



THE COMMONWEALTH OF MASSACHUSETTS
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OML 2022 – 122

VIA EMAIL

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RE: Open Meeting Law Complaint

Dear Attorney Lydon:

This office received two complaints alleging that the Marblehead Board of Health (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. We receive the first complaint from Mark Pelletier on February 8, 2022. We received the second complaint from Allen Waller on March 7, 2022. The complaints were originally filed with the Board on December 29 and 30, 2021, respectively. You responded on behalf of the Board by letters dated January 12, 2022. In their complaints, Mr. Pelletier and Mr. Waller allege that the Board 1) met on December 27 without posting notice 48 hours in advance, 2) failed to accommodate all members of the public who attempted to attend a December 29 meeting, and 3) failed to announce which members of the Board would be participating remotely during the December 29 meeting.^{1, 2}

Following our review, we find that the Board violated the Open Meeting Law by improperly meeting on December 27 without posting notice 48 hours in advance, and holding a meeting on December 29 that was not adequately open and accessible to the public. We find no violation with respect to the third allegation. In reaching this determination, we reviewed the original complaints, the Board’s responses to the complaints, and the complainants’ requests for further review. We reviewed notices of the Board’s December 27 and 29 meetings, and minutes

¹ Unless otherwise specified, all dates refer to 2021.

² In addition, Mr. Pelletier alleges that the Board stopped accepting public comment after 30 minutes. We note that, even if true, this allegation would not constitute a violation of G.L. c. 30A, §§ 18-25 as the Open Meeting Law does not guarantee a right to public participation in public body meetings. Accordingly, we decline to review it. See OML Declination 1-25-16 (Nahant Housing Authority Board of Commissioners).

of the Board's January 11, 2022, meeting. We also reviewed Facebook screenshots and Zoom participant logs relating to the December 29 meeting. Finally, we corresponded by email with Attorney Lydon and Mr. Pelletier in February through May of 2022.

FACTS

We find the facts as follows. On December 27 at 10:45 a.m. the Board posted notice for a meeting to be held on the same day at 7:30 p.m. via Zoom. The purpose of the meeting was to discuss and vote on a mask mandate for all public indoor spaces in light of an uptick in COVID-19 cases. The Board met as planned, and voted to order the mask mandate. Due to the short notice, public attendance at the meeting was low.

Also on December 27, the Board posted notice for a meeting to be held on December 29 via Zoom to again discuss and vote on the mask mandate. At this meeting, the Board ratified its vote from the December 27 meeting to implement that mask mandate. More than 300 members of the public attempted to join the December 29 Zoom meeting, exceeding the 300-participant cap of the Board's Zoom license.

DISCUSSION

1. The Board improperly met on December 27 without posting notice 48 hours in advance, as the Board's discussion did not constitute an emergency.

The Open Meeting Law requires that “[e]xcept in an emergency, in addition to any notice otherwise required by law, a public body shall post notice of every meeting at least 48 hours prior to such meeting excluding Saturdays, Sundays and legal holidays.” G.L. c. 30A, § 20(b). The Open Meeting Law defines an emergency as “a sudden, generally unexpected occurrence or set of circumstances demanding immediate action.” G.L. c. 30A, § 18; 940 CMR 29.02. The burden of justifying the need for an emergency meeting falls on the public body. See OML 2020-123.³ Emergency meetings are reserved for circumstances that are unanticipated and require an immediate response, that is, action that could not wait 48 hours for notice of a meeting to be posted. See OML 2021-119; OML 2017-131; OML 2016-70; OML 2011-45.

The Board argues that it was not required to post notice 48 hours in advance of its December 27 meeting because the meeting was convened in response to an emergency. In particular, the Board cites a section of the Massachusetts General Laws which relates to the promulgation of regulations by local boards of health, which includes a general requirement that boards of health hold a public hearing before issuing new regulations. In relevant part, that statute reads “If the board of health determines that an emergency exists, the board or its authorized agent, acting in accordance with section 30 of chapter 111, may, without notice of hearing, issue an order reciting the existence of the emergency and requiring that such action be taken as the board of health deems necessary to address the emergency.” G.L. c. 111, § 31. The Board therefore argues that, because the Board declared that an emergency existed, notice of a public hearing was not required to institute the mask mandate.

