

7 Official Opinions of the Compliance Board 208 (2011)

Exceptions Permitting Closed Sessions – Property Acquisition, §10-508(a)(3) – Discussion of use of property owned by the public body – outside exception

Minutes – Contents – Boilerplate reference to statutory exception in summary of closed session – in violation

Closed Session Procedures – Written Statement – Failure to include information required by Act – in violation

Administrative Function – Discussion of lease of real property to another entity not within the exclusion

June 27, 2011

Complainant

Janis Zink Sartucci

Roseann Hurwitz

Respondent

Montgomery County Board of Education

We have considered the allegations of Rosanne Hurwitz and Janis Zink Sartucci (“Complainants”) that the Montgomery County Board of Education (“County Board”) violated the Open Meetings Act (“the Act”) by discussing in a closed meeting or meetings a proposal to lease property to Montgomery County. We conclude that the County Board violated the Act in a number of ways.

I

The Parties’ Contentions

Complainants allege that the County Board received briefings about a proposal to lease County Board property to the County and that those briefings were not given in an open meeting. The property in question is the former Brickyard Middle School (“Brickyard”) site, which, Complainants allege, the County Board transferred to Montgomery County to be “turn[ed] ... over to a private entity for a commercial purpose.” They refer to a memorandum, attached to the agenda published for the March 8, 2011, County Board meeting in which the Superintendent addressed the “Lease Agreement – Brickyard Road site” and stated: “Staff ... briefed the Board of Education in May and June of 2010....”

The County Board responds that the May “briefing” was made only in the form of a memorandum and that the County Board’s June discussions were properly held in two meetings closed under § 10-508(a)(3) of the State Government Article (“SG”) for the discussions relating to the acquisition of real property or, in the alternative, closed for the performance of an executive function. Complainants reply that the County Board’s summaries of those closed meetings do not reflect discussions falling within the exception provided by SG § 10-508(a)(3) and that the verb, “to brief,” means to give an oral summary, not a written one. They further object to the County Board’s redaction of the entire text of a May 12, 2010, memorandum on the subject of “Future Brickyard Middle School Site – Proposed use by Montgomery County.”

II

Facts

For the facts, we look to the Superintendent’s May 2010 memorandum on the subject of the Brickyard site, the written resolutions adopted by the County Board as its basis for closing two June 2010 meetings, the summaries of the actions taken at those meetings, as reported in the minutes of the subsequent open meetings, and the minutes of those closed sessions, which we shall keep confidential.

On May 12, 2010, the Superintendent of the Board of Education wrote a “confidential memorandum” to the County Board members. The subject line reads “Future Brickyard Middle School Site – Proposed Use by Montgomery County.” The County Board has redacted everything below that line.

On June 8, 2010, the County Board met in a public session and adopted a written closing resolution which states, in pertinent part:

Resolved, That the Board of Education of Montgomery County discuss negotiation matters relating to the use of real property for a public purpose and matters directly related thereto, as permitted under Section 10-508(a)(3) of the *State Government Article* and Section 4-107(d) of the *Education Article*; and be it further

Resolved, That the Board of Education of Montgomery County dedicate part of the closed sessions on June 8, 2010, to acquit its

administrative functions and receive legal advice to adjudicate and review appeals

The minutes of the June 8, 2010, closed session demonstrate that the County Board discussed the Brickyard site. Although that discussion is placed under the heading, “Acquittal of Executive Function: Board/Superintendent Exchange,” the text cites SG § 10-508(a) and repeats the County Board’s version of the exception. The summary of that closed session, which appears in the minutes of the June, 28, 2010, open meeting, states:

The [County Board] met in closed sessions on June 8, 2010, ... and ...

6. Discussed negotiation matters relating to the use of real property for a public purpose and matters directly related thereto, as permitted under Section 10-508(a)(3) of the State Government Article and Section 4-107(d) of the Education Article. ...

8. Reviewed and selected appointments [to various committees] and recommendation [for a certain board] with a subsequent vote in open session, which are administrative functions outside the purview of the Open Meetings Act under Section 10-508(a).

