

THE COMMONWEALTH OF MASSACHUSETTS
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June 16, 2020

OML 2020 – 71

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

ROBERT NISLICK

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July 18, 2019

Attorney General Maura T. Healey
Attorney General's Division of Open Government
One Ashburton Place, 18th Floor
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Re: Open Meeting Law Complaint

Dear Attorney General Healey:

This office represents complainants Brooks S. Read, Susannah Kay, Leslee Robb, and Russell Robb, III. On May 16, 2019, the complainants filed an Open Meeting Law Complaint with the Concord Select Board. (A true and accurate copy of the Open Meeting Law Complaint is attached hereto as **EXHIBIT "A"**).

On June 6, 2019, the Concord Select Board responded to the Open Meeting Law Complaint. (A true and accurate copy of the Response to Open Meeting Law Complaint is attached hereto as **EXHIBIT "B"**). At least thirty days have passed after the Open Meeting Law Complaint was filed with the Concord Select Board.

The complainants are unsatisfied with the Concord Select Board's resolution of the complaint. Pursuant to G. L. c. 30A, § 23, and 940 Code Mass. Regs. § 29.05, the complainants hereby file their Open Meeting Law Complaint with the Attorney General.

The complainants' Open Meeting Law Complaint, dated May 16, 2019, alleges:

Dates of Alleged Violations

March 29-30, 2016; April 6, 2016; July 25, 2016; August 2, 2016; September 20, 2016; November 29, 2016; December 12, 2016; March 27, 2017; June 9, 2017; June 19, 2017; September 12, 2017; October 16, 2017; October 19, 2017; October 24-26, 2017; October 26, 2017; November 8, 2017; November 16, 2017; January 5, 2018; January 12, 2018; February 7, 2018; and February 21, 2018.

Description of Alleged Violations

1. On April 19, 2019, Concord produced Town of Concord's Third Supplemental Production of Documents in the case Town of Concord vs. Neil E. Rasmussen, et

al, Land Court Case No. 17 MISC 000605 (HPS). The documents produced were Bates stamped with numbers from CONCORD_0005743 through CONCORD_0006202. (Copies of the documents cited herein are attached hereto as Exhibit “B”).

2. Certain documents that Concord produced on April 19, 2019, establish that a quorum of the Concord Select Board deliberated and held meetings via electronic mail communication in violation of the Open Meeting Law on March 29-30, 2016 (see 5951); April 6, 2016 (see 5947); August 2, 2016 (see 5961); June 9, 2017 (see 5972, 5981); September 12, 2017 (see 6082, 6159, 6175); October 19, 2017 (see 6179); October 24-26, 2017 (see 6092, 6095, 6096, 6117, 6118); October 26, 2017 (see 6177); November 8, 2017 (see 6107); November 16, 2017 (see 6048, 6116); January 5, 2018 (see 6040, 6136, 6167); January 12, 2018 (see 6158, 6172); February 7, 2018 (see 6108); and February 21, 2018 (see 6042, 6062-6063).

3. The violations were not known and could not reasonably have been known to complainants until April 19, 2019. See 940 Code Mass. Regs. § 29.05(4). Complainants discovered the violations when Concord produced heavily redacted copies of electronic mail written communications to them on April 19, 2019.

4. The Open Meeting Law was enacted “to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based.” Ghiglione v. School Comm. of Southbridge, 376 Mass. 70, 72 (1978).

5. “The 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.” OML 2018-118 at 2. The law defines a “meeting” as, “a deliberation by a public body with respect to any matter within the body’s jurisdiction.” G. L. c. 30A, § 18. A “deliberation” is defined 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 other procedural meeting or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed.” G. L. c. 30A, § 18.

6. “Governmental bodies may not circumvent the requirements of the open meeting law by conducting deliberations via private messages, whether electronically, in person, over the telephone, or in any other form.” District Attorney for the N. Dist. v. School Comm. of Wayland, 455 Mass. 561, 570-571 (2009).

7. The Massachusetts open meeting law, G. L. c. 30A, §§ 18 and 20 (a), “requires public bodies to make their meetings, including ‘deliberations,’ open to the public.” Boelter v. Board of Selectmen of Wayland, 479 Mass. 233, 234 (2018).

8. “[I]n recognition that the overarching purpose of the open meeting law is to ensure transparency in governmental decision-making, the Legislature specified that no opinion of a board member could be expressed in any documents circulated to a quorum prior to an open meeting.” Boelter v. Board of Selectmen of Wayland, 479 Mass. 233, 241 (2018).

9. “In Boelter, the Court concluded that the Wayland Board of Selectmen violated the Open Meeting Law by distributing to its members employee performance evaluations that included opinions of individual Board members. Communication of these opinions by email constituted ‘deliberation’ by the Board members that may occur only during a properly noticed meeting. This decision establishes that public body members may not send opinions to each other . . . outside of a noticed meeting.” OML 2018-38.

