CITY OF
CAMBRIDGE
AMERICA'S MOST WALKABLE CITY
Office of the Mayor | Henrietta Davis

2013 OCT 31 PM 12 09
OFFICE OF THE CITY CLERK
CAMBRIDGE, MASSACHUSETTS

October 31, 2013

TO: **Donna Lopez, Cambridge City Clerk**

FROM: **Mayor Henrietta Davis** HD

Please find attached for transmission to the City Council an Open Meeting Law Complaint from Charles Teague together with a proposed City Council response to the Attorney General, prepared by the City Clerk in consultation with the City Solicitor, for the City Council's review and approval at its November 4th City Council meeting.

795 Massachusetts Avenue | Cambridge, Massachusetts 02139 | p. 617-349-4321 f. 617-349-4320 TTY. 617-349-4242 | mayor@cambridgema.gov

DRAFT FOR REVIEW BY CITY COUNCIL

November 4, 2013

Amy Nable, Assistant Attorney General
Director of Division of Open Government
Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Re: Action taken by Cambridge City Council on Open Meeting Law complaint of Charles Teague dated October 17, 2013

Dear Ms. Nable:

On behalf of the Cambridge City Council, I am writing to advise you pursuant to 940 CMR 29.05(5) of the action taken by the City Council on the Open Meeting Law complaint of Charles Teague. A copy of Mr. Teague's complaint dated October 17, 2013 is attached as Exhibit "A." Mr. Teague alleges that the actions of three members of the nine-member Cambridge City Council during a City Council meeting occurring on April 8, 2013 violated the Open Meeting Law. The City Council disagrees for the reasons stated herein.

FACTS

The Cambridge City Council is composed of nine Councillors. Five City Councillors constitute a quorum. The full City Council meets weekly on most Monday evenings throughout the year, except during July and August. At its Monday evening meeting on April 8, 2013, the City Councillors were considering a complex set of zoning ordinance amendments related to properties owned by the Massachusetts Institute of Technology in the Kendall Square area of Cambridge, which amendments would add a new Planned Unit Development District (known as PUD-5) in Section 13.80 to the Cambridge Zoning Ordinance. As part of the proposed new zoning, MIT had submitted a commitment letter to the City describing obligations that MIT would perform for the public benefit if the zoning amendment were adopted by the City Council. At the April 8 meeting, the City Council considered and voted on a number of amendments to the zoning ordinance and the commitment letter before them. One City Councillor, Minka van Beuzekom, proposed an amendment to the zoning ordinance language that Mr. Teague denotes as the "Net Zero Emissions Amendment," (hereafter "NZEA") which in essence would have required that the buildings constructed by MIT in the area affected by the new zoning laws meet energy standards that did not exist elsewhere in the Cambridge Zoning Ordinance and had not previously been applied to any other buildings in Cambridge. Adding the amended language to the proposed ordinance language before the City Council required a majority vote of five members of the City Council. The initial vote at the meeting was five members in favor, three

members against it, with one member voting present. A few moments later, Mayor Henrietta Davis announced publicly that she was changing her vote from a vote in favor to a vote of present. The NZEA thereupon failed with only four members in favor, being less than a majority. Mayor Davis explained her change of vote at the meeting as being based on her learning that passage of the NZEA might sink the entire project and jeopardize MIT's ability to see the project through, and because the zoning ordinance and MIT's development plans and obligations set forth in its commitment letter are tied together. No City Councillor challenged the right of Mayor Davis to change her vote on the NZEA. No City Councillor challenged the ruling of the chair (being Mayor Davis) that the NZEA failed. Then, the City Council voted on the enactment of the entire zoning ordinance , as amended, without the NZEA, and the motion passed seven members in favor, one member opposed, with one member voting present. The commitment letter, as it had been revised, was then adopted by the City Council as well. No City Councillor made a motion for reconsideration after the votes were taken, as permitted by the Rules of the City Council.[1]

Mr. Teague's Open Meeting Law Complaint does not identify the public body complained of, but states that the Complaint is against the "City of Cambridge," and that specifically, City Councillors David Maher, Kenneth Reeves and Mayor Henrietta Davis, being three of the nine City Councillors, violated the Open Meeting Law. Mr. Teague alleges that, during the City Council's April 8 public meeting, after the initial vote passing the NZEA, Councillor Maher left the meeting briefly to speak privately with MIT representatives while Councillor Reeves was speaking at the meeting ("implementing a diversion" according to Mr. Teague). Mr. Teague alleges that when Councillor Maher returned to the meeting, he spoke privately (on camera) with Mayor Davis who then reversed her vote on the NZEA, resulting in its defeat.