The June 28, 2010 meeting is not otherwise relevant to the complaint.¹

III

Discussion

We begin with the events of May 2010. None of the facts before us suggests that a quorum of the County Board met that month to discuss the Brickyard site. The Act applies only when a public body “meets,” a term defined by the statute as the convening of a quorum of the public body’s members. § 10-502(g) of the State Government Article (“SG”). Further, the Act “does not control a public body’s decision on how it is to conduct its

¹ After this opinion was drafted, the County Board produced an unredacted version of the memorandum to complainants who in turn provided it to Compliance Board staff. The contents of the memorandum do not change either the analysis in this opinion or the result.

business, and in particular whether it will discuss a matter in a meeting.” 3 *OMCB Opinions* 191, 193 (2002). The Act thus does not “inhibit a public body from conducting business in writing, rather than at a meeting.” *Id.*, quoting 2 *OMCB Opinions* 70,71-72 (1999). The Act does not apply to the distribution of the May 12, 2010, memorandum, and the question of whether the County Board is required to disclose its contents does not fall within our authority.

The June 8, 2010, closed session does fall within our purview. At that session, a quorum of the County Board members met to conduct public business. The allegations question whether the County Board properly invoked the exception in SG § 10-508(a)(3) regarding the acquisition of real property and whether its closing resolution complied with the Act. Because the County Board now asserts that the Act did not apply to the discussion, we must also address whether it closed the meeting to exercise an administrative function with respect to the Brickyard site, and whether it actually exercised such a function.

A threshold question is whether the County Board properly invoked the SG § 10-508(a)(3) exception to discuss leasing the Brickyard site to another entity. SG § 10-508(a)(3) permits a public body “to adjourn an open session to a closed session ... to ... consider the acquisition of real property for a public purpose and matters directly related thereto.” In claiming the exception in its closing resolution, the County Board replaced the word “acquisition” with the word “use.” That act was doubly problematic. First, the change was incorrect under the plain language of the statute: the exception applies to a public body’s acquisition of real property, not to divestment of an interest. 6 *OMCB Opinions* 35,39 (2008). Second, the County Board’s citation to that exception created the impression that the County Board members who voted to close the session on the basis of the resolution would in fact be discussing the acquisition of real property.

We have long stressed the importance of the Act’s requirement that a public body vote publicly, for a publicly-disclosed reason, to meet in a closed session. The vote provides the public the opportunity to object. 1 *OMCB Opinions* 191, 193 (1996), citing SG § 10-508(d)(3). It also effectuates the legislative policy of the Act, as stated in SG § 10-501(a) to provide the public the opportunity to “observe ... the performance of public officials”:

Members of a public body are accountable for their decision to hold a closed session, and part of their accountability is to make that decision before the public that is about to be excluded.

1 *OMCB Opinions* 191, *supra*, at 193. A key element of the closing procedures is the requirement that the public body's presiding officer provide three pieces of information on the written closing statement: a citation to the legal authority relied on for the closing, a listing of the topics to be discussed, and a statement of the reason for closing. SG § 10-508(d)(3). We find that the County Board violated the Act by misstating the legal authority it cited as a basis for excluding the public from this meeting.² We also find that the County Board further violated SG § 10-508(d)(3) by failing to provide any meaningful information on the reason for the closing and the topics to be discussed.

We remind the County Board that in 2009 we found one of its closing resolutions deficient for the exact same reason: the resolution did no more than repeat the words of the statutory exception. 6 *OMCB Opinions* 77, 82-83 (2009). The June 8, 2010, closing resolution did not even do that correctly.

In sum, both substantively and procedurally, the County Board did not invoke the SG § 10-508(a)(3) exception properly. Our conclusion that the exception did not apply to the topic leads necessarily to a finding that the County Board also violated the Act by discussing in closed session topics beyond the scope of the claimed exception. SG § 10-508(b).

We next address the County Board's alternative argument, which is comprised of two contentions: first, that it also closed its meeting to exercise an administrative function with regard to the Brickyard lease, and, second, that the consideration of whether to divest a school site fell within that function. With respect to whether the County Board relied on the administrative exclusion to discuss the Brickyard lease in a closed session, the County Board's boilerplate reference to the exclusion in its resolution is uninformative on the subject at best. Indeed, as shown in the language quoted above, the County Board placed that reference in the clause referring to its deliberations on appeals and not in the clause claiming a version of the real property exception. We look instead to County Board's public summary of the closed session.

² The County Board also cited § 4-107(d) of the Education Article as authority for the closing. That section permits, but does not require, county boards to "meet and deliberate in executive session if the matter under consideration is: (i) Land and site acquisitions...." The County Board has not claimed, and we do not find, that this provision permitted the County Board to discuss leasing County Board property to another entity. The County Board also did not cite SG § 10-508(a)(13), the exception that permits closing a meeting to comply with a statutory requirement "that prevents public disclosures about a particular ... matter."