10. “Orchestrated private exchanges of opinions . . . between individual members of a public body and its chair . . . are prohibited.” Boelter v. Wayland Board of Selectmen, Middlesex Superior Court No. 14-CV-0591-H (Curran, J.) (June 29, 2016).

11. The Town of Concord Committee Handbook, § VII.1 Appendix Q. Use of Electronic Mail (APP #50), states in pertinent part:

“COMMITTEE USE OF ELECTRONIC MAIL

In order to assist members of governmental bodies to comply with the Open Meeting Law in their use of this technology, the Middlesex District Attorney's Office has established guidelines for committees’ use of electronic mail. The guidelines reaffirm that **no substantive discussion by a quorum of members of a governmental body about public business within the jurisdiction of the governmental body is permissible except at a meeting held in compliance with the requirements of the Open Meeting Law. Like private conversations held in person or over the telephone, e-mail conversations among a quorum of members of a governmental body that relate to public business violate the Open Meeting Law, as the public is deprived of the opportunity to attend and monitor the e-mail ‘meeting.’**

Despite the convenience and speed of communication by e-mail, its use by members of a governmental body carries a high risk of violating the Open Meeting Law. Not only do private e-mail communications deprive the public of the chance contemporaneously to monitor the discussion, but by excluding non-participating members, such

communications are also inconsistent with the collegial character of governmental bodies. For these reasons, the Middlesex District Attorney cautions that **e-mail messages among members of governmental bodies are best avoided except for matters of a purely housekeeping or administrative nature.**”

(See Town of Concord Committee Handbook, § VII.1 Appendix Q. Use of Electronic Mail (APP #50) at 103-104 (Oct. 2018), available at <https://concordma.gov/DocumentCenter/View/17369/2018-Oct-Committee-Handbook---OML-Updates>) (emphasis added).

12. On March 29-30, 2016, Concord Select Board members Carmin Reiss, Michael Lawson, Alice Kaufman, Steven Ng, and Jane Hotchkiss communicated by electronic mail and expressed opinions concerning Estabrook Road. Carmin Reiss opined that she disagreed with Neil Rasmussen (a private citizen that the Town of Concord sued concerning Estabrook Road) concerning whether landowners have the right to post their land and that there is no public right of access to Estabrook Road. Michael Lawson replied to all members of the Concord Select Board, however, Concord redacted his response without any basis for doing so. The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. (See 5951).

13. On April 6, 2016, Concord Select Board members Carmin Reiss, Michael Lawson, Alice Kaufman, Steven Ng, and Jane Hotchkiss communicated by electronic mail and expressed opinions concerning Estabrook Road. Michael Lawson opined: “I agree.” Their e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. Complainants do not know what Michael Lawson was agreeing with because Concord redacted his response without any basis for doing so. The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. (See 5947).

14. On August 2, 2016, Concord Select Board members Thomas McKean, Michael Lawson, Alice Kaufman, Jane Hotchkiss, and Steven Ng communicated by electronic mail and expressed opinions concerning Estabrook Road. Thomas McKean opined: “Seems pretty straight forward and on point. Tom”. Complainants do not know what Thomas McKean thought was pretty straightforward and on point because Concord redacted his response without any basis for doing so. The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. (See 5961).

15. On June 9, 2017, Concord Select Board members Jane Hotchkiss, Alice Kaufman, Michael Lawson, Steven Ng, and Thomas McKean communicated by electronic mail in response to an e-mail from Concord Natural Resources Director Delia Kaye to Concord Town Manager Chris Whelan concerning Neil Rasmussen's sign posted along Estabrook Road notifying trail users of leash restrictions on his property. Complainants do not know what opinion Jane Hotchkiss expressed to the Concord Select Board because Concord redacted her response without any basis for doing so. The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. (See 5972, 5981).

16. On September 12, 2017, Concord Select Board members Thomas McKean, Alice Kaufman, Jane Hotchkiss, Michael Lawson, Steven Ng, communicated by electronic mail in response to an e-mail from Concord Town Manager Chris Whelan concerning the Estabrook Road draft complaint. Thomas McKean opined: "Timely. Tom". Michael Lawson responded as well, but complainants do not know what opinion Michael Lawson expressed because Concord redacted his response without any basis for doing so. The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. (See 6082, 6159, 6175).

17. On October 19, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with Concord Select Board members Alice Kaufman, Jane Hotchkiss, Michael Lawson, Steven Ng, and Thomas McKean regarding the subject: "CONFIDENTIAL Draft letter to accompany complaint." Chris Whelan stated: "Mike and SB, Would you please review this draft letter and let me know individually if you have any concerns. Kevin is hoping to send it out today. Chris". (See 6179).

18. Concord failed to produce any of the board members' responses. The Concord Select Board probably engaged in serial deliberation via electronic mail in response to Chris Whelan's e-mail request for individual responses from each member of the Concord Select Board, on dates between October 19-24, 2017. Concord town counsel did send a letter to the Rasmussens' counsel dated October 24, 2017, the same date on which Concord filed a complaint in the Land Court against the Rasmussens, Harvard University, and the complainants. (See 5622).

