

**TOWN OF CONCORD
SELECT BOARD
AGENDA
June 29, 2020
4:00PM
VIDEO CONFERENCE CALL**

Join Zoom Meeting

<https://us02web.zoom.us/j/84092395810?pwd=TnMyWmprWHBla21CczdQM0EvWVVFZz09>

Meeting ID: 840 9239 5810

Password: 865209

One tap mobile

+16465588656,,84092395810# US (New York)

Dial by your location

877 853 5257 US Toll-free

888 475 4499 US Toll-free

Meeting ID: 840 9239 5810

Find your local number: <https://us02web.zoom.us/u/kcwFtQro3l>

1.	Call to Order
2.	Consent Agenda - Approval of Town Accountant Warrants
3.	Town Manager Update
4.	Chairs Remarks
5.	Public Hearing: Grant of Location Application by Comcast for the Underground Installation of Coaxial Cable at 52 Main Street.
6.	Changes to the Gerow Project and Scope
7.	RHSO FY20 Budget Adjustment
8.	FY20 Year End Transfer
9.	Review Economic Vitality Committee Recommendations
10.	Review of Town Meeting Select Board Articles
11.	Accommodations for Citizen Articles not Moved at the Postponed Annual Town Meeting
12.	Review of AG's decision regarding an OML Complaint File by Rob Nislik
13.	Committee Nominations: Beth Kelly of 39 White Avenue to the White Pond Advisory Committee for a term to expire April 30, 2023. Jennifer McGonigle of 31 Highland Street to the Economic Vitality Committee for a term to expire April 30, 2023.
14.	Committee Liaison Reports
15.	Miscellaneous Correspondence
16.	Public Comments
17.	Adjourn



241 West Central Street
Natick, MA 01760
Phone: 508-647-1418 (o)
617-862-8437 (c)

May 15, 2020

Jeremy Romanul
Senior Administrative Assistant
Town Manager's Office
Town of Concord, MA

RE: Petition for Grant of Location, 52 Main Street

Dear Jeremy:

Enclosed please find Comcast's Petition for Underground Installation of Coaxial Cable at 52 Main Street. I have also enclosed a draft Order. Please advise when the Board will be able to hear us on this matter.

Thank you for your assistance in this matter. Please do not hesitate to contact me should you have any questions, comments or concerns regarding any aspect hereof.

Sincerely,

Gregory Franks

Greg Franks, Senior Manager of Government & Regulatory Affairs
Comcast

PETITION FOR UNDERGROUND INSTALLATION OF COAXIAL CABLE

Concord, Massachusetts

05/15/2020

To the Board of Selectmen of Concord, Massachusetts:

Comcast of Massachusetts III, Inc. requests permission to install coaxial cable to be owned and used by the petitioner, along and across the following public way or ways:

- *52 Main Street*

Wherefore they pray that after due notice and hearing as provided by law, they be granted permission to install coaxial cable over lashed to existing underground strand coaxial cable as they may find necessary and in accordance with the plan filed herewith.

1. **Comcast of Massachusetts III, Inc.**

By: *Gregory Franks*

Print name: Gregory Franks

Title: Sr. Manager of Government and Regulatory Affairs

Telephone or e-mail contact info: (617) 862-8437 cell ph
Gregory_Franks@comcast.com

ORDER FOR INSTALLATION OF UNDERGROUND COAXIAL CABLE

In Board of Selectmen of the Town of Concord, Massachusetts

Notice having been given and a public hearing held, as provided by law,

IT IS HEREBY ORDERED: that **Comcast of Massachusetts III, Inc.** be and is hereby granted permission to install coaxial cable as it deems necessary, in the public way or ways hereinafter referred to, as requested in the said petition and accompanying plan.

All construction under this order shall be in accordance with the following conditions:

The new coaxial cable shall be attached from the existing Comcast vault at the intersection of Keyes Road and Main Street to the proposed vault #1 at 52 Main Street using common industry standards and shall be set substantially at the points indicated upon the plan accompanying said petition. There may be installed by said Comcast of Massachusetts III, Inc. such coaxial cables as are necessary in its business and all said coaxial cables shall be placed in a manner that complies with the National Electrical Safety Code.

The following are the public ways or parts of ways along which the above referred to may be installed thereon under this order:

- *Main Street, Keyes Road*

I hereby certify that the foregoing order was adopted at a meeting of the Board of Selectman of the Town of Concord, Massachusetts held the _____ day of _____, 2020.

Clerk of Board of Selectmen

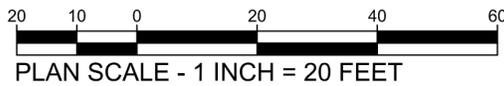
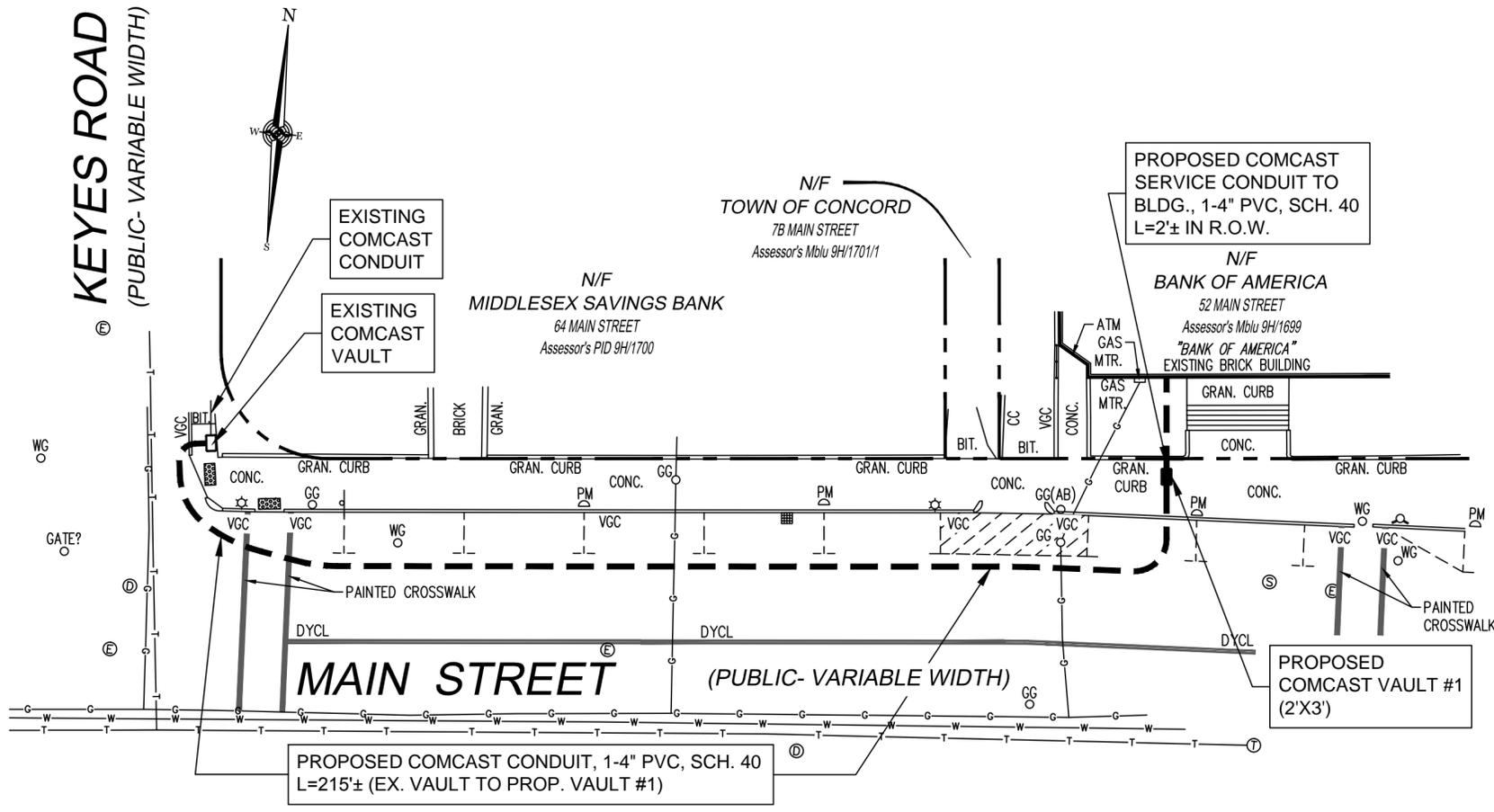
We hereby certify that on _____, at _____ O'clock _____, at Concord, Massachusetts, a public hearing was held on the petition of **Comcast of Massachusetts III, Inc.** permission to install coaxial cables, fixtures and connections described in the order herewith recorded, and that we mailed at least seven days before said hearing a written notice of the time and place of said hearing to each of the owners of real estate (as determined by the last preceding assessment for taxation) along the ways or parts of ways upon which the Company is permitted to install coaxial cables, fixtures and connections under said order. And that thereupon said order was duly adopted.

Selectmen of the Town of Concord, Massachusetts

CERTIFICATE

I hereby certify that the foregoing is a true copy of a location order and certificate of Hearing with notice adopted by the Board of Selectmen of the Town of Concord, Massachusetts, on the _____ day of _____, and recorded with the records of location orders of said Town, Book _____, Page _____. This certified copy is made under the provisions of Chapter 166 of General Laws and additions thereto or amendments thereof.