Mr. Teague acknowledged in a related complaint letter he sent on October 9, 2013 to Assistant Attorney General Margaret Hurley that the thirty day limitation period for filing an Open Meeting Law Complaint regarding the actions of April 8, 2013 expired long ago. See attached letter dated October 9, 2013 from Mr. Teague to Assistant Attorney General Margaret Hurley and Exhibit "A" thereto entitled "Chronology of Citizen's Petitions," at paragraph 3, attached as Exhibit "B" hereto. However, he now seeks to evade the bar of the limitation period by stating that he just recently became aware of a photograph that has been on a person's Twitter site since April 8 showing Councillor Maher standing in a doorway near MIT representatives.

DISCUSSION

1. Mr. Teague's complaint is untimely.

[1] City Council Rule 16 provides: "A question having been taken, it shall not be in order for any member to move reconsideration thereof at the same meeting. A motion to reconsider may be made at the next meeting, provided written notice of such motion has been filed with the City Clerk within thirty-six hours of the day of the vote, Saturdays and Sundays to be excluded in the computation of the thirty-six hours. No more than one motion for reconsideration of any votes shall be entertained. Any member may move reconsideration; if reconsideration is not moved prior to the adjournment of the next regular or special meeting called for that particular purpose, the action taken by the City Council stands."

Mr. Teague's Open Meeting Law Complaint should be dismissed because it is untimely. G.L.c.30A, §23(b) requires that an Open Meeting Law Complaint "shall be filed within 30 days of the date of the alleged violation." The Attorney General's regulations, at 940 CMR 29.05(3), provide that if the alleged violation of the Open Meeting Law "could not reasonably have been known at the time it occurred, then [a Complaint may be filed] within 30 days of the date it should reasonably have been discovered." The alleged violations occurred at a meeting on April 8, 2013. Any Open Meeting Law Complaint based on actions at that meeting had to be filed by May 8, 2013. Mr. Teague filed his Complaint on October 17, 2013, over five months late. Mr. Teague himself acknowledged in a related complaint letter dated October 9, 2013 that he sent recently to Assistant Attorney General Margaret Hurley that the thirty (30) day limitation period for filing an Open Meeting Law Complaint regarding the actions of April 8 expired long ago. See Exhibit B.

Mr. Teague's attempt to rely on "new evidence" to assert that he could not reasonably have known of the alleged violations until he saw a still photograph this month of Councillor Maher near MIT representatives should not be credited for a number of reasons. First, the Division of Open Government has stated consistently that: "Events that occur during an open session meeting are reasonably discoverable at the time they occur." OML Declination 4-30-13, p.1. Similarly, in OML Declination 11-5-12, the Division of Open Government stated: "Acts that take place during an open session meeting are discoverable at the time they occur. That the complainant chose not to attend that particular meeting does not change the fact that any member of the public could have attended the meeting and learned of the alleged violations on that date." The reasonableness standard is objective, not subjective; that is, it is not dependent on whether a particular individual personally learned of information beyond the limitation period. Second, the "new evidence" itself, the photo, is not actually new. It was apparently posted on Twitter the evening of the meeting. That it may have been "new" to Mr. Teague several months later is not relevant for determining the expiration of the limitation period. Third, the photo at issue is silent; it gives no indication of the content of communications, if any, among the individuals pictured. Therefore, it in no way supports allegations of an Open Meeting Law violation.

2. There was no Open Meeting Law violation.

No further action is necessary if the Open Meeting Law Complaint is dismissed as untimely. If the Complaint is not dismissed as untimely, it fails in any event for the following reasons.

a. There must be five City Councillors to constitute a quorum.