19. "[A] public body may not engage in a serial deliberation, whereby a quorum communicates in a non-contemporaneous manner outside of a meeting on a matter within the public body's jurisdiction." OML 2018-71 at 4. See McCrea v. Flaherty, 71 Mass. App. Ct. 637, 648-649 (2008).

20. On October 24-26, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with Concord Select Board members Alice Kaufman, Jane Hotchkiss, Michael Lawson, Steven Ng, and Thomas McKean

regarding the subject: “FW: Estabrook Road Complaint Filed Today.” Concord redacted the contents of Chris Whelan’s electronic mail to the Concord Select Board. (See 6117-6118). Alice Kaufman opined: “This is an unusual press release in that it reads as an op-ed. It asserts opinion that may serve to inflame the arguments with the abutters that I do not think is served in the Concord Journal. It is customary to use attribution for statements of interpretation or beliefs.” (See 6092, 6117). Chris Whelan replied that he would “prepare something and will review it with Jane.” (See 6117). Jane Hotchkiss opined: “I agree and look forward to your rewrite.” (See 6117). Alice Kaufman opined: “Chris Please see my comments to the draft. Take them or not as you see fit. I do not wish to fan flames at this point and suggest we be neutral in the language for the news release. It is probably not really necessary to wordsmith this further but a neutral written statement will have a lower probability of being misconstrued when Henry or someone else writes the story. Your quote looks good and I agree that we should delete the reference to call counsel. Should you receive calls, you can advise the caller who to contact. I would not be surprised if you receive a call from the Globe and perhaps local TV too. Alice”. (See 6056, 6096). Chris Whelan replied: “Thanks Alice! I have accepted your changes in the document and forwarded it to Erin requesting that she try to get it out today. Chris”. (See 6096). Jane Hotchkiss opined: “Thanks for moving this out Chris - we will undoubtedly see some response on Monday”. (See 6096). The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

21. On October 26, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with Concord Select Board members Jane Hotchkiss, Alice Kaufman, Michael Lawson, Steven Ng, and Thomas McKean regarding the subject: “Re: Concord – Estabrook Road”. Chris Whelan’s electronic mail stated: “SB: Attached is Kevin Batt’s letter to Harvard’s general counsel [Redacted].” Jane Hotchkiss opined: “Might be politic to cc Andy Biewinder (so?)” (See 6177). The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

22. On November 8, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: “Re: Live Estabrook Webcams”. Chris Whelan’s electronic mail stated: “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 on their privacy . Chris <http://www.saveourheritage.com/Estabrook Road.htm>”. (See 6107). Michael Lawson responded, but complainants do not know what opinion Michael Lawson expressed because Concord redacted his response without any basis for doing so. The Concord Select Board’s e-mail correspondence violated the Open

Meeting Law because it was a deliberation and a meeting which was not open to the public.

23. On November 16, 2017, Concord Select Board members, Alice Kaufman, Michael Lawson, Steven Ng, Jane Hotchkiss, and Thomas McKean communicated by electronic mail concerning a letter that Alice Kaufman received “regarding Estabrook today”. (See 6116). Michael Lawson responded: “Hi Alice, Yes, I received the same, exact, letter. [Redacted] [Redacted]. Mike”. (See 6116). Complainants do not know what opinion Michael Lawson expressed concerning the letter he received regarding Estabrook, because Concord redacted his response without any basis for doing so. Steven Ng responded: “I haven’t received anything.” (See 6116). Jane Hotchkiss responded: “I have not seen anything”. (See 6048). The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

24. On January 5, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: “FW: FY18 Supplemental Appropriation – Legal Expenses”, in which he discussed “a warrant article requesting a supplemental appropriation for legal service expenses in the current fiscal year. . . . The primary issue is the Estabrook matter, and there has been some interest in settlement. . . . Would you please let me or Jane know individually if you agree.” (See 6040-6041). Michael Lawson opined: “Chris I support your point of view. Your remark about some interest in settlement surprised me. I've heard nothing. Mike” (See 6040). Chris Whelan responded. Then Michael Lawson responded, but complainants do not know what opinion Michael Lawson expressed because Concord redacted his response without any basis for doing so. Thomas McKean opined: “I agree with Chris's analysis and see little advantage in raising an issue that is likely to get sidetracked into a debate on Estabrook.” (See 6136). Jane Hotchkiss opined: “Agreed!” (See 6136). Alice Kaufman opined: “I am glad to hear that there is some positive movement towards settlement regarding Estabrook. Have there been further conversations since our attorney's reached out to Mintz Levin and the abutters just before the holidays? [Redacted] I trust that you and Kerry have talked through our needs to support the various active cases and have determined that there is no need for a supplemental appropriations for legal services. Do we have a Plan B should we not reach agreement on Estabrook and proceed to court?” (See 6167). Complainants do not know the entirety of Alice Kaufman’s opinion because Concord redacted her response without any basis for doing so. The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

25. On January 12, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: “FW: Estabrook Road Litigation?”. (See 6158, 6172). Chris Whelan’s e-mail stated:

“SB: FYI re proposal to mediate Estabrook Road matter.” (See 6158). Michael Lawson opined: “Good to hear. Michael Lawson” (See 6172). Alice Kaufman opined: “Small progress, thanks.” (See 6172). The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

26. On February 7, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board, and stated: “Select Board: Here’s the answers from respondents on the Estabrook matter. Chris”. (See 6108). Concord failed to produce any of the board members’ responses. The Concord Select Board probably engaged in serial deliberation via electronic mail in response to Chris Whelan’s e-mail, in violation of the Open Meeting Law.

