



**State of New York
Department of State
Committee on Open Government**

One Commerce Plaza
99 Washington Ave.
Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

OML AO 5646

By Electronic Mail Only

November 19, 2021

The Committee on Open Government is authorized to issue advisory opinions. The ensuing advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear Stefan Ebaugh:

The Committee on Open Government (Committee) received your request for an advisory opinion regarding the use of executive session by the Cold Springs Village Board to discuss a draft lease for the Cold Spring Boat Club.

As a threshold matter, I note that the Committee is authorized to provide advice and legal opinions regarding the Freedom of Information Law (FOIL) and the Open Meetings Law (OML). The Committee is not authorized to determine whether violations of open government laws have occurred. Only the courts, through the initiation of a Civil Practice Law and Rules Article 78 proceeding, have that authority.

The minutes for a September 9, 2021, meeting of the Village Board reflect the board entered executive session to discuss “the Lease of Real Property,” a reference to the Boat Club lease. While subsequent minutes do not mention discussion of the specific lease, the agenda from a November 4, 2021, Village meeting includes a bullet point reading: “Authorize mayor to sign Boat Club Lease.” In our view, the presumed use of executive session to discuss the draft lease does not appear to be consistent with the OML. The law provides the appropriate bases for entering executive session, one of which is: “h. the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity *would substantially affect* the value thereof.” OML § 105(1) (emphasis added).

In determining whether publicity would substantially affect the value of real property, the Committee has previously [opined](#):

when a municipality is seeking to purchase a parcel and the public is unaware of the location or locations under consideration, it is possible if not likely that premature disclosure or publicity would indeed substantially affect the value of the property. In that kind of situation, publicity might result in speculation or offers from others, thereby precluding the municipality from reaching an optimal price on behalf of the taxpayers. However, when details concerning a potential real property transaction, such as the location and potential uses of the property, are known to the public, publicity would have a lesser effect or impact on the value of the parcel.

FOIL AO-14539. Thus, this exemption for the proposed lease of real property is designed to protect the interests of taxpayers by ensuring that publicity does not result in, for example, a governmental entity entering a bidding war for the relevant real property. A key question, in our view, involves the extent to which information relating to possible real property transactions has become known to the public.

In response to our request to the Village for additional information, the Village Attorney confirmed that the executive session in question “involved particular discussions about specific proposed terms of a lease.” The Village Attorney also responded that our previously-issued opinion “fails to recognize the potential negative impact that public knowledge of the individual Board member’s opinion on certain terms of a proposed lease could have on closing such a deal.” The Village also questioned: “how does a Board know ahead of time that its discussion will not eventually substantially impact the value? It seems possible that a discussion amongst the Board members in public could eventually lead to a discussion that substantially affects the value of the property and undermines the deal.”

To this question, the New York State Appellate Division, Third Department, has answered that a possibility of (or speculation as to whether there will be) an impact to value is not the relevant standard: “Although respondents claim that publicity would have affected the value of the real property discussed at the meeting, there is no evidence in the record to support such a claim, which is pure speculation.” *Glens Falls Newspapers Inc. v. Solid Waste & Recycling Comm. of Warren County Board of Supervisors*, 195 A.D.2d 898, 899 (3d Dep’t 1993). In the instant matter, it is not evident how publicity would substantially affect the value of the lease given: 1) the land is already owned by the Village, which leases it to the Boat Club rent-free; and 2) the public is already aware, through news reporting, of the existing lease, as well as discussions regarding a renewed lease, between the Village and the Boat Club. In our view, the Village, much like the Warren County Board of Supervisors in the *Glens Falls Newspapers* matter, has

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supplied “no evidence” that publicity relating to the proposed lease would substantially affect the value of the lease, and accordingly the decision to discuss the proposed lease in executive session appears to be based on “pure speculation.”

We hope that this is responsive to your inquiry.

Sincerely,

Jake Forken
Jake Forken
Excelsior Fellow

cc: John Furst, Village Attorney