Attest: _____
Town Clerk



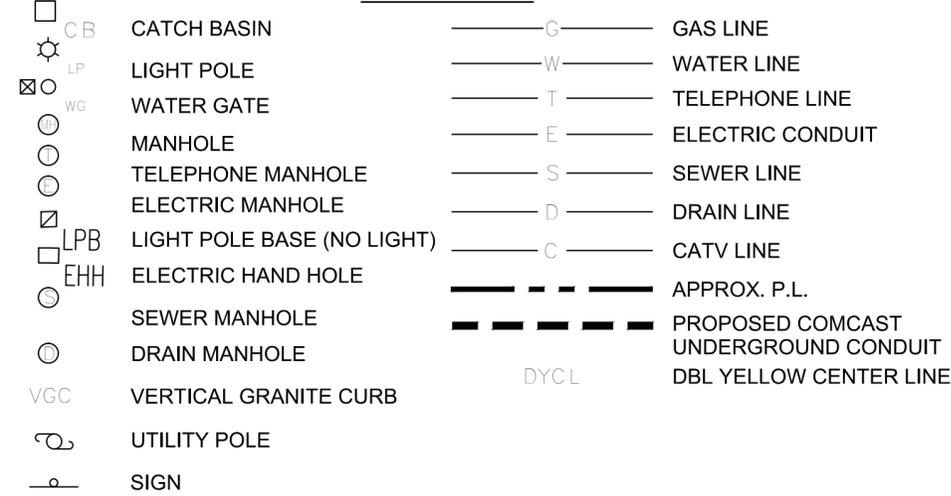
NOTES:

1. These plans were prepared from record data on file at the Town of Concord Engineering Department and various utility companies.
2. The locations of underground utilities shown are based on the above referenced data. Locations of underground utilities/structures may vary from location hereon and are not warranted to be accurate and/or correct. Additional buried utilities/ structures may be encountered. No excavations were performed during the progress of this survey to locate buried utilities/structures.
3. Prior to any construction the Contractor shall notify DIG-SAFE at least 72 hours in advance at 811 (National Call Number) for verification of utilities and for field locations.
4. It is the responsibility of the utility contractor installing the Comcast underground conduits to notify those utility companies not associated with the DIG-SAFE system to verify the locations of their respective utilities. Also, the installing contractor shall be responsible for repairing or replacing any traffic signal loops damaged during the installation of the new Comcast underground conduits and manholes.
5. Prior to the start of construction, the Utility Contractor shall confirm the number of manholes/vaults, number of conduits and size of the conduits for this project with the Comcast Project Coordinator.
6. These plans were prepared for permitting purposes with the Town of Concord, MA. After all utility lines have been marked out in the field the locations of the Proposed Comcast Underground Conduits and Manholes may be adjusted to fit with the existing utilities in the field.
7. All work to be performed is for the installation of the New 4" PVC, Schedule 40 underground conduits and associated manholes.
8. All work shall conform to the approving authorities Engineering and DPW Standards.
9. Upon completion of the trench work for the day, the contractor shall backfill, compact and pave the trench in all roadway and sidewalk areas and the work area shall be broom swept clean. In grassed areas the trench shall be loamed, seeded and hay mulch spread to keep the area stabilized until the grass has taken hold.
10. All concrete sidewalks, brick sidewalks and concrete pavement disturbed or damaged by the placement of the Comcast Underground Conduit and Associated Manholes shall be repaired/replaced in kind in accordance with the Town of Concord Standards and requirements. All Curbing, Signage, Road and Parking stripping and traffic signal conduits, wiring or detection loops disturbed during the placement of the Comcast Underground Conduit and Associated Manholes shall be restored/replaced to their original condition by the Utility Contractor. All property and street line bounds and markers expected to be damaged or disturbed by the placement of the Comcast Underground Conduit and Associated Manholes shall be located and tied in by a Massachusetts Registered Professional Land Surveyor prior to the work and shall be replaced by the Land Surveyor as part of the project.
11. Street/Property lines are not the result of a boundary survey and are considered to be approximate.

CONSTRUCTION NOTES:

1. Following the Dig-Safe "mark out" and field verification of the existing underground utilities, the Proposed 4" PVC, Schedule 40 Comcast Conduits and associated manholes shall be adjusted in the field by the utility contractor to avoid being located over any existing utilities.

LEGEND



QUAZITE® SERVICE BOX SPECIFICATIONS/DATA

24" X 36" "PG" Style (Stackable) Assembly
HH HEAVY DUTY COVER (OR EQUAL)

COVER: 3/8"-16 UNC STAINLESS STEEL HEX HEAD BOLT W/ WASHER (2), 35 5/8" (905 mm), 24" (610 mm), 1/2" (13 mm) X 4" (102 mm) PULL SLOT, SKID RESISTANT SURFACE.

EXTENSION: 37 1/8" (943 mm), 28 1/2" (726 mm), 33 1/2" (854 mm), 21 3/4" (553 mm), 4 3/4" (121 mm) X 4 3/4" (121 mm) KNOCKOUTS (8).

BOX: 37 5/8" (956 mm), 28" (711 mm), 33 7/8" (860 mm), 22 1/4" (569 mm), 4" (102 mm) X 4" (102 mm) MOUSEHOLES (2) PG2436BB.

OPTIONS:
1. Specific cover logo
2. Green or other colors
3. 1" (25 mm) X 4" (102 mm) Bell pull slots.
4. See Options, Hardware & Meter Lid pages.

COVERS (Blank unless logo is specified)

DESCRIPTION	PART NO.	WEIGHT
W/ 2 Bolts	PG2436CA00	85# (38.6 kg)
W/ No Bolts	PG2436WA00	85# (38.6 kg)
Heavy Duty W/ 2 Bolts	PG2436HA00	140# (63.5 kg)

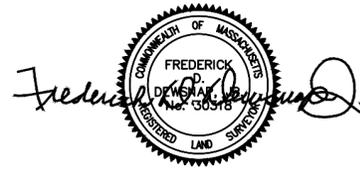
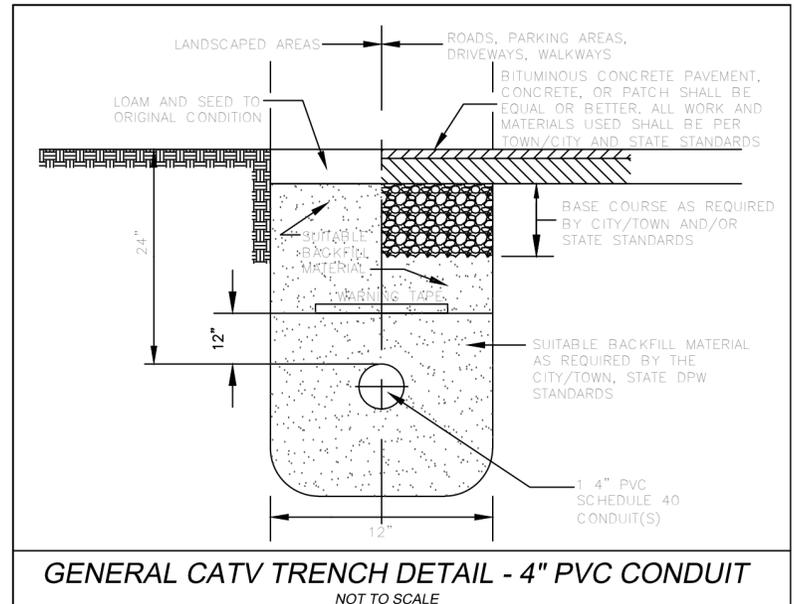
BOXES (Stackable) * 24" & 30" deep boxes must be used as bottom of any stack

DESCRIPTION	PART NO.	WEIGHT	DIMENSIONS	
			A	B
W/ No Base	PG2436BA18	130# (59.0 kg)	18" (457 mm)	15" (381 mm)
	PG2436BA24	174# (78.9 kg)	24" (610 mm)	21" (533 mm)
	PG2436BA30	212# (96.2 kg)	30" (762 mm)	27" (686 mm)
W/ No Base (2) Mouseholes	PG2436BA42	244# (110.7 kg)	42" (1067 mm)	39" (991 mm)
	PG2436BB18	128# (58.1 kg)	18" (457 mm)	15" (381 mm)
	PG2436BB24	172# (78.0 kg)	24" (610 mm)	21" (533 mm)
W/ Base	PG2436BB30	210# (95.3 kg)	30" (762 mm)	27" (686 mm)
	PG2436BB42	242# (109.8 kg)	42" (1067 mm)	39" (991 mm)
	PG2436DA18	162# (73.5 kg)	18 1/2" (470 mm)	15" (381 mm)
PG2436DA24	204# (92.5 kg)	24 1/2" (622 mm)	21" (533 mm)	
PG2436DA30	241# (109.3 kg)	30 1/2" (775 mm)	27" (686 mm)	
PG2436DA42	285# (120.2 kg)	43 1/2" (1105 mm)	39" (991 mm)	

CATV VAULT DETAIL
NOT TO SCALE

DETAIL NOTES:

1. The details depicted are for general reference only. The final product used shall be the responsibility of the general contractor and shall be of equal or greater material than that depicted and shall conform to the Engineering/DPW Standards for the City/Town and/or State where the project is located.