The Complaint alleges that three City Councillors violated the Open Meeting Law by deliberating only with each other. Even if that were true, because a quorum of the City Council is five, there could be no "deliberation" as defined in the Open Meeting Law among only three City Councillors. See, G.L.c.30A, §18 ("Deliberation [is] an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body…."). Therefore, a discussion among three City Councillors does not violate the Open Meeting Law.

b. A member of a public body taking a break during a meeting and speaking briefly with a member of the public is not an Open Meeting Law violation.

The Complaint alleges that one City Councillor left the public meeting, spoke briefly with MIT representatives, and then returned to the meeting. The Attorney General's Division of Open Government has statutory authority to determine "whether there has been a violation of the open meeting law." G.L.c.30A, §23(c). There is no provision of the Open Meeting Law that prohibits the complained of behavior. One City Councillor is not a quorum. Therefore, a single City Councillor speaking with members of the public outside of a public meeting is not engaging in prohibited "deliberation."

c. The Mayor's change of vote at the meeting of April 8, 2013 is not an Open Meeting Law violation.

The final allegation in the Complaint is that the Mayor's change of vote during the public meeting of April 8, 2013 violated the Open Meeting Law. However, there is no provision of the Open Meeting Law that prescribes what procedure must be followed for a member of a public body to change her vote. Therefore, a change of vote does not violate the Open Meeting Law.

In addition to its not violating the Open Meeting Law, the vote change was not fatally flawed from a procedural perspective. The Mayor orally explained her vote change immediately after changing it, no other City Councillor objected to her vote change, and minutes later, the City Council voted on the enactment of the entire zoning ordinance, as amended, without the NZEA, and the motion passed seven in favor, one opposed, with one member voting present. The City Council's actions after the vote change essentially ratified it.[2] Also, as stated in City Council Rule 16, the absence of a timely motion for reconsideration by any City Councillor means that "the action taken by the City Council stands."

3. Even if the practices complained of were timely asserted violations of the Open Meeting Law, the remedies requested by Mr. Teague are extreme and inappropriate.

Even if the Complaint had been timely and there had been Open Meeting Law violations, the three remedies requested by Mr. Teague in his Complaint are inappropriate. First, he asks for the public body to admit to an intentional violation of the Open Meeting Law even though there were no Open Meeting Law violations, and even if there were a violation, there is no indication that any such violation was intentional. "Intentional violation" as defined in 940 CMR 29.02 requires specific intent to violate the law, acting with deliberate indifference to the law's requirements, or acting contrary to advice from a court or the Attorney General regarding specific conduct. None of those elements is present in this case.

Second, Mr. Teague asks that the zoning ordinance enacted at the April 8, 2013 meeting be altered to include the NZEA. This would effect a significant change to a complex zoning law that has existed now for over six and a half months, and upon which those affected by the

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[2] See, Roberts Rules of Order, §45, p.409: "Assembly's Prerogative in Judging Voting Procedures. The assembly itself is the judge of all questions arising that are incidental to the voting or the conduct of the votes."

ordinance have no doubt acted in reliance. This is unwarranted because: the Open Meeting Law was not violated; Mayor Davis explained her vote change publicly at the meeting; no City Councillor objected; after the vote change, the City Council enacted the zoning ordinance without the NZEA; and no City Councillor moved subsequently for reconsideration of the vote. These actions constitute subsequent independent deliberative action taken by the City Council that cured any previous violations. Violations of the Open Meeting Law may be cured by subsequent independent deliberative action taken in a full meeting. McCrea v. Flaherty, 71 Mass.App.Ct. 637, 642 (2008). In addition, state law, at G.L.c.40A, §5 and G.L.c.40, §32, provide a ninety (90) day period after the publication of an enacted zoning ordinance[3] to mount a legal challenge based on procedural defects to the enactment of a local zoning amendment. That limitation period expired months ago, and there was no filing of a challenge to the zoning amendment within the limitations period.

Third, Mr. Teague asks that Councillors Maher and Reeves not be appointed as chairs of any City Council committees for the next two-year term. The appointment of City Council committee chairs in the next term will be made at the next Mayor's discretion.[4] If Councillors Maher and Reeves are re-elected by Cambridge voters, it would be inappropriate in response to this Complaint to limit the ways in which these City Councillors will be allowed to serve the citizens of Cambridge in the future who elect them. It would also be inappropriate for there to be any interference with the next Mayor's authority to appoint City Council committee chairs as he/she sees fit.