³ All previous determinations issued by the Division can be found on the Attorney General's website: <https://www.mass.gov/the-open-meeting-law>.

The Division of Open Government’s jurisdiction concerns compliance with the Open Meeting Law. Therefore, we take make no findings regarding whether notice of a public hearing was required for the Board to promulgate new regulations under G.L. c. 111, § 31, at its December 27 meeting. However, the Open Meeting Law makes clear that its 48-hour notice requirement is separate from the notice requirements of other laws as the Open Meeting Law states, “[e]xcept in an emergency, in addition to any notice otherwise required by law, a public body shall post notice of every meeting at least 48 hours prior to such meeting, excluding Saturdays, Sundays and legal holidays.” G.L. c. 30A, § 20(b). In an emergency, a public body shall post notice as soon as reasonably possible prior to such meeting. *Id.* An emergency is defined as “a sudden, generally unexpected occurrence or set of circumstances demanding immediate action.” G.L. c. 30A, § 18; OML 2011-45. We therefore find that, regardless of whether a public hearing was required, the Board’s December 27 meeting was still subject to the notice requirement of the Open Meeting Law, including the narrow exception for emergency meetings.

We now must examine whether the purpose of the Board’s December 27 meeting—imposing a mask mandate in light of increasing COVID-19 cases—constituted an emergency as defined by the Open Meeting Law. We find that it was not for several reasons. First, as the Omicron variant spread across the country in December of 2021, the increase in cases in Massachusetts was foreseeable for several weeks before the Board chose to contemplate the mask mandate at a meeting on December 27. Therefore, the rise in cases was not “unexpected.” Second, although there may be a situation in which waiting one more day to impose a public health regulation may produce a negative impact on public health, the Board has not demonstrated why the mask mandate in this case “demand[ed] immediate action,” that is, that the mandate could not wait one additional day to enable posting notice to the public 48 hours in advance of the meeting. *See* G.L. c. 30A, § 18; OML 2021-119 (finding that a board of health was justified in holding an emergency meeting where waiting 48 hours would have almost entirely precluded the board from taking effective action). For these reasons, we find that the circumstances surrounding the December 27 meeting did not meet the criteria for an emergency meeting under the Open Meeting Law and, therefore, the Board violated the Law by failing to post notice of the meeting 48 hours in advance.

2. The Board’s December 29 meeting was not open and accessible to all members of the public who attempted to attend.

The complaints allege that all interested members of the public were not able to access the Board’s December 29 remote meeting, because the Board’s Zoom account only allowed up to 300 participants in the Board’s meeting. Meetings of a public body must be open to members of the public, unless an executive session is convened. *See* G.L. c. 30A, §§ 20(a), 21. Due to the COVID-19 pandemic, public bodies are permitted to meet entirely remotely, provided that the public body provides adequate, alternative means of public access to the deliberations of the public body. “Adequate, alternative means” may include, without limitation, providing public access through telephone, internet, or satellite enabled audio or video conferencing or any other technology that enables the public to clearly follow the proceedings of the public body in real time. For all meetings, whether held in person or remotely, public bodies must make reasonable accommodations for overflow crowds. *See* OML 2018-27; OML 2015-92; OML 2012-66.

Here, it was reasonable to anticipate that the Board's December 29 meeting would attract a significant crowd, given the known controversy regarding mask mandates and the fact that similar meetings held in nearby towns shortly before the Board's December 29 meeting had attracted hundreds of people. The Board explains that the Town's Health Director spent approximately 30 minutes at the beginning of the December 29 meeting letting in members of the public to the Zoom meeting from the waiting room. As an initial matter, we note that a delay as long as 30 minutes for members of the public to join a meeting is an unacceptable delay.