PROPOSED COMCAST UNDERGROUND

MIDDLESEX COUNTY

PLAN OF LAND
IN
CONCORD, MA

Prepared for: COMCAST 9 FORBES ROAD, SUITE 9B WOBURN, MA 01801	Prepared BY: DEWSNAP ENGINEERING ASSOC. LLP 178 Lincoln Avenue - Saugus, MA 01906 Tel. #:(781) 233-0595
Date: April 15, 2020	Scale: As Shown
Checked By: F.D.D. & P.A.D.	PROJECT LOCATION: 52 Main Street Concord, MA
Drawn By: W.A.J.	
Field By: P.A.D. & A.D.	
Sheet No. 1 of 1	

133 Keyes Road
Concord, MA 01742



DATE: 06/16/2020

MEMORANDUM

TO: Jeremy Romanul, Senior Administrative Assistant
VIA: Alan Cathcart, Director of Public Works
FROM: Stephen Dookran PE, Town Engineer
PREPARED BY: Justin Richardson, PE, Assistant Town Engineer
SUBJECT: Petition for Underground Installation of Coaxial Cable – 52 Main Street

Concord Public Works (CPW) Engineering Division has reviewed the attached petition from Comcast for the above referenced project in the Town's public right-of-way and provides the following conditions and recommendations.

1. A right-of-way (ROW) permit is required to be filed with the Concord Public Works – Engineering Division prior to commencement of work and all required information as stipulated in the application should be submitted with the permit application.
2. The new conduit is located on the north side of Main Street adjacent to the existing parking spaces. It runs approximately 215 feet from west to east starting at an existing Comcast vault located at the intersection of Keyes Road and Main Street and runs in Main Street to a proposed Comcast vault in the Main Street sidewalk in front of #52 Main Street. The service connection to #52 Main Street is made from the proposed Comcast vault. In accordance to the Right of Way (ROW) permitting program a Life Cycle Maintenance Fee (LCMF) of \$1,912.50 is assessed for the work performed in the right of way. The LCMF is calculated as follows:

$$\text{LCMF} = [(\text{UC} \times \text{L} \times \text{W}) + \$400.00] \times \text{PCI}$$

L = Length of trench in feet = 215 feet

W = Width of trench in feet = 2.5 feet

UC = Unit cost to reconstruct the roadway (dollars per square foot) UC= \$4.00/sf

PCI = Pavement Condition Index expressed as a percentage = 0.75

$$\text{LCMF} = [(\$4.00/\text{sf} \times 215\text{ft} \times 2.5\text{ft}) + \$400.00] \times 0.75$$

$$\text{LCMF} = \$1,912.50$$

The constant \$400.00 is to cover the mobilization costs for maintenance. The cost assumes a 4 man crew (1 driver, 1 foreman, and 2 laborers) will visit the trench twice over the life of the trench for a total of 8 man hours.

The Right of Way (ROW) permit will not be issued until LCMF has been paid in full. It should be noted that if actual dimensions in trench length or width differ substantially from the plan, the LCMF will be adjusted accordingly.

3. As part of the ROW permit a traffic mitigation plan shall be submitted to the Concord Police Department Traffic Safety Officer and the CPW – Engineering Division. It appears from the plan provided, that the work will require partial or full closure of the

roadway and sidewalk. A sketch shall be provided detailing the anticipated vehicular and pedestrian movements for the duration of the job. The roadway and sidewalk shall be secured at the end of each work day to ensure safe and adequate passage. The temporary pedestrian route shall conform to ADA Regulations. Work shall not commence until the review and approval of the traffic mitigation plan.

4. Contractors shall adhere to the CPW Construction and Tree Protection Standard Operating Procedures including the protection of public shade trees: “No person may plant, trim, cut, or remove a public shade tree without the prior permission of the Tree Warden and Engineering Division. This control includes the cutting of roots during construction.” The contractor shall be responsible for installing wooden tree guards with orange snow fencing on public shade trees located within the work zone.
5. The contractor/petitioner shall provide the CPW Engineering Division with their project schedule with the ROW permit application.
6. Prior to any work in the ROW commencing the contractor must notify the CPW-Engineering Division as specified in the ROW permit.
7. CPW Engineering Division requires the following:
 - The concrete site walks shall be replaced to the nearest joint and not only over the proposed conduit
 - The Granite curb shall be reset per Town of Concord Construction Standards
 - Street Patching shall conform to Town of Concord Construction Standards
 - All Street Markings that are removed as a result of this construction shall be replaced
8. CPW Water and Sewer Department requires that the proposed conduit be offset a minimum of 3 feet from the existing water main, running parallel to the proposed conduit along the parking spaces on the north side of Main Street, allowing for the least amount of impact to the Comcast conduit in the event that the water main must be excavated. Additionally, the proposed Comcast conduit will cross the following know services:
 - #64 Main Street fire service, domestic water service (installed in 2019 not updated in GIS) and sewer service connection in Main Street,
 - #58 Main Street sewer service.These services and any others encountered shall be crossed in accordance with CPW’s Design and Construction Standards.
9. An as-built plan shall be provided to the CPW prior to the final closeout of the ROW Permit.

MEMO

TO: Stephen Crane, Town Manager
Concord Select Board

FROM: Kate Hodges, Deputy Town Manager

CC: Recreation Commission
Natural Resources Commission

DATE: June 23, 2020

As you know, the Gerow Park project has been ongoing over the past several years. Throughout the many months, there have been two prominent schematics which have been the subject of much public discussion. The earliest version of the plans included: a larger parking area, composting toilets, a fishing pier, canoe launch, boardwalk and a pavilion located on the flat meadowlands near the park entrance driveway. After much community discussion and a staff-level site plan review, a second version of the plan was developed. This version: reduced the paved parking area to allow for more open space, the fishing pier and boardwalk were deleted and the canoe launch area was modified to include a ground/beach launch with a *possibility* for an elevated launch area in a future phase of development. The greatest change from the first to the second iteration, was the modification of the intended pavilion to that of an 'event barn.' The community had expressed a desire for 3-season programming and events. In working with the Recreation Director, the idea of a post-and-beam structure, without restrooms or a kitchen, was envisioned and we began the process of placing that within the site close to the restrooms and away from the entrance and prime pond-viewing areas.

A great deal of site work and additional recognition went into the entire park planning effort as you know. As many initial assessments were being conducted, the Town was also directing a full storm water design and infiltration tests to determine how best to mitigate and control our construction efforts. The storm water management team began their work to evaluate the park soils in the fall of 2019 and moved on to measure the entire parcel's ground water infiltration capacity this past spring.

Unfortunately, the unforeseen COVID-19 Pandemic has had a great impact on all Town operations, which I realize is of little shock. The impact on Recreation, having been the only Department who needed to furlough employees, has been one of substantial loss. Their revenues are decreased significantly, and while we are looking positively into the future, the need to put certain capital projects and expansion efforts on hold has become necessary.

In light of the soil test results and the change to the recreational fund balance and operation, the team has had to change its approach to the project once more in order to remain environmentally and fiscally responsible. Below you will find a detailed breakdown of the changes – including the team's reasons and justifications for each.

EVENT BARN'S CONVERSION TO A PAVILION

The Recreation revolving account was slated to contribute \$200,000 to building the event barn. The idea surrounding this plan was that Recreation would make the initial investment in the structure and program it such that they could recoup their initial investment over a period of five years and generate enough money to sustain its operation and upkeep indefinitely.

After careful analysis of what would need to be Recreation's initial monetary investment, coupled with the programmatic challenges that the Recreation Director and the Commission have expressed, a number of barriers to building the event barn were identified.

The most notable barriers included:

- An event barn was determined to increase the daily amount of projected visitors by nearly 50%; this type of attendance number immediately triggered additional plumbing code requirements including an expanded leach field and septic capacity;
- Recreation, due to their current financial and programming barriers, is not planning to replace many of their vacant positions; therefore, the aforementioned expanded programming efforts are no longer feasible in the immediate future;
- Recreation is projecting a revenue loss of approximately \$250,000 for FY20 and further expects a loss in FY21, the amount of which will not be known until the full weight of COVID has been realized. Spending additional capital money from their fund balance is not financially prudent at this time;
- There was a strong concern from the Natural Resources Commission that an event barn, as proposed, may have a negative effect on the resource areas surrounding Warner's Pond. Given that one of the main goals for the Park Project centered around the need to enhance the resource areas, it seemed the idea of the barn was working in conflict with that mission.

That being said, we have reverted back to the initial pavilion plan. The location which was originally designated for the event barn – immediately adjacent to the bathroom facility and nearest to the new BFRT connections, will remain as the site for the pavilion structure.

In moving this initiative forward, we are doing the following:

- The Town's architects have been instructed to *scale down* the event barn and create a simple open air pavilion. We are planning to keep the same massing and footprint, but will be removing porches and the exterior wall systems.
- Any and all detailing which would allow a wall system to be constructed in place in the future will be kept. This way, should the community express a desire to expand upon the pavilion idea or have a more closed-in structure for programming, we would have the ability to do so with very little expense.
- We are looking at several options for the pavilion and restroom foundation areas – meaning, a basement crawlspace *or* a simple concrete slab on grade. Consideration must be given for the park's ongoing maintenance needs. It would seem that in lieu of an unsightly stand-alone shed for a mower and supplies, a crawl space which can double as a shed below grade may be more esthetically pleasing and less intrusive to the overall landscape.

Please see the attachments located at the end of this memo for an example of what the post-and-beam pavilion structure may look like.

COMPOSTING TOILETS – CHANGE TO FULL SEPTIC

The soil infiltration analysis yielded a number of very interesting results including the realization that the soil, consisting of mostly sand and permeable materials, is most advantageous to a septic system and, conversely, makes the need for composting units redundant.