As required by 940 CMR 29.05(5), the City Council reviewed the allegations of this Open Meeting Law complaint within 14 business days of receiving it. At its meeting of November 4, 2013, the City Council voted to adopt this letter as its response and resolution. Mr. Teague is being informed of the City Council's action by copy of this letter.

Very truly yours,

Donna P. Lopez
City Clerk

cc. Charles Teague
23 Edmunds Street
Cambridge, MA 02140

[3] The MIT zoning amendment at issue was published after enactment on April 18, 2013.

[4] Mayor Davis is not running for re-election as a City Councillor for the next term. Even if she were running and were elected, she would not necessarily be Mayor, as the nine City Councillors vote to elect a new Mayor after they are sworn in at the beginning of each new term.

Exhibit A

OPEN MEETING LAW COMPLAINT FORM

Office of the Attorney General
One Ashburton Place
Boston, MA 02108

Please note that all fields are required unless otherwise noted.

Your Contact Information:

First Name: Charles Last Name: Teague

Address: 23 Edmunds St

City: Cambridge State: MA Zip Code: 02140

Phone Number: +1 (617) 212-3132 Ext.

Email: charles.d.teague@gmail.com

Organization or Media Affiliation (if any):

2013 OCT 17 PM 3 07
OFFICE OF THE CITY CLERK
CAMBRIDGE, MASSACHUSETTS

Are you filing the complaint in your capacity as an individual, representative of an organization, or media?
(For statistical purposes only)

☒ Individual ☐ Organization ☐ Media

Public Body that is the subject of this complaint:

☒ City/Town ☐ County ☐ Regional/District ☐ State

Name of Public Body (including city/town, county or region, if applicable): City of Cambridge

Specific person(s), if any, you allege committed the violation: City Councillors David Maher & Kenneth Reeves, Mayor Henrietta Davis

Date of alleged violation: Apr 8, 2013

Description of alleged violation:

Describe the alleged violation that this complaint is about. If you believe the alleged violation was intentional, please say so and include the reasons supporting your belief.

Note: This text field has a maximum of 3000 characters.

I received an email on Oct 14 2013 with new evidence confirming my previously un-provable suspicion of an intentional OML violation by three members of the Cambridge City Council: Mayor Henrietta Davis, Councillors David Maher and Kenneth Reeves. The new evidence proves by way of a photograph that Maher met with MIT representatives, including Steve Marsh, while the council was in session. See the photo at: http://tinyurl.com/Maher-MIT-Picture and text at: tinyurl.com/Maher-MIT-Tweet.

I was not able to "reasonably" discover this new evidence within 30 days of the violation. I had left City Hall after the opening "Public Comment" period, my video camera was operated by a friend, and the photograph was taken by an independent journalist who told me of it sometime after reading my article (see tinyurl.com/Article-MIT-Vote).

The violation is that Maher left the April 8 2013 City Council meeting during a diversion executed by Reeves, met with MIT representatives, returned to the meeting, and then deliberated privately with Davis who subsequently, without any public deliberation, reversed her vote on an amendment to MIT's zoning petition.

This is documented by a video record (see tinyurl.com/Davis-Changes-Vote) from my camera supplemented by the city's camera system, by journalists who were there, and by my article.

I believe that Maher, Reeves and Davis intentionally violated the OML as they were (1) in the process of their (failed) defense of a Dec. 4 2012 OML complaint and should have been well aware of OML requirements, (2) clearly shown on the video record as deliberating with each other but not to the rest of the councillors or the public, and (3) implementing a diversion to distract the rest of the councillors and the public.

Before I received the new evidence, I informed Margaret Hurley, Director of the Municipal Law Unit, by letter dated Oct 9 2013 of other violations of state law by Maher and staff of the City of Cambridge.

What action do you want the public body to take in response to your complaint?

Note: This text field has a maximum of 500 characters.