The Board also states that, once the Health Director admitted everyone from the waiting room, there were exactly 297 participants in the meeting, which was just below the Zoom meeting's capacity of 300 people. However, contemporaneous social media posts by members of the public indicate that some people could not join the meeting because the meeting was at capacity. In addition, the records of the Zoom meeting indicated that well over 300 people attempted to join the meeting—approximately 380 attempts. Even assuming that some of the login attempts were from a single person trying to access the meeting on multiple devices, we find that more than 300 people attempted to attend the December 29 meeting, including many who attempted to join the meeting for a brief period of time and then likely ceased their attempts to enter.

When a Zoom meeting that features a waiting room reaches capacity, any other individual who attempt to join will receive a popup notification that the meeting is full and they will not be able to join the waiting room. In this case, the meeting administrator, believing that all interested attendees were in the waiting room, might not be aware that potential attendees were denied access even into the Zoom waiting room. Although the Board may not have been aware that some members of the public were prevented from entering the waiting room and thus prevented from being admitted into the meeting, the Board should have investigated when the number of admitted participants—297—came so close to the meeting capacity of 300. For a meeting that was foreseeably crowded, the Board did not make reasonable efforts to accommodate the overflow crowd. We therefore find that the Board violated the Open Meeting Law.

3. We decline to find a violation of the Open Meeting Law where the Board clearly and effectively conveyed the identifies of the Board members participating in the December 29 meeting remotely.

Finally, Mr. Waller alleges that the Board did not announce which members of the Board would be participating remotely in the December 29 meeting. The Board acknowledges that the Board members did not introduce themselves for the record or announce who would be participating remotely. The Open Meeting Law regulations require that “[a]t the start of the meeting, the chair shall announce the name of any member who will be participating remotely.” However, we have explained that other announcements or visual displays that clearly and effectively convey to the public the identify of public body members participating remotely will be deemed to satisfy this requirement. See OML 2021-44; OML 2020-168.

Here, the Board used the Zoom platform, and members' names were each displayed on the screen. Therefore, we find that it was evident to the public which Board members were participating remotely, thus fulfilling the transparency goals of the Open Meeting Law. See OML 2021-44; OML 2020-168. We therefore decline to find a violation with respect to this allegation.

CONCLUSION

For the reasons stated above, the Board violated the Open Meeting Law by improperly meeting on December 27 without posting notice 48 hours in advance, and by holding a meeting on December 29 that was not adequately open and accessible to the public. We order the Board's immediate and future compliance with the Open Meeting Law and caution the Board that a determination by our office of a similar violation in the future may be considered evidence of intent to violate the Open Meeting Law.

In addition, we order all members of the Board to attend an Open Meeting Law webinar training provided by our office within **ninety (90) days** of the Board's receipt of this letter.⁴

In response to the complaints, the Board held a meeting on January 11, 2022, at which the Board re-voted the indoor mask mandate. In addition, the Board voted on February 11, 2022, to rescind the Marblehead indoor mask mandate. Therefore, we order no further relief.

We now consider the complaints addressed by this determination to be resolved. This determination does not address any other complaints that may be pending with our office or the Board. Please feel free to contact the Division at (617) 963 - 2540 if you have any questions.

Sincerely,



Sarah Monahan
Assistant Attorney General
Division of Open Government

cc: Mark Pelletier (via e-mail: Markpelletier1@gmail.com)
Allen Waller (via e-mail: awaller@asperaassociates.com)
Marblehead Board of Health, c/o Director of Public Health Andrew Petty
(via e-mail: pettya@marblehead.org)

⁴ Information regarding trainings held by our office may be found here: <https://www.mass.gov/service-details/open-meeting-law-trainings>

This determination was issued pursuant to G.L. c. 30A, § 23(c). A public body or any member of a body aggrieved by a final order of the Attorney General may obtain judicial review through an action filed in Superior Court pursuant to G.L. c. 30A, § 23(d). The complaint must be filed in Superior Court within twenty-one days of receipt of a final order.