Considerations relative to the toileting systems included many factors, most notable being:

- The specific soil samples taken from the Gerow property were a healthy mixture of mostly sand and some silt areas. Wastewater, in this environment, will readily percolate into the sandy and gravelly soils which is most conducive to traditional septic systems. Soils that have a large

amount of clay, such as those seen at Emerson Field, work to slow water movement and ultimately reduce the capacity of the soil to absorb septic-tank effluent.

- The Board of Health Director has determined that a substantially larger leach field, even a gray water leach field (i.e. one for hand-washing only) was going to be a requirement for the site. She cited a number of reasons for this including capacity from the park and the rail trail and the fact that she cannot be sure that people would not put food waste down the sinks.
 - Because of this, we were going to be required to build a septic system that can handle about 75% of the anticipated maximum capacity (also known as ‘surge’) which is believed to be about 150 people daily.
 - As such, we would need to construct a $\frac{3}{4}$ regulation septic *in addition to* the composting toilets to meet these standards.
 - The composting toilets were going to cost approximately \$60,000; the addition of a $\frac{3}{4}$ septic system will be at a cost of approximately \$100,000. Building only one system, a full septic in this instance, will save the overall project between \$50,000 to \$60,000.
 - The composting toilets were going to require an annual maintenance contract for pumping and ‘turning.’ A composting system requires a unique balance of both solids and liquids and those within a park setting such as Gerow are not likely to see a ‘regular’ amounts of solid deposits. Because of this, a company would need to be contracted to regularly enter the underground composting bin to add *solids* such as sawdust and manure in order to induce the composting action. Given that a contract for this involves hazardous waste and material handling, it is likely to be costly. A traditional septic eliminates the need for this type of service.
 - A traditional septic allows for future expansion of the park, the park buildings and/or its capacity should that be needed or desirable. It will also allow for a larger number of visitors should there be an increase as the adjacent BFRT Phase 2B comes online.

For those reasons, we have decided to move away from the composting toilets in lieu of a fully-operational, code compliant and sustainable septic system.

Specifically, this will mean:

- The bathroom building foundation and the plumbing will be changed to be water based assuring that waste is directed through the septic tank and leach field appropriately;
- We will likely procure fixtures that will ensure the bathrooms are sustainable including automatic flushers, faucets and lighting;
- A limited, but additional, scope of work will be needed for the architects to redo the restroom plans, but much of the complexity of the electrical and water systems, as well as our ongoing coordination with the composting toilet company, will go away. Therefore, we anticipate seeing a reduction in our costs for both design and engineering relative to the facilities.

We believe the above changes are in the best interest of the Town and work to provide sustainable, accessible and financially responsible planning efforts. We are excited to continue to work on the project and, with these modification solidified and the project’s pending NRC approval, we are confident that our August bid-deadline can still be maintained. We affirm our belief that we will be able to complete Phase I of this project on time and under budget.

Please let me know if you have any additional questions or concerns. Thank you, as always, for your support.

Examples of Possible Post-and-Beam Pavilion Structure:



Town of Concord
Finance Department
Memorandum

TO: Stephen J. Crane Town Manager

FROM: Kerry A. Lafleur, ^{KAL} Chief Financial Officer

SUBJ: FY20 Revolving Fund Budget Adjustment

DATE: June 22, 2020

Elizabeth Rust has asked that the Town consider a budget adjustment for the Regional Housing Services Revolving Fund for FY20. Her request is detailed in the attached memorandum.

The FY20 Budget for this revolving fund was approved under Article 8 of the 2019 Annual Town Meeting, in the amount of \$265,000. Under MGL Chapter 44, Section 53E ½, “...the limit on the amount that may be spent from a revolving fund may be increased with the approval of...the board of selectmen and finance committee in a town.”

At this time, on behalf of the Regional Housing Services Office, I am asking for an FY20 Budget adjustment of \$20,000, for a total FY20 Budget of \$285,000, to account for the increase in contracted services, which is fully offset by fees collected for those services.

This item is scheduled for action as follows:

- Finance Committee on Thursday, June 25, 2020; and
- Select Board on Monday, June 29, 2020.

Please be in touch with any questions.

/kal



Regional Housing Services Office

Serving Acton, Bedford, Concord, Lexington, Lincoln, Sudbury, Wayland, and Weston

Office Address: 37 Knox Trail, Acton, MA 01720
Phone: (978) 287-1092

Website: WWW.RHSOhousing.org
Email: INFO@RHSOhousing.org

June 9, 2020

To: Kerry Lafleur
From: Liz Rust
CC: Marcia Rasmussen
RE: Increase FY20 Revolving Fund total expenditure

Dear Kerry,

I am writing to request an increase of the RHSO Revolving Fund expenditure for FY20.

The current limit for the RHSO Revolving funds was set at \$265,000 at the 2019 Annual Town Meeting. The current expenses are projected to be \$283,303 for year-end, or \$18,303 above the approved spending limit.

While the limit was set allowing for some headroom, the RHSO has increased its expenses (with corresponding fee income) by more than expected, \$36,605 this year. Lincoln joined the collaboration, and Acton, Concord and Sudbury purchased supplemental hours. Those fees have been received.

The FY20 total expenditure may be increased with the approval of both the Select Board and Finance Committee. Thank you for your offer to work on getting the item scheduled with both boards.

As for FY21, I understand that Concord will be operating on a 1/12th (of FY20) appropriation until Town Meeting. For the RHSO that equates to about \$22k per month, or \$66,250 for the first quarter (based on the \$265,000 limit), which should be sufficient. The RHSO staffing costs, which comprise 90% of the total RHSO expenses, are estimated at \$63,000 for Q1.

I have attached a copy of the FY20/FY21 RHSO budget for reference.

Please let me know if I can support this request further in any way.

Sincerely,
Elizabeth Rust

**Regional Housing Services Office
FY21 Budget**

	FY20 - Budget, with adjustments						FY21 - Budget		
	IMA FY20	Adjustments	Total FY20	IMA Hours	Adjustments	Total FY20	IMA FY20	IMA Hours	% of Total
Starting Balance	\$0	\$4,183	\$4,183				\$2,000		
Revenue									
Acton	\$36,862	\$6,642	\$43,504	470	96	566	\$29,950.00	384	11%
Bedford	\$31,372	(\$2,301)	\$29,071	400		400	\$29,950.00	384	11%
Concord	\$39,214	\$8,250	\$47,464	500	118	618	\$47,967.00	615	17%
Lexington	\$29,803		\$29,803	380		380	\$29,950.00	384	11%
Lincoln	\$0	\$14,941	\$14,941		208	208	\$14,975.00	192	5%
Maynard	\$0		\$0			0	\$10,920.00	140	4%
Sudbury	\$65,488	\$6,928	\$72,416	835	100	935	\$72,925.00	935	26%
Wayland	\$15,294		\$15,294	195		195	\$12,870.00	165	5%
Weston	\$30,666	(\$1,812)	\$28,854	391		391	\$28,858.00	370	10%
Total	\$248,699	\$32,648	\$281,347	3,171	522	3,693	\$278,365.00	3,569	100%
Expenses									
Staffing	\$219,698	\$69.44	\$256,303.00				\$251,361	Labor Rate =>	\$70.43
Program expenses	\$5,000		\$5,000.00				\$6,000		
One Time	\$2,000		\$2,000.00				\$0		
Administrative Cost	\$20,000		\$20,000.00				\$21,000		
Total Expenses	\$246,698		\$283,303				\$278,361		
Ending Balance	\$2,001		\$2,227				\$2,004		
Billing Rate	\$78.43						\$77.99	<= Billing Rate	

Town of Concord
Finance Department
Memorandum

TO: Select Board
 Finance Committee
 Stephen J. Crane, Town Manager

FROM: Kerry A. Lafleur, ^{KAL} Chief Financial Officer

SUBJ: Request to approve FY20 year-end transfers

DATE: June 22, 2020

As you will recall, the Town's fiscal year budget is appropriated by Town Meeting in thirty-nine (39) distinct line items. Transfers are allowed between line items either by:

- Further Town Meeting action; or
- Under the procedure outlined in MGL Chapter 44, Section 33B.

At this time, I am seeking approval of several line item transfers under MGL Ch. 44, Section 33B. Under this law, line item transfers are allowed between May 1 and July 15, with the approval of the Select Board and Finance Committee, the purpose being to close the year without line item deficits.

The following list of transfers was prepared based upon estimates of bills not yet received and/ or those in process, which include:

Chapter 44, Section 33B Transfers Needed to Close FY20				
number	to/ from	line item	line description	amount
1	to	2	Legal Services	\$ 291,000
2	to	3	Elections & Registrars	\$ 22,000
3	to	4	Town Meeting & Reports	\$ 20,000
				\$ 333,000
4	from	26	Library	\$ 333,000

The deficit in legal services has been widely discussed at several meeting. The anticipated deficits in Elections and Town Meeting is a result of assumed additional expenses related to Covid-19, some or all of which may be reimbursed through the CARES Act. The sum total of the anticipated deficits is \$333,000.

As a result of the Covid-19 pandemic, several of our departments have been operating at reduced levels resulting in budgetary savings. As such, we are able to cover these line item deficits within our existing FY20 appropriation. Specifically, I seek a transfer from Line Item 26, Library, in the amount of \$333,000 to cover these deficits.

Thank you for your consideration of this request.