1.) admit intentional violation of Open Meeting Law on April 8, 2013 which led to the failure of the "Net Zero Emissions Amendment" (NZEA) to MIT's zoning petition

2.) order correction of Zoning Ordinance by including the NZEA as Davis's first vote was legal, her change of her vote was not legal, and therefore cannot be honored. MIT can simply file another zoning petition to remove the NZEA

3.) not appoint Councillors Maher & Reeves as chairs of any committees for the next two-year term

Review, sign, and submit your complaint

Read this important notice and sign your complaint.

Under most circumstances your complaint will be considered a public record and be available to any member of the public upon request.

I understand that when I submit this complaint the Attorney General's Office cannot give me legal advice and cannot act as my personal lawyer.

I certify that the information contained on this form is true to the best of my knowledge.

Signed: _____ **Date:** 10-17-2013

For Use By Public Body
Date Received by Public Body:

For Use By AGO
Date Received by AGO:

Exhibit B

Charles Teague
23 Edmunds St
Cambridge, MA 02140
charles.d.teague@gmail.com
(617) 212-3132

2013 OCT 10 AM 10 42
OFFICE OF THE CITY CLERK
CAMBRIDGE, MASSACHUSETTS

October 9, 2013

Margaret Hurley, Director
Municipal Law Unit
Office of the Attorney General
10 Mechanic Street
Worcester, MA 01608

Dear Director Hurley,

As a concerned citizen of the City of Cambridge, I write to your office requesting assistance in addressing the City Council's ongoing prejudice toward citizens' zoning petitions and, in connection therewith, its violations of the Zoning Act, G.L. c. 40A, and of the requirements of the City's own Zoning Ordinance and/or its failure to address inconsistencies between them.

Specifically, among the violations/inconsistencies are:

A. David Maher, as Chair of the City Council's Ordinance Committee and responsible for its schedule, failed to open a hearing on a citizen's petition within sixty-five (65) days of submittal, in violation both of G.L. c. 40A, § 5, and of its own Zoning Ordinance, Section 1.51, which incorporates said statute by reference.

B. David Maher has (1) repeatedly violated City Council rules, (2) together with the council was found to have violated the Open Meeting Law (OML) by the Attorney General's office, (3) appears to have violated the OML again on April 8 (after the December 2012 OML complaint), and (4) has exhibited a prejudice against citizen participation, especially Citizen Zoning Petitions. For these reasons, the above violation of G.L. c. 40A, § 5 is intentional and is a violation of Massachusetts ethics laws, namely the standards of conduct established by G.L. c. 268A, § 23 (e.g. acting in a manner which would cause a reasonable person to conclude that he can be improperly influenced in the performance of his official duties).

C. The City of Cambridge does not have a Master Plan in violation of G.L. c. 41, § 81D. Said Section provides that "a planning board. . . shall make a master plan ... and from time to time may extend or perfect such plan ..." Statutorily, the master plan must contain nine (9) elements: a goals and policy statement; a land use plan; a housing element; an economic development element; an inventory of natural and cultural resources; an inventory of recreational resources and open space areas; a services and facilities element; an inventory of circulation and transportation systems; and an implementation program. By its own admission (see Exhibit I, City Website on Master Plan) the City seeks instead to qualify its Zoning Ordinance and Map, a 1993/2007 "growth policy document" and other, disjointed planning studies it has undertaken, collectively, as its "master plan". It is not.

D. The Zoning Ordinance provides, in Section 1.52, that "[f]ailure of the City Council to take action on a petition for a zoning amendment within ninety (90) days after the Planning Board's hearing on said petition shall render the petition inactive. . . [and] require another Planning Board public hearing. . ." Said provision is a source of confusion due to its inconsistency with and contradiction of G.L. c. 40A, § 5, ¶ 4, which calculates the aforesaid, ninety-(90)-day deadline not from the date of the Planning Board's hearing but from the date of "the city council [or committee thereof, presumably] hearing" thereon.

E. The above confusion aside, the rendering of a petition "inactive" is not explained in the Ordinance, is not authorized by G.L. c. 40A, § 5, (or consistent with the legislative purpose of the same) and is implemented by the City in a manner that is prejudicial and an undue burden and expense to petitioners and their supporters. That is, upon the passage of ninety (90) days from the date a Planning Board public hearing is held on a proposed zoning amendment, the City does not re-notice and hold a new hearing, but declares the petition "dead," so to speak, requiring that it be re-filed (and a new fee paid) by the petitioner.