27. On February 21, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: “FW: Mediation screening - privileged and confidential”. (See 6062). Complainants do not know the contents of the e-mail because Concord redacted the e-mail without any basis for doing so. (See 6062-6063). Michael Lawson responded: “I can be available if needed.” (See 6042). The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

28. On May 9, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: “SB Meeting next Monday Concerning Estabrook?” (See 6151, 6176). Chris Whelan’s e-mail informed Tom McKean that Alice Kaufman, Michael Lawson, and Chris Whelan “spent all day in mediation yesterday on the Estabrook matter.” (See 6176). Chris Whelan’s e-mail stated further: “Although the board voted to authorize Mike and Alice to act on behalf of the board to settle the case, we think it would be beneficial to discuss some of the things we heard yesterday. Would you be willing to schedule a meeting next Monday, May 14 at 8:00 a.m. [Redacted] [Redacted] If that is agreeable, could Linda and Jane advise on whether they are available to meet next Monday. (We would meet first in open session, then adjourn to executive session to discuss this matter only) Thanks!” (See 6130, 6176). Jane Hotchkiss responded: “I will be there.” (See 6176). Tom McKean responded: “I will be there as well. Tom”. (See 6151). Concord redacted a portion of Chris Whelan’s electronic mail communication to the Select Board without any basis for doing so. Additionally, Concord failed to produce the responses of any other Select Board members. The Concord Select Board probably engaged in serial deliberation via electronic mail in response to Chris Whelan’s redacted e-mail, in violation of the Open Meeting Law. The Concord Select Board did meet in executive session on May 14, 2018, at eight o’clock in the morning. Although the meeting notice for the May 14, 2018, meeting referenced the Estabrook Road litigation, it failed to include topics that were evidently discussed in the executive session, such as mediation, settlement, and

the redacted portion of Chris Whelan's electronic mail. Complainants did not know that the Concord Select Board planned to discuss those topics in executive session on May 14, 2018, until Concord produced Chris Whelan's May 9, 2018, e-mail.

29. On May 14, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with Michael Lawson, Alice Kaufman, and Jane Hotchkiss, a quorum of the Concord Select Board regarding the subject: "FW: CR's Along Estabrook Road?" (See 6152, 6155). Complainants do not know what Chris Whelan communicated to them because Concord redacted his e-mail without any basis for doing so. (See 6152). Michael Lawson responded: "Thanks Chris. Mike". (See 6152). Jane Hotchkiss responded: "Hope it goes well tomorrow will keep My fingers crossed". (See 6152). Complainants do not know whether Alice Kaufman responded. The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

30. Additionally, Concord's production of documents on April 19, 2019, establishes that the Concord Select Board conducted illegal executive sessions concerning Estabrook Road on or about July 25, 2016 (see 5944-5946); September 20, 2016 (see 5944-5946); November 29, 2016 (see 5989); December 12, 2016 (see 5993); March 27, 2017 (see 5983); June 19, 2017 (see 5985); and October 16, 2017 (see 6110). On multiple occasions, the Concord Select Board deceitfully posted notices which stated it intended to discuss "litigation", or "ongoing litigation", "litigation strategy", or "land acquisition", when the Concord Select Board was actually discussing "Estabrook Road" more than a year before there was any litigation concerning Estabrook Road.

31. On or about July 25, 2016, the Concord Select Board conducted an executive session concerning "Estabrook Road". The Concord Select Board posted no notice that it would meet concerning "Estabrook Road". Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced an e-mail dated November 22, 2016, from Concord Select Board member Jane Hotchkiss to Concord Town Manager Chris Whelan. (See 5944-5946). The subject is: "RE: Estabrook Road". In the e-mail, Jane Hotchkiss asks: "Have there been any other legal engagements since July or the September update?" A review of the Concord Select Board's meeting notices for July 2016, shows no mention of a meeting concerning "Estabrook Road" in either open session or executive session. The Concord Select Board did enter executive session on July 25, 2016, to consider matters of land acquisition, improperly. In any event, complainants are not certain whether "Estabrook Road" was discussed in this particular executive session, because the Concord Select Board has never released the executive session minutes from July 25, 2016.