Finance Committee Action: _____

Select Board Action: _____

Town of Concord
Finance Department
Memorandum

TO: Stephen J. Crane Town Manager

FROM: Kerry A. Lafleur, Finance Director ^{KAL}

SUBJ: Options to cover FY20 legal overrun

DATE: January 23, 2020

As you are aware, the FY20 Legal Appropriation has been fully expended. As this is a standalone Town Meeting appropriation (06-ATM-2019, line 2), we are unable to process payment on additional legal expenses without either a Reserve Fund Transfer or additional town meeting action. The purpose of this email is to outline the options that are available and to explain what may happen if no action is taken to correct this matter.

First Option: Under 06-ATM-2019 (FY20 Budget Article), line 32, \$225,000 was appropriated as a Reserve Fund. As provided under MGL Ch. 40, Section 6, the purpose of the Reserve Fund is "to provide for extraordinary or unforeseen expenditures ...to be voted by the finance committee." MGL does not define the terms "extraordinary" or "unforeseen," leaving that to the discretion of the Finance Committee. At this time, there have been no requests for Reserve Fund transfer, and none other than for legal are anticipated. Note: presented to fincom on 01/23/2020. Request denied.

Second Option: If the Finance Committee does not approve a Reserve Fund transfer, we are able to seek a budget adjustment from Town Meeting at the Annual Town Meeting in April. Here, we would be asking Town Meeting to approve a transfer from one line item appropriation to another, with the net impact being \$0. For instance, we could seek approval to transfer from line 32, Reserve Fund, to line 2, Legal Services. The upside to this approach is there is no need to determine that the transfer is needed due to unforeseen or extraordinary expenses. The downside is that we would have no legal ability to pay additional legal bills until April, assuming favorable Town Meeting action occurs at that time. Note: ATM postponed to end of July 2020 (or later); too late to utilize this option.

Third Option: If favorable action is not obtained via either the first or second option, we could seek a year end adjustment within the last 60 days of FY20 or first 15 days of FY21, as provided under MGL Ch. 44, Section 33B. This process allows for the transfer of appropriations between any approved lines with the approval from both the Finance Committee and Select Board. The purpose of this statutory authority is to provide some flexibility in budget to close the year after Annual Town Meeting, without the need to call a (costly) Special Town Meeting.

Should we prove unsuccessful on all fronts, we would be faced with closing FY20 with a deficit, for which we have no authority (i.e. not a legally allowed deficit). In this case, I believe the following consequences would result:

- Department of Revenue would "hit" our Free Cash and require us to raise the deficit amount within the FY21 levy limit; and/ or
- Our auditors would issue a management letter finding, making either a recommendation or citing a material weakness; and/ or
- A note about this error would be made in our next bond rating opinion.

Any of these consequences would be unfortunate as we would have had the means to correct the problem, but did not. Please be in touch if you have any additional questions.

/kal Note: confirmed with Auditor that all 3 items above would occur.

Disposition of Select Board Articles for the Postponed ATM

Article 1	Choose Town Officers	Consent Calendar
Article 2	Hear Reports	Consent Calendar
Article 13	Affordable Housing Trust Bylaw	
Article 14	Funds for Affordable Housing	
Article 15	Senior Means Tested Property Tax Exemption	
Article 16	Tax Increment Financing	
Article 29	Middle School Stabilization	
Article 40	Fossil Fuel Infrastructure	
Article 49	Neonicotinoids Prohibition of Town Land	
Article 50	Additional Liquor Licenses	



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

TEL: (617) 727-2200
www.mass.gov/ago

June 16, 2020

OML 2020 – 71

Kevin D. Batt, Esq.
Anderson & Kreiger LLP
50 Milk Street, 21st Floor
Boston, MA 02109

By email only: kbatt@andersonkreiger.com

RE: Open Meeting Law Complaint

Dear Attorney Batt:

This office received a complaint from Attorney Robert Nislick on July 18, 2019, alleging that the Concord Select Board (the “Board”) violated the Open Meeting Law, G.L. c. 30A, §§ 18-25. The complaint was originally filed with the Board on May 16, 2019, and you responded to the complaint, on behalf of the Board, by letter dated June 6, 2019. The complaint alleges that i) a quorum of the Board improperly deliberated by email approximately 31 times between March 29, 2016, and May 14, 2018, and ii) the Board improperly met in executive session on September 20, 2016; November 29, 2016; December 12, 2016; March 27, 2017; June 19, 2017; and October 16, 2017.

We appreciate the patience of the parties while we reviewed this matter. Following our review, we find that the Board violated the Open Meeting Law by deliberating by email on March 29 and 30, 2016; April 6, 2016; August 2, 2016; June 9, 2017; September 12, 2017; November 16, 2017; and January 12, 2018. We find that the Board did not violate the law in the other ways alleged. In reaching this determination, we reviewed the original complaint, which included all the emails at issue, the Board’s response to the complaint, and the complaint filed with our office requesting further review. In addition, we reviewed the notices and open session minutes of the Board meetings held on February 22, 2016; March 14, 2016; September 20, 2016; November 29, 2016; December 12, 2016; March 27, 2017; June 19, 2017; and October 16, 2017, as well as the executive session minutes of the Board meetings held on September 20, 2016; November 29, 2016; December 12, 2016; March 27, 2017; June 19, 2017; and October 16, 2017. We also reviewed transcripts of the depositions of Michael Lawson and Jane Hotchkiss from

November 5, 2019. Finally, we communicated with the complainant by email on May 21, 2020, and spoke with you by telephone on June 1, 2020.¹

FACTS

We find the facts as follows. The Board is a five-member public body; thus, three members constitute a quorum. Between January 1 and April 5, 2016, the members of the Board were Jane Hotchkiss, Alice Kaufman, Michael Lawson, Steven Ng, and Carmin Reiss. Ms. Reiss' last Board meeting was April 5, 2016. Beginning on May 9, 2016, Thomas McKean began attending meetings as a new Board member. In 2017, the members of the Board were Jane Hotchkiss, Alice Kaufman, Michael Lawson, Thomas McKean, and Steven Ng. Between January 1 and April 11, 2018, the members of the Board were Jane Hotchkiss, Alice Kaufman, Michael Lawson, Thomas McKean, and Steven Ng. Mr. Ng's last Board meeting was April 11, 2018. Beginning on April 23, 2018, Linda Escobedo began attending meetings as a new Board member.

During a March 14, 2016, meeting, the Board created the Estabrook Woods Access Study Committee (the "Committee") to consider how to address the increased pressure for adequate and safe parking at trail heads, review other impacts from increased visitor use, and make recommendations to the Board "for immediate and longer term natural area recreation management plans." On or about November 17, 2016, the Committee submitted its final recommendations to the Board. One of the Committee's primary recommendations was that the Board and Town Manager "work with town counsel and direct abutters to resolve legal uncertainties regarding the current dirt road trail in order to secure permanent public access at this location."

Emails Exchanged Between March 2016 and May 2018

On March 29, 2016, Ms. Reiss sent an email to all Board members sharing a conversation she had with Neil Rasmussen, a resident of Estabrook Road, who raised concerns about public access to land surrounding his home and people walking dogs. Mr. Lawson's response, which was sent to Ms. Reiss and all Board members, asked if the police chief weighed in and that it sounded like a public safety issue that might require action.

On April 6, 2016, Ms. Reiss sent an email to the Town Manager in which she shared her thoughts on a legal opinion provided by Attorney Kevin Batt, Town Legal Counsel, with respect to Estabrook Road. Mr. Lawson responded to that email, copying the three other Board members, stating "I agree."

On August 2, 2016, the Town Manager emailed to Mr. Lawson a memorandum from Attorney Batt regarding Estabrook Road. Mr. Lawson responded and copied all Board members stating, "That's [sic] wasn't what I expected." Mr. McKean then responded stating, "Seems pretty straight forward and on point."

¹ For purposes of clarity, we will refer to you in the third person hereafter.

On June 9, 2017, the Town Manager emailed the Board advising them that an executive session had been scheduled with Attorney Batt. Ms. Hotchkiss responded to the Town Manager and all Board members reminding everyone of certain steps taken to resolve the legal issues regarding Estabrook Road.

On September 12, 2017, the Town Manager forwarded to the Board a draft Land Court complaint involving Estabrook Road.² Mr. McKean responded to the Town Manager and all Board members stating “Timely.” Mr. Lawson also responded but only to the Town Manager.

On October 19, 2017, the Town Manager forwarded to all Board members a draft letter from Attorney Batt and asked the Board to review the draft and “let me know individually if you have any concerns.”

Between October 24 and 26, 2017, the Town Manager sent an email to the Board advising them that he had received a message from Neil Rasmussen “expressing concern about the litigation.” The Town Manager specifically asked Ms. Hotchkiss and Ms. Kaufman to edit a draft press release “to suggest ways it could be improved.” Both Ms. Hotchkiss and Ms. Kaufman responded with edits, but the edits were only sent to each other and the Town Manager.

On October 26, 2017, the Town Manager forwarded to all Board members a letter from Attorney Batt that had been sent to Harvard University regarding the complaint filed in Land Court. Ms. Hotchkiss responded, copying all Board members, stating: “Might be politic to cc Andy Biewinder.”

On November 8, 2017, the Town Manager sent the following email to the Board: “Select Board: FYI – I was sent this link to three live cameras at the beginning of the unpaved portion of Estabrook Road, which some people might consider an intrusion of their privacy.” Mr. Lawson responded to the Town Manager only.

