the OML. The 2009 amendments have cemented the Nigro decision in place by changing the phrase "subcommittee of any … town" to "subcommittee within any … town," and by adding the word "created" to the italicized phrase in the sentence quoted above. These amendments make abundantly clear that any multiple-member entity "created …

[1] Before the 2009 amendments, the OML used the term "governmental body" rather than "public body."

appointed or otherwise constituted" by a town board or committee – i.e., by *another* public body – is a subcommittee subject to the OML.[2]

Despite the apparent clarity of this ruling, there remains a circular quality to the definition of "subcommittee" (i.e., it's only a "public body" if it has been constituted somehow as a body). If it were assumed that any non-quorum of a board, getting together on board business, were constituting themselves as a "body," then extending that principle to its logical conclusion would negate the need for a quorum as a prerequisite for an OML violation.

The Attorney General's office, however, has resisted an overbroad reading of the words "created" or "otherwise constituted" so as to preserve the quorum requirement where appropriate. In the decisions issue by the AG's office to date, a non-quorum of a board's membership is only "created" or "constituted" as a subcommittee if *the board or committee as a whole* makes a decision to create or constitute them as such, especially for the purpose of making findings and recommendations on matters that would otherwise be the responsibility of the full board.[3] In the AG's analysis, whether a "subcommittee" has been created "hinges on the Board's action and whether it intended to create a multiple-member body." In OML 2017-111 (Brookline Board of Selectmen), the AG found there was no intent to create a "multiple-member body" because the Board clearly sought to assign the task in question to a single member. Even though another member volunteered, at the meeting, to assist in that task, the AG did not find the subsequent conversations between those members to be the work of a subcommittee because there was no decision by the Board to constitute them as such. By contrast, in OML 2016-59 (Billerica Board of Selectmen), the AG, noting that the Board had <u>voted</u> to create a subcommittee to consider proposals for medical marijuana dispensaries pursuant to an agenda item entitled "Form Board of Selectmen Sub Committee to Consider Medical Marijuana Proposal," found the resulting subcommittee to be subject to the OML.

<u>Analysis and Recommendations</u>

The key distinction between the two AG decisions cited above is obviously that, in Brookline, there was no vote or record of board "action," and that in Billerica, action was

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[2] A subcommittee appointed to advise a single official, such as a school superintendent or mayor, who is not himself subject to the OML in making the decision on which he/she is seeking advice, is not considered a "public body" under the OML. See <u>Connelly v. School Committee of Hanover</u>, 409 Mass. 232 (1991).

[3] Consistent with that approach, the AG's office gave some informal guidance to Belmont's Warrant Committee in November 2010, agreeing with the contention that the Warrant Committee's Chair, Vice-Chair and Secretary did not constitute a "governmental body" when they got together to set the agendas for the meetings of the full Committee.

contemplated on the agenda and followed by a vote. (See also OML 2014-63, where the Foxborough Selectmen voted to designate two of the five members to meet with a liquor licensee and make recommendations to the Board, and the AG determined that the board had voted to form a subcommittee.) Obviously, the clearest indication of a board's intentions is found in what it votes to do or accomplish. So the facile conclusion one might reach from these decisions is that, as long as a board does not vote to establish a subcommittee, a non-quorum of its members can meet to carry out elements of the board's business without OML compliance. This is the current state of the decisional law on this question.

I think, however, that over-reliance on this principle is ill-advised. The courts and the AG have a history of expanding prohibitory rules whenever it appears that boards and committees have developed intentional strategies to evade OML requirements. The phrase "however created, elected, appointed or otherwise constituted" lends itself to a more expansive reading if the circumstances seem to warrant it. If a board develops a practice of doing significant elements of its business through "working groups" not constituting a quorum of the board, and there is evidence that this approach is accepted by the board as standard operating procedure, I think there is a substantial risk that, on the right set of facts, the AG will infer intent by means other than a vote.[4] Boards should not be looking for ways to do their business without OML compliance. When that's the intention (especially when it's the stated intention), any strategy that appears to be effective is an invitation for expansion of the rules. I do not think it would be wise for boards to assume that the use of "working groups" is a successful "model" for avoidance of OML compliance. The more this gets embedded into the practices of boards and committees as a system, the more likely it is that it will lead to its own demise.[5]

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[4] I am not suggesting that there is any particular example of any board conduct in Belmont that has been brought to my attention that constitutes the "right set of facts" for an AG finding of an OML violation.

[5] See, e.g., McCrea v. Flaherty, 71 Mass. App. Ct. 637, 648 (2008), in which the Appeals Court essentially invented the rule against "serial communications" to foreclose a clever strategy by the Boston City Council, described as follows:

> On several occasions the council allegedly posted a guard from the BRA at the door of a private meeting room to maintain a careful headcount and ensure that only a minority of councillors, albeit a rotating minority, were physically in each others' presence at any one moment, despite the fact that the council had been previously ordered to abandon this practice by a judge of the Superior Court.

The rule against "serial communications" was then incorporated into the OML in the 2009 amendments.

With that warning, let me suggest a few approaches for boards to get needed work done by their members outside public meetings without tempting fate under the OML.

- *Give assignments to individuals, not groups*. Most boards rely on individual members to write decisions, conduct research, and attend meetings with staff or other boards. It is better to assign the writing of a decision or report, for example, to an individual member. As OML 2017-111 demonstrates, there is nothing wrong with that member obtaining input from other members, as long as those consultations do not extend to a quorum of the members (as that would raise the "serial communication" issue). The concept of "working groups" should be retired.

- *Clearly differentiate the functions of the board and the functions of staff*. In addition to assigning work to individual members, boards with staff support can assign particular duties to staff, either on a recurring or task-specific basis. For example, a land use board may ask its staff to review each new application for completeness and to circulate a memorandum with preliminary comments for the first hearing; it should not raise OML concerns if one or more board members (again, short of a quorum) interacts with staff to supervise and provide feedback to help ensure the sufficiency of the staff report. But it is critical to that example that the final work product is that of the staff, not the sub-group of board members. If it is confusing to the public whether the work being done outside the meeting is a board function or staff function,

- *When sending multiple members to meetings with other groups, do not assign those members the responsibility to make decisions or recommend further action.* There are several exceptions to the definition of meeting that cover attendance of a subgroup at other meetings. Specifically, members of a public body may (1) conduct an on-site inspection of a project or program, (2) attend a conference, training program or event; or (3) attend a duly posted meeting of another public body provided that they communicate only by open participation. All three of these exceptions are expressed with the proviso that the members "may not deliberate at such gatherings." It is consistent with that limitation to request board members to attend, participate in, or present at, such conferences and meetings. It is *not* consistent with that limitation to ask the attending members to make recommendations, as a group, on the action that the Board should take in response to whatever transpired at the conference or meeting, because to agree on a recommendation requires deliberation.

Finally, I would note that none of the court or AG decisions regarding subcommittees suggest that an individual member of a board or committee cannot contact another member, or multiple members not constituting a quorum, to push for the inclusion of a new item on the board's agenda, or to strategize on how to get a majority of the board to

act, or refrain from acting, on a particular issue. Almost by definition, these kinds of discussions do not occur on behalf of the board as a whole.

If anyone has any particular concern about the manner in which a non-quorum of a board's members can communicate that is not addressed by this memo, I would be happy to address it.