32. On or about September 20, 2016, the Concord Select Board conducted an executive session concerning “Estabrook Road”. The Concord Select Board posted no notice that it would meet concerning “Estabrook Road”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced an e-mail dated November 22, 2016, from Concord Select Board member Jane Hotchkiss to Concord Town Manager Chris Whelan. (See 5944-5946). The subject is: “RE: Estabrook Road”. In the e-mail, Jane Hotchkiss asks: “Have there been any other legal engagements since July or the September update?” A review of the Concord Select Board’s meeting notices for September 2016, shows no mention of a meeting concerning “Estabrook Road” in either open session or executive session. The Concord Select Board did enter executive session on September 20, 2016, to consider matters of land acquisition, improperly. In any event, complainants are not certain whether “Estabrook Road” was discussed in this particular executive session, because the Concord Select Board has never released the executive session minutes from September 20, 2016.

33. On November 29, 2016, the Concord Select Board conducted an executive session concerning “Estabrook”. The Concord Select Board posted no notice that it would meet concerning “Estabrook”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced e-mail correspondence dated November 21, 28-29, 2016, from Concord Town Manager Chris Whelan to Andrew Mara, Kevin D. Batt, and Andrew W. Fowler. (See 5989). The subject is: “FW: Meet with Select Board on Estabrook?”.

On November 21, 2016, Chris Whelan wrote:

“Andrew,
Would you please check with the Select Board to see if they are available to meet with town counsel on the Estabrook Road matter on Tuesday, November 29. Please remind members that the public hearing for the December 8 Special Town Meeting is also scheduled for 11/29 at 7:00 p.m.

I think having an executive session before the hearing, from 530 to 630 or from 600 to 645, would work. Would you please check and see if members are available? Thanks!

Chris”

On November 22, 2016, Concord Senior Administrative Assistant Andrew Mara e-mailed Concord Town Manager Chris Whelan, “RE: Estabrook Road”, to inform him that “Jane and Mike, and Steve can do Executive Session”. (See 5954).

On November 28, 2016, Kevin D. Batt wrote: “Chris, do we have a meeting confirmed for tomorrow? (See 5989).

On November 29, 2016, Chris Whelan wrote:

“Kevin,

Yes. The board is posted for an exec session discussion with town counsel at 6:00 p.m. in the Select Board room of the Town House. I had thought a 4:00 p.m. site visit before dark might be useful, but it sounds like rain all day tomorrow. Let me know if you'd like to see conditions on the ground and I will arrange to have someone meet you out there. Thanks!

Chris” (See 5989).

A review of the Concord Select Board’s meeting notice for November 29, 2016, shows no mention of a meeting concerning “Estabrook” or “Estabrook Road” in either open session or executive session. The Concord Select Board did enter executive session on November 29, 2016, to consider matters of litigation. There was no litigation concerning “Estabrook Road” until October 24, 2017, when Concord sued the complainants. The Concord Select Board has never released the minutes from its illegal executive session on November 29, 2016.

34. On December 12, 2016, the Concord Select Board conducted an executive session concerning “Estabrook”. The Concord Select Board posted no notice that it would meet concerning “Estabrook”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced e-mails dated November 17-18, 2016, between Concord Town Manager Chris Whelan and Concord town counsel Kevin D. Batt. (See 5993). The subject is: “RE: Meet with Select Board on Estabrook?”. Kevin D. Batt wrote: “Chris, would you prefer we come on a Monday? If so, we could make it on December 12. Or please let us know if another weekday would work and we can check our schedules.” (See 5993). Chris Whelan responded: “Kevin, Thanks for getting back to me. The meeting need not be a Monday, so Mike Lawson will check with members and offer a couple of dates that might work. I will be back to you when we have some dates to suggest. Thanks! Chris” (See 5993). A review of the Concord Select Board’s meeting notices for December 2016, shows no mention of a meeting concerning “Estabrook” in either open session or executive session. The Concord Select Board did enter executive session on December 12, 2016, “for the purposes of discussing ongoing litigation”, improperly. See the meeting notice, which is available at https://concordma.gov/AgendaCenter/ViewFile/Agenda/_12122016-4802. There was no litigation concerning “Estabrook” until October 24, 2017, when Concord sued the complainants. The Concord Select Board has never released the minutes from its illegal executive session on December 12, 2016.

35. On March 27, 2017, the Concord Select Board conducted an executive session concerning “Estabrook Updates”. The Concord Select Board posted no notice that it would meet concerning “Estabrook Updates”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced an e-mail dated March 13, 2017, from Concord Select Board member Jane Hotchkiss to Concord Select Board member Michael Lawson and Concord Town Manager Chris Whelan. (See 5983). The subject is: “Estabrook Updates”. Jane Hotchkiss wrote: “I met with Sally and Polly on Thursday and we’d like to tee a follow up discussion led by Delia on the recommendations the SB passed for our March 27 meeting. [Redacted]” (See 5983). A review of the Concord Select Board’s meeting notices for March 2017, shows no mention of a meeting concerning “Estabrook Updates” in either open session or executive session. The Concord Select Board did enter executive session on March 27, 2017, “for the purposes of discussing litigation strategy”, improperly. See the meeting notice, which is available at https://concordma.gov/AgendaCenter/ViewFile/Agenda/_03272017-5105. There was no litigation concerning “Estabrook” until October 24, 2017, when Concord sued the complainants. The Concord Select Board has never released the minutes from its illegal executive session on March 27, 2017.