On November 16, 2017, Ms. Kaufman sent an email to all Board members asking whether “others received similar letters regarding Estabrook.” Mr. Ng responded to all Board members stating that he had not received anything. Mr. Lawson responded to all Board members advising that he received the letter and also shared advice that he received from Town Counsel.

On January 5, 2018, the Town Manager emailed the Board informing them that the Concord Finance Director recommended a warrant article for supplemental appropriation for legal service expenses. The Town Manager advised the Board that he believed such a warrant article was unnecessary. The Town Manager then asked the Board to individually respond to

² On October 24, 2017, the Town filed a complaint, Town of Concord v. Rasmussen et. al., 2017 MISC 000605, in Land Court requesting that the Court “confirm the public’s longstanding rights to access the foot trail” at Estabrook Road. The defendants included Neil and Anna Rasmussen who reside at 393 Estabrook Road and Brooks Read and Susannah Kaye who reside at 366 Estabrook Road, as well as Russell Robb, Leslie Robb and Thomas Falwell, Trustees of the Pippin Tree Land Trust; Fellows of Harvard College; John Baker, Trustee of the Neilsen Realty Trust; and Nina Neilsen, Trustee of the Baker Realty Trust, all of whom own property abutting Estabrook Road.

him or Chair Hotchkiss. Mr. McKean and Ms. Kaufman responded to both the Town Manager and Chair Hotchkiss, while Mr. Lawson responded only to the Town Manager.

On January 12, 2018, the Town Manager forwarded to all Board members a “proposal to mediate the Estabrook Road matter” from Attorney Melissa Allison, Town Legal Counsel. Mr. Lawson and Ms. Kaufman responded to the Town Manager, copying all Board members, stating, “Good to hear” and “Small progress, thanks,” respectively.

On February 7, 2018, the Town Manager forwarded to all Board members answers to counterclaims filed in the Estabrook Road litigation case.

On February 21, 2018, the Town Manager sent an email to all Board members advising them that “the ‘mediation screening’ ordered by the judge in the Estabrook Road matter, to determine whether mediation might work in this case, is scheduled for March 9 at 10:00.” Mr. Lawson responded only to the Town Manager informing him that he could be available if needed.

On May 9, 2018, the Town Manager emailed Mr. McKean, and copied the other four Board members, stating that he, Ms. Kaufman, and Mr. Lawson “spent all day in mediation yesterday on the Estabrook matter.” The Town Manager explained that issues arose that had never been discussed by the Board before and asked if Mr. McKean “would be willing to schedule a meeting next Monday, May 14 at 8:00 a.m.” The Town Manager then asked, “could Linda and Jane advise on whether they are available to meet next Monday.” Ms. Hotchkiss responded to all Board members stating that she will be there, and then Mr. McKean responded saying he would be there as well.

On May 14, 2018, the Town Manager forwarded an email from Attorney Batt to Mr. Lawson, Ms. Kaufman, and Ms. Hotchkiss regarding Estabrook Road. Ms. Hotchkiss responded to the Town Manager, Mr. Lawson and Ms. Kaufman saying, “Hope it goes well tomorrow will keep my fingers crossed.” Mr. Lawson then responded to Ms. Hotchkiss, copying the Town Manager and Ms. Kaufman, by saying thanks.

Executive Session Meetings Held Between September 2016 and October 2017

On September 20, 2016, the Board met in executive session and discussed only one matter, the purchase of property located at 55 Church Street. On June 19, 2017, the Board met in executive session to discuss two matters, litigation and land acquisition. With respect to the land acquisition topic, the Board only discussed the property at 55 Church Street. On February 24, 2020, the Board approved for release both the September 20, 2016, and June 19, 2017, executive session minutes with respect to the Church Street property and the minutes are posted on the Town’s website.

The Board duly posted notices of meetings to be held on November 29, 2016; December 12, 2016; March 27, 2017; June 19, 2017; and October 16, 2017. Each notice listed, among other topics, an executive session to discuss litigation or litigation strategy. The notices did not specifically identify the litigation matter that the Board planned to discuss.

The Board met on November 29, 2016; December 12, 2016; March 27, 2017; June 19, 2017; and October 16, 2017. During the December 12, 2016; June 19, 2017; and October 16, 2017, meetings, the Board convened in open session and discussed the noticed topics. After discussing the open session topics, the Board then approved a unanimous vote by roll call to convene in executive session to discuss litigation. During the November 29, 2016, and March 27, 2017, meetings, the Board first convened in open session and then immediately approved a unanimous vote by roll call to convene in executive session to discuss litigation. The Board did not announce the specific litigation matter that it planned to discuss in any of the five executive session meetings held between November 29, 2016, and October 16, 2017.

During the December 12, 2016, meeting, the Board discussed litigation initiated by a former Recreation Department employee. During the March 27, 2017, meeting, the Board discussed initiating litigation against the Town of Acton to appeal certain conditions imposed with respect to a special permit. The Board did not discuss Estabrook Road during either meeting. On March 11, 2019, the Board approved for release the minutes of these two meetings.

During the remaining three executive sessions, November 29, 2016; June 19, 2017; and October 16, 2017, the Board discussed litigation strategy with respect to Estabrook Road. The Board has not publicly released the minutes of these executive sessions; therefore, we do not recount their content in detail here. However, according to Attorney Batt, the Board discussed strategy with respect to initiating litigation to resolve a longstanding dispute with Estabrook Road landowners regarding the public right of access at the end of Estabrook Road. The Town commenced a lawsuit against the Estabrook Road landowners on October 24, 2017.

DISCUSSION

The Open Meeting Law was enacted “to eliminate much of the secrecy surrounding deliberation and decisions on which public policy is based.” Ghiglione v. School Board of Southbridge, 376 Mass. 70, 72 (1978). The Open Meeting Law requires that meetings of a public body be properly noticed and open to members of the public, unless an executive session is convened. See G.L. c. 30A, §§ 20(a)-(b), 21.

I. The Board Improperly Deliberated by Email in March, April and August 2016, in November 2017, and in January 2018.

The Open Meeting Law defines a “meeting,” in relevant part, as “a deliberation by a public body with respect to any matter within the body’s jurisdiction.” G.L. c. 30A, § 18. The law defines “deliberation” as “an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction; provided, however, that ‘deliberation’ shall not include the distribution of a meeting agenda, scheduling information or distribution of other procedural meeting [sic] or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed.” Id. For the purposes of the Open Meeting Law, a “quorum” is a simple majority of the members of a public body. Id.

The complaint alleges that a quorum of the Board deliberated by email between March 29, 2016, and May 14, 2018, outside of a properly posted meeting. We find that emails exchanged on March 29-30, 2016; April 6, 2016; August 2, 2016; June 9, 2017; September 12, 2017; November 16, 2017; and January 12, 2018, contain improper deliberations because these emails reached a quorum of the Board and included members' opinions on or suggested resolutions of matters currently pending before the Board or matters to be discussed by the Board and within the Board's jurisdiction, namely issues regarding Estabrook Road. See OML 2018-118; 2015-3; OML 2014-108; OML 2013-136; Boelter v. Board of Selectmen of Wayland, 479 Mass. 233, 243 (2018).³ The expression of an opinion of by one public body member on matters within the body's jurisdiction to a quorum of a public body is a deliberation, even if no other public body member responds. See OML 2016-104; OML 2015-33; OML 2012-73. We order the Board to publicly release these emails within 30 days of receipt of this determination, if it has not already done so.⁴

We find that the emails exchanged on October 26, 2017; May 9, 2018; and May 14, 2018, contained either scheduling or procedural information, or were administrative in nature, and are therefore exempt from the definition of deliberation under the law. See G.L. c. 30A, § 18; OML 2017-85; OML 2017-28; OML 2015-69. We caution the Board, however, that determining which tasks are merely administrative or procedural, and therefore appropriate for email, can be challenging, and that email communication between a quorum of public body members - however innocent - creates at least the appearance of an Open Meeting Law violation. As such, we caution public bodies on the use of electronic communications. See OML 2017-88; OML 2014-80.

Finally, we note that the remaining emails (October 19, 2017; October 24-26, 2017; November 8, 2017; January 5, 2018; February 7, 2018; February 21, 2018) were sent by the Town Manager to a quorum of the Board. However, the Town Manager is not a member of the Board or otherwise subject to the Open Meeting Law, and thus, any emails sent by him to a quorum of the Board do not constitute improper deliberation. See OML 2020-53; OML 2014-80. In certain of those emails, a Board member responded and expressed his or her opinion on the subject matter of the email, which was a matter within the jurisdiction of the Board. However, those opinions were shared only with the Town Manager or with a subquorum of the Board and therefore did not violate the Open Meeting Law. See OML 2018-132; OML 2017-199; OML 2017-69; OML 2015-77; OML 2011-52.

We must determine whether this violation was, as the complainant urges, an intentional one. See G.L. c. 30A, § 23(c). An intentional violation is an "act or omission by a public body or a member thereof, in knowing violation of [the Open Meeting Law]." 940 CMR 29.02. An intentional violation may be found where the public body acted with deliberate ignorance of the

³ Open Meeting Law determinations may be found at the Attorney General's website, <https://www.mass.gov/the-open-meeting-law>.

