

# HISTORIC DISTRICT COMMISSION

October 23, 2013

SPECIAL MEETING 4:00 P.M.

## JUDGE WELSH ROOM

**Members Present:** Mr. David McGlothlin, Mr. Thomas Biggert and Ms. Marcene Marcoux.

**Members Absent:** Ms. Polly Burnell, Mr. Lance Hatch, and Mr. Ryan Landry.

**Staff Present:** Ms. Gloria McPherson, Town Planner.

David McGlothlin called the Special Meeting to order at 4:55 P.M.

### **Public Comments:**

None.

Marcene Marcoux stated that this Special Meeting was being held in order to address an Open Meeting Law Complaint from Bernard Brahm received September 17, 2013 concerning an alleged violation on August 21, 2013 and related matters and to consider possible responses to the complaint and vote to resolve the same.

The facts, circumstances and legal issues of the complaint were reviewed by the Commission, based on a summary received from Town Counsel.

Mr. Biggert stated that Bernard Brahm filed on September 17, 2013 a new Open Meeting Law complaint against the HDC. In that complaint, he alleges that he recently became aware through a discussion with the Attorney General's office that the HDC failed to respond to his complaint dated September 10, 2012. With respect to the September 10, 2012 complaint, in reviewing potentially responsive records, it appears that the HDC did inadvertently overlook the September 10, 2012 complaint, as it was filed simultaneously with a public records request, and several other complaints were filed by the same complainant in near proximity to the September 10, 2012 complaint. The HDC has, of course, sought to respond timely to Mr. Brahm's numerous complaints, and such omission was unintentional. The meetings at issue in the September 10, 2012 complaint were held on January 4, 2012 and April 12, 2012. Both of those meetings occurred significantly more than 30 days prior to September 10, 2012, and the September 10, 2012 complaint was received too late under the law. The law requires that a complaint be filed with the public body no more than 30 days after the alleged violation, or 30 days from the date on which it could have "reasonably have been discovered." 940 CRM 29.05(3).

Ms. Marcoux noted further that the complainant had already filed numerous complaints about the January 4, 2012 meeting. These complaints have been resolved in favor of the HDC, and it appears that the new complaint is yet another attempt to inappropriately reverse the presumption that the HDC undertakes its activities in accordance with law, and/or to undermine the work of the HDC. Additionally, the complaint relates to the HDC's response to a question from the Attorney General's office with respect to whether it had taped the meetings. Thus, the complaint does not allege a violation of the Open Meeting Law.

Mr. McGlothlin stated that for informational purposes, the HDC's response to the Attorney General, apparently, was that it had not taped its meetings. While there may be tapes of the meeting created by the Cable Access Corporation or posted on-line in other locations, such records are not the records of the HDC and are not public records of the Town. In any event, the Open Meeting Law does not impose a requirement on a public body to make an audio recording of its meetings. If the Attorney General is or was dissatisfied with the Town's response to its inquiry, that would be between the Attorney General and the Town. The matter would not and does not constitute a violation of the Open Meeting Law. The HDC has and will continue to be cooperative with the Attorney General's Division of Open Government to resolve Open Meeting Law complaints. With respect to the September 17, 2013 complaint, this complaint does not constitute a complaint for purposes of the law, and was also untimely filed. The complaint is, essentially, a statement that the HDC apparently failed to respond to an earlier complaint. There is a process to lodge such a complaint with the Attorney General, and the Complainant did not follow that process.

Mr. McGlothlin further stated that when the complainant received no response from the HDC, it was then evident that the HDC had apparently failed to respond within the 14 business-day time frame. The Attorney General's regulations, at 940 CMR 29.05(6), provide that "if at least 30 days have passed after the complaint was filed with the public body and if the complainant is unsatisfied with the public body's resolution of the complaint, the complainant may file a complaint with the Attorney General." The regulations provide further that such a complaint should be filed within 90 days after the alleged violation. 940 CRM 29.05(6). Nonetheless, the complainant did not file such complaint with the Attorney General. The Complainant is quite familiar with the applicable procedures. Thus, the Attorney General should decline to review the allegations set forth in the September 10, 2012 complaint. The complainant should not now be permitted to resurrect his earlier complaint.

Ms. Marcoux stated that he should not be able to file a new complaint concerning the same matter. The underlying matters occurred well over a year ago. The statute and regulations require that he file his complaint within 30 days of the date of the violation or the date on which it could reasonably have been discovered. His knowledge of the matters at issue were already several months old when he filed the September 10, 2012 complaint and are even older now.

Ms. Marcoux also described a conversation she had with the AG's office which had previously resolved other complaints by Mr. Brahm.

### **Commission Discussion**

Ms. Marcoux stated that the review of the information constituted the discussion. She further stated that it was appropriate at this point to make a motion to resolve the complaint, based on a draft motion drafted by Counsel.

The Commission acknowledged receipt of a complaint on September 17, 2013 from Mr. Brahm alleging that the Historic District Commission failed to respond to his September 10, 2012 complaint.

#### ***A motion was made by Commissioner Marcene Marcoux to resolve the complaint as follows:***

- In reviewing potentially responsive records, it appears that the HDC did inadvertently overlook the September 10, 2012 complaint
- The complaint was filed simultaneously with a public records request, and several other complaints were filed by the same complainant during the same time period;
- Such omission on the part of the HDC was not intentional;
- In any event, the September 10, 2012 complaint was received too late under the law, in that the meetings at issue in the complaint were held more than 30 days prior on January 4, 2012 and April 12, 2012 (and, at least with respect to the January 4, 2012 meeting, it has been the subject of numerous complaints);
- In any event, the complaint's allegations involve the HDC's response to a question from the Attorney General relative to the taping of meetings;
- To put the matter in context for informational purposes, the HDC does not tape its meetings, there are times we do but there may be times we don't, and while it may be possible that a public access corporation does, and/or that a tape of such meeting could be posted on an on-line site, such tapes were not created by the HDC;
- If the Attorney General is or was dissatisfied with the Town's response to its inquiry, that would be between the Attorney General and the Town, but such matter does not trigger a violation of the Open Meeting Law;
- Further, the September 17, 2013 complaint was also untimely filed; it was filed more than 11 months after the original complaint was filed; his recourse was to file a complaint with the Attorney General when at least 30 days had passed from the filing with the HDC, and within a period of 90 days following the date of the alleged violation; he did not;
- Moreover, he should not be able to now resurrect his complaint with respect to earlier allegations, where the matters at issue occurred in 2012, well over 30 days ago;
- Where the underlying matters have been dealt with several other times, and where the complaints at issue were both untimely, there is no remedial action warranted and the complaints should both be dismissed without further action;

- In summary, the HDC has and will continue to be cooperative with the Attorney General's Division of Open Government to resolve Open Meeting Law complaints, and authorizes Town Counsel to send a letter to the complainant and the Attorney General consistent with this vote.

***The motion was seconded by Commissioner Thomas Biggert. VOTE 3-0-0.***

At 5:08 P.M., Mr. McGlothlin made a motion to adjourn. The motion was seconded by Mr. Biggert. The motion passed unanimously.

Respectfully submitted,

Gloria McPherson