36. On June 19, 2017, the Concord Select Board conducted an executive session “discussion of the Estabrook Road matter”. (See 5985). The Concord Select Board posted no notice that it would conduct an executive session “discussion of the Estabrook Road matter”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced e-mail correspondence dated May 31, 2017, with the subject: “RE: Available for Concord SB Meeting on Estabrook?” (See 5985). Concord’s counsel wrote to Concord Town Manager Chris Whelan: “Chris, Kevin and I are available on Monday, June 19th to discuss the Town’s next steps. An 8:30pm meeting? Sincerely, Andrew” (See 5985). Chris Whelan wrote to Concord Select Board member Jane Hotchkiss: “Jane Andrew and Kevin are available to join you on 6/19 for an exec session discussion of the Estabrook Road matter. I will ask Andrew Mara to share with Kevin and Andrew the four letters we received from abutters. Chris” (See 5985). Jane Hotchkiss responded: “Thank you Chris”. A review of the Concord Select Board’s meeting notices for June 19, 2017, shows no mention of any “discussion of the Estabrook Road matter” in either open session or executive session. The Concord Select Board did enter executive session on June 19, 2017, “to discuss litigation and land acquisition”, improperly. See the meeting notice, which is available at https://concordma.gov/AgendaCenter/ViewFile/Agenda/_06192017-5285. There was no litigation concerning “the Estabrook Road matter” until October 24, 2017, when Concord sued the complainants. The Concord Select Board has never released the minutes from its illegal executive session on June 19, 2017.

37. On October 16, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with Concord Select Board members Alice Kaufman, Jane Hotchkiss, Michael Lawson, Steven Ng, and Thomas McKean regarding the subject: “Draft lawsuit from Mintz Levin on Estabrook Road”. Although Concord redacted a portion of the e-mail without any basis for doing so, the unredacted portion states: “We are scheduled for an exec session tonight, so we can discuss at that time.” (See 6110).

38. “Except in an emergency, in addition to any notice otherwise required by law, a public body shall post notice of every meeting at least 48 hours prior to such meeting, excluding Saturdays, Sundays and legal holidays. In an emergency, a public body shall post notice as soon as reasonably possible prior to such meeting. Notice shall be printed in a legible, easily understandable format and shall contain the date, time and place of such meeting and a listing of topics that the chair reasonably anticipates will be discussed at the meeting.” G. L. c. 30A, § 20 (b).

39. “Except in an emergency, public bodies shall file meeting notices sufficiently in advance of a public meeting to permit posting of the notice at least 48 hours in advance of the public meeting, excluding Saturdays, Sundays and legal holidays, in accordance with M.G.L. c. 30A, § 20. In an emergency, the notice shall be posted as soon as reasonably possible prior to such meeting.” 940 Code Mass. Regs. § 29.03 (1) (a).

40. “Meeting notices shall be printed or displayed in a legible, easily understandable format and shall contain the date, time and place of such meeting, and a listing of topics that the chair reasonably anticipates will be discussed at the meeting. The list of topics shall have sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting.” 940 Code Mass. Regs. § 29.03 (1) (b).

41. The Concord Select Board failed on multiple occasions to provide any notice to the public, or to complainants, that it would discuss Estabrook Road, or any topic related to Estabrook Road, in executive session, in violation of G. L. c. 30A, § 20 (b), 940 Code Mass. Regs. § 29.03 (1) (a), (b); G. L. c. 30A, § 21.

42. The complainants believe the Concord Select Board committed repeated intentional violations of the Open Meeting Law. See G. L. c. 30A, § 18. The Concord Select Board acted with specific intent to violate the law and/or with deliberate ignorance of the law’s requirements. See 940 Code Mass. Regs. § 29.02 (a), (b). For more than a year before Concord sued complainants in the Land Court, the Concord Select Board and Concord’s town manager clearly discussed Estabrook Road in multiple executive sessions, without notice to any of the parties that it sued. The Concord Select Board and Concord’s town manager actively concealed the fact that they were conducting these secret meetings. They

did so by posting meeting notices which represented that they planned to discuss “litigation”, “litigation strategy”, or “ongoing litigation”, when, in fact, there was no litigation over Estabrook Road at the time. Concord conspired to sue, and in fact did sue, the complainants without providing them with any prior notice. Following Concord’s commencement of this case, the Concord Select Board has repeatedly deliberated secretly by electronic mail, and without notice to the complainants.

(See **EXHIBIT “A”**).