F. The consequences of the City's action, as described in Item E, above, are: first, that the City Council, by refusing to act on a citizen's petition within 90 days of the Ordinance Committee or Planning Board's (depending on whether it relies upon state law or its own Zoning Ordinance) hearing thereon, can prevent consideration or adoption of an amendment indefinitely; and second, that the lapse between the expiration and re-filing of a petition provides a "window" for applicants to validly obtain building permits or special permits that will be

grandfathered, pursuant to G.L. c. 40A, § 6, should the re-filed petition ultimately pass prohibiting the authorized use or structure.

For your convenience and in support of my grievances, above, I include herewith a chronology of multiple, recent citizens' zoning petitions (see Exhibit A, Chronology of Citizen's Petitions) and the actions of the City Council relative to the same. Please be aware of the manner in which the petitions' supporters have been repeatedly prejudiced by the City Council's action or, conversely, its inaction, e.g. the permitting of project(s) that would have been prohibited by a zoning amendment that was not heard or acted upon.

Any effort that can be made by the Office of the Attorney General to investigate the actions of the Cambridge City Council and to act appropriately to ensure its future compliance with the Zoning Act and the City's Zoning Ordinance will be greatly appreciated. Instruction or an advisory opinion to the Council admonishing its past actions and advising it to conform its practices to the Zoning Act, the Ordinance, and its own rules is certainly appropriate. While I defer to your Office, I might also suggest consideration of an order that the Cambridge City Council amend Section 1.52 of the Cambridge Zoning Ordinance so as to be consistent with G.L. c. 40A, § 5. I might further suggest consideration of an order that the Cambridge Planning Board create a Master Plan that complies with G.L. c. 41, § 81D.

Thank you in advance for your consideration.

Sincerely,

Charles Teague

CC: The City Clerk's Office
Cambridge City Hall
795 Massachusetts Ave
Cambridge, MA 02139

Exhibit A. Chronology of Citizen's Petitions

Chronology of Citizen's Petitions

Background: previous City Council irregularities

1. The Office of the Attorney General stated in a letter dated June 4, 2013: *"we find that the [Cambridge City] Council violated the Open Meeting Law ... and caution that future **similar violations may be considered evidence of intent to violate the Law**"*. (see Exhibit C, Finding by Attorney General)

2. The city admitted that Councillor Maher and three other Councillors initiated the action, reneging on the City Council's commitment to the public for an open and transparent search for a replacement City Manager, that led to said violation. (see Exhibit D, Open Meeting Law Response by City)

3. Video of the subsequent April 8, 2013 City Council meeting documents at least a violation of City Council rules and possibly the Open Meeting Law by at least Mayor Henrietta Davis and likely Councillors David Maher and Kenneth Reeves. The time limits (7 day time limit to affect the zoning amendment and 30 day time limit for an open meeting law complaint) for any "appeal" have expired but that does not validate or excuse the conduct of Maher, Reeves, or Davis. (see Exhibit E, Article on Violations)

Phillips Citizen's Petition: discrepancy of 90 day limit

4. The Phillips Citizen's Petition was filed with the City Clerk on March 28, 2013. The Phillips Citizen's Petition was advertised on or about May 2, 2013.

5. The City Solicitor's legal opinion to the City Council by letter dated July 29, 2013 ("Opinion Letter") is that the Phillips Citizen's Petition expired on either August 20, 2013 or September 3, 2013. The two possible dates are due to a discrepancy between the Cambridge Zoning Ordinance and MGL 40A Section 5 as documented in Section 1.A in the Opinion Letter. Again, the discrepancy is that the Zoning Ordinance provides for a ninety-(90)-day deadline calculated from the date of the Planning Board's hearing on a petition (and provides for expiration of the petition upon passage of said deadline) whereas state law, i.e. G.L. c. 40A, § 5, provides for a ninety-(90)-day deadline calculated from the date of the city council (or council committee's) hearing thereon (and is silent as to expiration, only requiring that, thereafter, a new hearing be noticed and held). (see Exhibit G, Opinion Letter by City)