⁴ We note that these emails have already been released to the complainant. We note further that certain of the emails contain redacted information based on attorney-client privilege. The Open Meeting Law authorizes the Attorney General to investigate a complaint alleging a violation of the law but does not give us the authority to determine whether the Board's assertion of the attorney-client privilege was justified. See OML 2016-129; OML 2014-22; OML 2013-7. We have no reason to challenge the Board's claim of attorney-client privilege, and do not order that the Board release these emails in unredacted form.

law's requirement or has previously been advised that certain conduct violates the Open Meeting Law. Id. This Office has not issued any determinations that advised the Board that deliberating by email among a quorum of members on a matter of Board business violated the Open Meeting Law. Although the prohibition on deliberating outside of properly noticed public meetings is at the core of the Open Meeting Law and should not require a reminder from our Office, here the violations that we find consisted of brief, passing remarks by different Board members over the course of two years, and do not demonstrate a pattern of email deliberations among a quorum outside of a posted meeting. Therefore, we also do not find that the Board acted with deliberate ignorance of the law, and we decline to find that this violation was intentional.

II. The Board Properly Met in Executive Session.

A public body may enter an executive, or closed, session for any of the ten purposes enumerated in the Open Meeting Law provided that it has first convened in an open session, that a majority of members of the body have voted to go into executive session, that the vote of each member is recorded by roll call and entered into the minutes, and the chair has publicly announced whether the open session will reconvene at the conclusion of the executive session. G.L. c. 30A, §§ 21(a), (b); see also OML 2014-94.

Before entering the executive session, the chair must state the purpose for the executive session, stating all subjects that may be revealed without compromising the purpose for which the executive session was called. See G.L. c. 30A, § 21(b)(3); see also District Attorney for the N. Dist. v. Sch. Comm. of Wayland, 455 Mass. 561, 567 (2009) (“[a] precise statement of the reason for convening in executive session is necessary ... because that is the only notification given the public that a [public body] would conduct business in private, and the only way the public would know if the reason for doing so was proper or improper”). This level of detail about the executive session topic must also be included in the meeting notice. See OML 2016-72.

One permissible reason to convene in executive session is “to discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares.” G.L. c. 30A, § 21(a)(3) (“Purpose 3”). This purpose offers the narrow opportunity to discuss strategy with respect to litigation that is pending or clearly and imminently threatened or otherwise demonstrably likely; the mere possibility of litigation is not sufficient to invoke Purpose 3. See Doherty v. School Committee of Boston, 386 Mass. 643, 648 (1982); Perryman v. School Committee of Boston, 17 Mass. App. Ct. 346, 352 (1983); OML 2012-05. When convening in executive session pursuant to Purpose 3, a public body should identify the litigation matter to be discussed, if doing so will not compromise the lawful purpose for secrecy. See OML 2016-12; OML 2013-97. While we generally defer to a public body's assessment of whether the inclusion of such information would compromise the purpose for the executive session, a public body must be able to demonstrate a reasonable basis for such a claim if challenged. See OML 2015-14.

The complaint alleges that the Board improperly discussed Estabrook Road during executive session meetings held on September 20, 2016; November 29, 2016; December 12, 2016; March 27, 2017; June 19, 2017; and October 16, 2017. We find that the Board did not

discuss any matters involving Estabrook Road during its September 20, 2016; December 12, 2016; or March 27, 2017, meetings. Rather, the Board discussed the purchase of property located on Church Street in Concord in its September meeting, discussed a former employee's lawsuit against the Town in its December meeting, and discussed potential litigation against the Town of Acton in its March meeting.

However, the Board did discuss Estabrook Road during executive session meetings held on November 29, 2016; June 19, 2017; and October 16, 2017. The Board argues that its discussions in executive session on these dates were proper under Purpose 3 because the discussions involved litigation strategy concerning Estabrook Road. We find that the discussions during the October 16, 2017, executive session meeting pertained to a decision to pursue litigation against the Estabrook Road landowners and therefore the Board did not violate the Open Meeting Law by meeting under Purpose 3. See OML 2017-178; OML 2013-23. Whether the discussions during the November 29, 2016, and June 19, 2017, executive session meetings properly fall within Purpose 3 is a closer question. A public body's discussions with its counsel do not automatically fall under Purpose 3 or any other executive session purpose. See Plymouth Dist. Atty v. Selectmen of Middleborough, 395 Mass. 629 (1985); OML 2012-55. Attorney Batt has assured this office that the discussions in executive session pertained to strategy with respect to anticipated litigation to resolve a longstanding dispute with Estabrook Road landowners regarding the public right of access at the end of Estabrook Road, and to advise the Board of the potential litigation consequences of initiating litigation. See OML 2012-5 (concluding that a public body's executive session discussion was proper where the public body's attorney advised the public body about the potential litigation consequence of its decision because, in the attorney's judgment, a real threat of litigation existed). Our review of the executive session minutes, although partially redacted,⁵ confirms that explanation. We find that the Board properly met in executive session and that it was also reasonable to conclude that announcing the specific topic of litigation prior to convening in executive session would have comprised the purpose for the executive sessions and alerted the potential litigants. See OML 2017-87.

CONCLUSION

We find that the Board violated the Open Meeting Law by deliberating by email on March 29-30, 2016; April 6, 2016; August 2, 2016; June 9, 2017; September 12, 2017; November 16, 2017; and January 12, 2018. We order the Board to publicly release these emails within 30 days of receipt of this determination. Additionally, we order immediate and future compliance with the law's requirements and we caution that similar future violations could be considered evidence of intent to violate the law.

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

⁵ Although the Attorney General generally has authority to require public bodies to provide documents and information in the course of an Open Meeting Law complaint investigation, the Attorney General may not require the disclosure of privileged material. G.L. c. 30A, § 24 (a), (e).

Sincerely,



KerryAnne Kilcoyne
Assistant Attorney General
Division of Open Government

cc: Robert Nislick, Esq. – By email only: rob@nislick.com
Concord Select Board c/o Chair Michael Lawson – By email only:
MLawson@concordma.gov

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.

Message

From: Alice Kaufman [akaufman@concordma.gov]
Sent: 1/12/2018 2:16:09 PM
To: Michael Lawson [mlawson@concordma.gov]
CC: Chris Whelan [cwhelan@concordma.gov]; Jane Hotchkiss [jhotchkiss@concordma.gov]; Steven Ng [sng@concordma.gov]; Thomas McKean [tmckean@concordma.gov]
Subject: Re: Estabrook Road Litigation?

Small progress, thanks.

Sent from my iPhone. Please excuse typos and brevity.

On Jan 12, 2018, at 10:06 AM, Michael Lawson <mlawson@concordma.gov> wrote:

Good to hear.

Michael Lawson

On Jan 12, 2018, at 10:19 AM, Chris Whelan <cwhelan@concordma.gov> wrote:

SB: FYI re proposal to mediate Estabrook Road matter.

Chris

From: Melissa C. Allison [<mailto:mallison@AndersonKreiger.com>]
Sent: Wednesday, January 10, 2018 8:33 PM
To: Chris Whelan
Subject: RE: Estabrook Road Litigation?

Hi Chris,

Redacted

Melissa

Sent with Good (www.good.com)

From: Chris Whelan
Sent: Wednesday, January 10, 2018 11:32:31 AM
To: Melissa C. Allison
Subject: Estabrook Road Litigation?

Hi Melissa,

Redacted

Chris

Christopher Whelan
Town Manager
Concord, MA 01742

Disclaimer

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Message

From: Michael Lawson [mlawson@concordma.gov]
Sent: 3/30/2016 11:08:19 AM
To: Carmin Reiss [creiss@concordma.gov]
CC: Alice Kaufman [akaufman@concordma.gov]; Steven Ng [sng@concordma.gov]; Jane Hotchkiss [jhotchkiss@concordma.gov]; Chris Whelan [cwhelan@concordma.gov]
BCC: Carmin Reiss [creiss@concordma.gov]; Alice Kaufman [akaufman@concordma.gov]; Steven Ng [sng@concordma.gov]; Jane Hotchkiss [jhotchkiss@concordma.gov]; Chris Whelan [cwhelan@concordma.gov]; Carmin Reiss (GMail) [carmin.reiss@gmail.com]
Subject: Re: An Estabrook Conversation

Carmin

Thanks for the note. Has the police chief weighed in? This sounds like a real public safety issue that might require some action. And, you're correct, [Redacted] Chris do you think there is some action that we should be taking?
Mike

Sent from my iPad

> On Mar 29, 2016, at 11:07 PM, Carmin Reiss <creiss@concordma.gov> wrote:

>

> All:

>

> I happened to see Neil Rasmussen at Starbucks today and had a brief chat. (FYI, Starbucks traffic was completely out of control, blocking Thoreau St, and a Concord Fire Dept vehicle stopped to speak to offending drivers to clear road)

>

> Neil said that the situation is terrible, Anna is afraid to go to the mailbox, and yesterday a man from Acton walking multiple dogs stopped to yell about his rights to walk in the Estabrook. He also was distressed about the rider who fell when loose dogs chased and spooked her horse - concerned about the potential for liability to him as property owner. He mentioned that the rude woman, who didn't inquire as to the fallen rider's well-being and did not apologize, was from Acton.

>

> Neil said that landowners are going to have to act and they are planning to post some rules about use of their land. I said that I hoped they would not post anything new until the committee had a chance to convene and do its work; he was non-committal. Neil noted that the landowners have the right to post their land and that there is no public right of access. I told him that I would have to disagree with him there and when he pressed for reasons I mentioned long public use and perhaps easement by prescription. Neil said that his understanding is that an easement by prescription attaches only to individuals, not the public.