The complainants’ Open Meeting Law Complaint, dated May 16, 2019, seeks the following relief:

1. Declare the executive sessions invalid because they failed to comply with the Open Meeting Law.
2. Acknowledge that all matters within the executive sessions are public.
3. Release all executive session minutes and audiovisual recordings from the executive sessions, and unredacted copies of all cited electronic mail correspondence forthwith.
4. Acknowledge that it repeatedly intentionally violated the Open Meeting Law.
5. Such other and further relief as may be appropriate.

(See **EXHIBIT “A”**).

The Open Meeting Law Complaint detailed how the Concord Select Board committed twenty-one separate violations of the Open Meeting Law. On June 6, 2019, the Concord Select Board responded to the Open Meeting Law Complaint. In response to some of the complainants’ allegations, the board concedes that it violated the Open Meeting Law yet attempts to minimize the significance of its violations. For some of the complainants’ allegations, the board acknowledges that it communicated by e-mail yet denies that its e-mail was a deliberation, or alternatively denies that e-mail communication was among a quorum of board members. Some of the complainants’ allegations involve in-person illegal executive sessions on various dates, which the board also denies. (See **EXHIBIT “B”**).

The Concord Select Board's Concessions of Open Meeting Law Violations

“He should have refrained from expressing his opinion to other Board members, but his infraction is understandable”. (See Response ¶ 1; March 29-30, 2016; OML Compl. ¶ 12).

“Mr. Lawson should have been more careful to confine his two-word response to Ms. Reiss's e-mail to her and the Town Manager rather than replying to all email recipients.” (See Response ¶ 2; April 6, 2016; OML Compl. ¶ 13).

“The Board members should not have shared any response to a quorum of the Board outside of a properly-noticed executive session.” (See Response ¶ 3; August 2, 2016; OML Compl. ¶ 14);

“Town Manager Chris Whelan transmitted information protected by attorney client and work product privilege to the Select Board. Select Board member Tom McKean made an inconsequential comment in response, copied to a quorum of the Board.” (See Response ¶ 5; September 12, 2017; OML Compl. ¶ 16).

“On November 16, 2017, Board members exchanged emails to determine whether all members had received a letter. These communications largely involve confirming the distribution of a document to the Board, which is akin to a procedural communication exempt from the definition of deliberation. G.L. c. 30A, § 18. Redacted material from Mr. Lawson's email involves advice he had requested from counsel. Mr. Lawson's report to the Board that he had sought such advice from counsel is at most a minor infraction.” (See Response ¶ 10; November 16, 2017; OML Compl. ¶ 23).

“On January 12, 2018, Mr. Whelan forwarded an email from Town Counsel concerning the Estabrook Road litigation. Mr. Lawson and Ms. Kaufman each responded with words of acknowledgment of the message received, copying a quorum of the Board. Their comments were not substantive, and at most, are a minor infraction of the OML.” (See Response ¶ 12; January 12, 2018; OML Compl. ¶ 25).

The Concord Select Board's Denials of Open Meeting Law Violations

The June 9, 2017, Open Meeting Law violation:

“15. On June 9, 2017, Concord Select Board members Jane Hotchkiss, Alice Kaufman, Michael Lawson, Steven Ng, and Thomas McKean communicated by electronic mail in response to an e-mail from Concord Natural Resources Director Delia Kaye to Concord Town Manager Chris Whelan concerning Neil Rasmussen's sign posted along Estabrook Road notifying trail users of leash restrictions on his property. Complainants do not know what opinion Jane Hotchkiss expressed to the Concord Select Board because Concord redacted her response without any basis for doing so. The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. (See 5972, 5981).” (See OML Compl. ¶ 15).

The board's denial of the June 9, 2017, Open Meeting Law violation:

"As follow up to an email from the Town Manager notifying the Select Board of the subject matter intended for an upcoming executive session, the Board Chair Jane Hotchkiss further clarified the subject of the upcoming executive session. This email falls within the exception to the definition of "deliberation" as a procedural notice to Board members of the subject to be deliberated upon in the executive session. G.L. c. 30A, §18." (See Response ¶ 4; June 9, 2017; OML Compl. ¶ 15).

The complainants' response:

The e-mail does not fall within the exception to the definition of deliberation. Complainants still do not know what opinion Hotchkiss expressed because the entirety of Revised 5981 is still redacted. (On June 19, 2019, the board produced revised versions of the redacted records cited in the Open Meeting Law Complaint. Those records are still heavily redacted. Copies of the revised redacted records cited in this Complaint are attached hereto as **EXHIBIT "C"**).