Under the Act, when a public body recesses an open meeting to exercise an administrative function in a closed session, “the minutes for the public body’s next meeting shall include ... a phrase or sentence identifying the subject matter discussed at the administrative function meeting.” SG § 10-503 (c). The County Board included such information in the minutes of its next open meeting; item #8 of its closed-session summary, quoted above, lists a number of topics discussed and actions expressly taken in the exercise of the County Board’s administrative function. There is no mention in that category of any discussion of the Brickyard site. Instead, the County Board stated in its item #6 that it had “[d]iscussed negotiation matters relating to the use of real property for a public purpose and matters directly related thereto, as permitted under Section 10-508(a)(3).”³ We have read the closed-session minutes, and they do not disclose any other topic pertaining to real property. Thus, according to its contemporaneous public statements, the County Board only invoked SG § 10-508(a)(3) to exclude the public from its discussion of the Brickyard lease and exercised its administrative function with regard to other matters.

We have found that the County Board improperly invoked the real property exception to exclude the public from the Brickyard site discussion, and we have inferred, as well as we can from the boilerplate on the closing resolution, that the County Board did not rely on the administrative exclusion for this particular matter. We are left with the question of whether the discussion actually did involve the exercise of that function.

The County Board asserts that its discussion of whether to lease the Brickyard site to another entity merely entailed the administration of existing law. The County Board cites 76 *Opinions of the Attorney General* 190 (1991) for the proposition that, under § 4-114 of the Education Article, it is “statutorily charged with administering the use of school property” and *Hormes v. Baltimore County*, 225 Md. 371, 378 (1961) for the proposition that “[w]here the execution of a lease by a public body does not require the enactment of a new law, a public body’s decision to enter into a lease is an executive, not a legislative, function.”

Hormes was decided before the enactment of the Act. In a case involving another county’s Board of Education, we explained the Act’s administrative exclusion this way:

³ A public entity’s summary of a closed session, like its closing statement, must provide meaningful information. The Board’s summary, which merely recites its version of the SG § 10-508(a)(3) exception, also violates the Act.

We have frequently recited a two-part test for determining whether a particular matter before a public body qualifies as an administrative function. First, we inquire whether the topic falls within the definition of any alternative defined function. If so, analysis stops because, by definition, it could not qualify as an administrative function. If it does not involve an alternative function, we then ask whether the public body was involved in the “administration” of an existing law, rule, or regulation. If not, the topic does not qualify as an administrative function.

6 *OMCB Opinions* 145, 147 (2009) (citation omitted).

As to the first step, the question is whether the Brickyard lease topic fell into any function defined by the Act. The Act specifies that the term “administrative function” excludes five functions, including the “quasi-legislative function.” SG § 10-502 (b)(2). It then defines “quasi-legislative” to mean “the process or act of ... approving, disapproving, or amending a contract.” SG § 10-502 (j). The County Board’s discussions about leasing the Brickyard property were part of the process of approving the lease. The analysis stops there.

Nonetheless, it may be useful to explain when the administrative exclusion might apply to discussions involving a contract. In 6 *OMCB Opinions* 145, *supra*, at 148, we explained that a county board would likely be performing that function “where the superintendent of schools or the superintendent’s staff shared information with the school board involving administrative matters under the authority of the superintendent,” because that practice was “consistent with the school board’s responsibility in overseeing the superintendent’s performance.” *Id.* We cited our longer discussion of the exclusion at 3 *OMCB Opinions* 39, 42-43 (2000). We then stated:

Of course, if the superintendent or staff was advising a school board on a contractual matter and the proposed contract or contract modification could not be given effect absent school board approval, it could not be considered an administrative function. The school board would be involved in a quasi-legislative function as defined by the Act. § 10-502(j)(3); 3 *OMCB Opinions* at 44, n.5.

Here, Section 4-114 of the Education Article requires the County Board, not its superintendent, to hold real property in trust for the benefit of the school or school system. The County Board's consideration of matters relating to a lease of the Brickyard site to another entity thus constituted a quasi-legislative function.

IV

Conclusion

We conclude that the County Board violated the Open Meetings Act when it convened a closed session on the basis of a resolution that did not meet three requirements of SG § 10-508(d)(2), when it discussed matters exceeding the scope of the exception it claimed, and when it did not include meaningful information about the session in the minutes of its subsequent open meeting. The administrative exclusion, even had the County Board closed the meeting for that purpose to discuss the Brickyard site, did not apply.

We once again encourage the County Board to adopt closing resolutions and closed-session summaries that do more than simply repeat or refer to the statutory exception.

OPEN MEETINGS COMPLIANCE BOARD

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