[Redacted]

> Carmin

>

>

> Sent from my iPhone

Message

From: Thomas McKean [tmckean@concordma.gov]
Sent: 8/2/2016 8:30:58 PM
To: Michael Lawson [mlawson@concordma.gov]; Chris Whelan [cwhelan@concordma.gov]
CC: Alice Kaufman [akaufman@concordma.gov]; Jane Hotchkiss [jhotchkiss@concordma.gov]; Steven Ng [sng@concordma.gov]
BCC: Michael Lawson [mlawson@concordma.gov]; Chris Whelan [cwhelan@concordma.gov]; Alice Kaufman [akaufman@concordma.gov]; Jane Hotchkiss [jhotchkiss@concordma.gov]; Steven Ng [sng@concordma.gov]
Subject: RE: Estabrook Road - Favorable Legal Opinion!

Seems pretty straight forward and on point. Tom

-----Original Message-----

From: Michael Lawson
Sent: Mon 8/1/2016 5:58 PM
To: Chris Whelan
Cc: Alice Kaufman; Jane Hotchkiss; Steven Ng; Thomas McKean
Subject: Re: Estabrook Road - Favorable Legal Opinion!

Hi
That's wasn't what I expected.
Mike

Michael Lawson

On Aug 1, 2016, at 5:54 PM, Chris Whelan <cwhelan@concordma.gov> wrote:

Mike,

Redacted

Chris

From: Kevin D. Batt [<mailto:kbatt@AndersonKreiger.com>]
Sent: Monday, August 01, 2016 5:22 PM
To: Chris Whelan
Cc: Andrew W. Fowler
Subject: FW: Estabrook Road

PRIVILEGED AND CONFIDENTIAL

Redacted

Kevin D. Batt

ANDERSON & KREIGER LLP

One Canal Park, Suite 200

Cambridge MA 02141

t: 617-621-6514

f: 617-621-6614

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From: Kevin D. Batt
Sent: Monday, August 01, 2016 4:52 PM
To: cwhelan@concordma.gov
Cc: Andrew W. Fowler
Subject: Estabrook Road

PRIVILEGED AND CONFIDENTIAL

Chris,

Redacted

Redacted

Kevin D. Batt

ANDERSON & KREIGER LLP

One Canal Park, Suite 200

Cambridge MA 02141

t: 617-621-6514

f: 617-621-6614

P Please consider the environment before printing this e-mail.

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<Estabrook discontinuance memo (A0379354-3xB0BA5).docx>

<Exhibits to Estabrook Road memo (A0381451xB0BA5).pdf>

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 6/9/2017 12:18:02 PM
To: Alice Kaufman [akaufman@concordma.gov]; Jane Hotchkiss [jhotchkiss@concordma.gov]; Michael Lawson [mlawson@concordma.gov]; Steven Ng [sng@concordma.gov]; Thomas McKean [tmckean@concordma.gov]
Subject: FW: Dogs and NBC

SB: FYI. Jane has scheduled an executive session with Kevin Batt and Andrew Fowler from Anderson/Kreiger

Redacted

Chris

From: Delia Kaye
Sent: Thursday, June 08, 2017 3:32 PM
To: Chris Whelan
Cc: Marcia Rasmussen
Subject: Dogs and NBC

Chris,

Just a heads up that an NBC reporter showed up just now looking for information on the NRC/dog discussion. She also spoke with Jeff Young, and the story will be on tonight between 7 and 7:30.

She asked me about the sign along Estabrook Road, which Jeff Young pointed out to her as being a private sign in the public right of way. It is Neil's sign notifying trail users of leash restrictions on his property and I don't think that sign will be part of her story. I've asked Laurie Livoli to take a look at the sign and whether it complies with the sign bylaw as I believe Jeff Young is correct that it's within the ROW.

Delia

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 6/9/2017 12:57:01 PM
To: Chris Whelan [cwhelan@concordma.gov]; Alice Kaufman [akaufman@concordma.gov]; Michael Lawson [mlawson@concordma.gov]; Steven Ng [sng@concordma.gov]; Thomas McKean [tmckean@concordma.gov]
Subject: Re: Dogs and NBC

Redacted

From: Chris Whelan
Sent: Friday, June 9, 2017 8:18 AM
To: Alice Kaufman; Jane Hotchkiss; Michael Lawson; Steven Ng; Thomas McKean
Subject: FW: Dogs and NBC

SB: FYI. Jane has scheduled an executive session with Kevin Batt and Andrew Fowler from Anderson/Kreiger

Redacted

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Sent: Thursday, June 08, 2017 3:32 PM
To: Chris Whelan
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Delia

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 11/16/2017 7:30:57 PM
To: Steven Ng [sng@concordma.gov]; Michael Lawson [mlawson@concordma.gov]
CC: Alice Kaufman [akaufman@concordma.gov]; Thomas McKean [tmckean@concordma.gov]; Chris Whelan [cwhelan@concordma.gov]
Subject: Re: Letter

I have not seen anything

From: Steven Ng
Sent: Thursday, November 16, 2017 3:46 PM
To: Michael Lawson
Cc: Alice Kaufman; Jane Hotchkiss; Thomas McKean; Chris Whelan
Subject: Re: Letter

I haven't received anything

Steve Ng
Concord Select Board
Sent from my iPhone

On Nov 16, 2017, at 3:16 PM, Michael Lawson <mlawson@concordma.gov> wrote:

Hi Alice,

Yes, I received the same, exact, letter.

Redacted

Redacted

Mike

On 11/16/17, 3:10 PM, "Alice Kaufman" <akaufman@concordma.gov> wrote:

Have others received similar letters regarding Estabrook today? I am not aware of a letter Russ Rob sent on April 29 referenced here.

Alice

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 6/9/2017 12:57:01 PM
To: Chris Whelan [cwhelan@concordma.gov]; Alice Kaufman [akaufman@concordma.gov]; Michael Lawson [mlawson@concordma.gov]; Steven Ng [sng@concordma.gov]; Thomas McKean [tmckean@concordma.gov]
Subject: Re: Dogs and NBC

I would remind everyone that the Board requested that Chris engage A&K in a title search and other due diligence to qualify the town's legal position vis a vie Estabrook Road connecting from the end of the pavement in Concord through to Carlisle. Abutters have made clear legal claims which has colored the process of resolving access, parking, usage and now dogs.

It was the hope that we could put the legal questions to bed early, but that has not happened. I would encourage us to pick a firm direction.

From: Chris Whelan
Sent: Friday, June 9, 2017 8:18 AM
To: Alice Kaufman; Jane Hotchkiss; Michael Lawson; Steven Ng; Thomas McKean
Subject: FW: Dogs and NBC

SB: FYI. Jane has scheduled an executive session with Kevin Batt and Andrew Fowler from Anderson/Kreiger

Redacted

Chris

From: Delia Kaye
Sent: Thursday, June 08, 2017 3:32 PM
To: Chris Whelan
Cc: Marcia Rasmussen
Subject: Dogs and NBC

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Delia

Message

From: Michael Lawson [mlawson@concordma.gov]
Sent: 4/6/2016 11:01:42 AM
To: Carmin Reiss [creiss@concordma.gov]
CC: Chris Whelan [cwhelan@concordma.gov]; Alice Kaufman [akaufman@concordma.gov]; Jane Hotchkiss [jhotchkiss@concordma.gov]; Steven Ng [sng@concordma.gov]
BCC: Carmin Reiss [creiss@concordma.gov]; Chris Whelan [cwhelan@concordma.gov]; Alice Kaufman [akaufman@concordma.gov]; Jane Hotchkiss [jhotchkiss@concordma.gov]; Steven Ng [sng@concordma.gov]; Carmin Reiss (GMail) [carmin.reiss@gmail.com]
Subject: Re: Estabrook legal opinion

I agree.

Sent from my iPad

> On Apr 6, 2016, at 12:35 AM, Carmin Reiss <creiss@concordma.gov> wrote:

>

> Chris,

>

Redacted

> Carmin

>

> Sent from my iPhone

Message

From: Thomas McKean [tmckean@concordma.gov]
Sent: 9/12/2017 1:10:04 PM
To: Chris Whelan [cwhelan@concordma.gov]; Alice Kaufman [akaufman@concordma.gov]; Jane Hotchkiss [jhotchkiss@concordma.gov]; Michael Lawson [mlawson@concordma.gov]; Steven Ng [sng@concordma.gov]
Subject: Re: Estabrook Road draft Complaint - privileged and confidential

Timely. Tom

From: Chris Whelan
Sent: Tuesday, September 12, 2017 8:37 AM
To: Alice Kaufman; Jane Hotchkiss; Michael Lawson; Steven Ng; Thomas McKean
Subject: FW: Estabrook Road draft Complaint - privileged and confidential

SB: The attached draft complaint arrived last night during the SB meeting. I haven't reviewed it yet, but will let you know my thoughts when I have.

Chris

From: Melissa C. Allison [mailto:mallison@AndersonKreiger.com]
Sent: Monday, September 11, 2017 9:18 PM
To: Chris Whelan
Cc: Andrew W. Fowler; Kevin D. Batt
Subject: Estabrook Road draft Complaint - privileged and confidential

Redacted

ANDERSON
KREIGER

Melissa Cook Allison
T. 617.621.6512 | F. 617.621.6612
[Anderson & Kreiger LLP](#) | 50 Milk Street, 21st Floor, Boston, MA 02109

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