The September 12, 2017, Open Meeting Law violation:

"16. On September 12, 2017, Concord Select Board members Thomas McKean, Alice Kaufman, Jane Hotchkiss, Michael Lawson, Steven Ng, communicated by electronic mail in response to an e-mail from Concord Town Manager Chris Whelan concerning the Estabrook Road draft complaint. Thomas McKean opined: "Timely. Tom". Michael Lawson responded as well, but complainants do not know what opinion Michael Lawson expressed because Concord redacted his response without any basis for doing so. The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. (See 6082, 6159, 6175)." (See OML Compl. ¶ 16)

The board's denial of the September 12, 2017, Open Meeting Law violation:

"On September 12, 2017, Town Manager Chris Whelan transmitted information protected by attorney client and work product privilege to the Select Board. Select Board member Tom McKean made an inconsequential comment in response, copied to a quorum of the Board. Mr. Lawson responded to Mr. Whelan without copying any other Board members and did not violate the OML by doing so. No other Board members responded." (See Response ¶ 5; September 12, 2017; OML Compl. ¶ 16).

The complainants' response:

The fact that Mr. Lawson may have responded to Mr. Whelan without copying any other Board member, where the response was part of a thread among all of the board members, does not excuse the board's conduct of a deliberation and meeting which was not open to the public. Moreover, Mr. McKean's comment was not inconsequential. "[I]n recognition that the

overarching purpose of the open meeting law is to ensure transparency in governmental decision-making, the Legislature specified that no opinion of a board member could be expressed in any documents circulated to a quorum prior to an open meeting.” Boelter v. Board of Selectmen of Wayland, 479 Mass. 233, 241 (2018).

The October 19, 2017, Open Meeting Law violation:

“17. On October 19, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with Concord Select Board members Alice Kaufman, Jane Hotchkiss, Michael Lawson, Steven Ng, and Thomas McKean regarding the subject: “CONFIDENTIAL Draft letter to accompany complaint.” Chris Whelan stated: “Mike and SB, Would you please review this draft letter and let me know individually if you have any concerns. Kevin is hoping to send it out today. Chris”. (See 6179).

18. Concord failed to produce any of the board members’ responses. The Concord Select Board probably engaged in serial deliberation via electronic mail in response to Chris Whelan’s e-mail request for individual responses from each member of the Concord Select Board, on dates between October 19-24, 2017. Concord town counsel did send a letter to the Rasmussens’ counsel dated October 24, 2017, the same date on which Concord filed a complaint in the Land Court against the Rasmussens, Harvard University, and the complainants. (See 5622).

The board’s denial of the October 19, 2017, Open Meeting Law violation:

“On October 19, 2017, Mr. Whelan distributed a letter drafted by Town Counsel seeking input on the draft from Board members, asking them to respond to him individually. No electronic communications were circulated among a quorum of Board members and no violation of the OML occurred.” (See Response ¶ 6; October 19, 2017; OML Compl. ¶¶ 17-18)

The complainants’ response:

The complainants do not trust the board’s representation that no electronic communications were circulated among a quorum of board members. The board has not produced the members’ individual responses to the letter. Nor has the board stated that no board members responded to Whelan individually. The Attorney General should order the board to produce the board members’ individual responses to Mr. Whelan’s request. There was very likely an instance of prohibited serial deliberation on October 19, 2017, which warrants further investigation by the Attorney General.

“[A] public body may not engage in a serial deliberation, whereby a quorum communicates in a non-contemporaneous manner outside of a meeting on a matter within the public body’s jurisdiction.” OML 2018-71 at 4. See McCrea v. Flaherty, 71 Mass. App. Ct. 637, 648-649 (2008).

The October 24-26, 2017, Open Meeting Law violation:

“20. On October 24-26, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with Concord Select Board members Alice Kaufman, Jane Hotchkiss, Michael Lawson, Steven Ng, and Thomas McKean regarding the subject: “FW: Estabrook Road Complaint Filed Today.” Concord redacted the contents of Chris Whelan’s electronic mail to the Concord Select Board. (See 6117-6118). Alice Kaufman opined: “This is an unusual press release in that it reads as an op-ed. It asserts opinion that may serve to inflame the arguments with the abutters that I do not think is served in the Concord Journal. It is customary to use attribution for statements of interpretation or beliefs.” (See 6092, 6117). Chris Whelan replied that he would “prepare something and will review it with Jane.” (See 6117). Jane Hotchkiss opined: “I agree and look forward to your rewrite.” (See 6117). Alice Kaufman opined: “Chris Please see my comments to the draft. Take them or not as you see fit. I do not wish to fan flames at this point and suggest we be neutral in the language for the news release. It is probably not really necessary to wordsmith this further but a neutral written statement will have a lower probability of being misconstrued when Henry or someone else writes the story. Your quote looks good and I agree that we should delete the reference to call counsel. Should you receive calls, you can advise the caller who to contact. I would not be surprised if you receive a call from the Globe and perhaps local TV too. Alice”. (See 6056, 6096). Chris Whelan replied: “Thanks Alice! I have accepted your changes in the document and forwarded it to Erin requesting that she try to get it out today. Chris”. (See 6096). Jane Hotchkiss opined: “Thanks for moving this out Chris - we will undoubtedly see some response on Monday”. (See 6096). The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

The board’s denial of the October 24-26, 2017, Open Meeting Law violation:

“On October 24, 2017, Mr. Whelan circulated a writing protected by attorney client and work product privilege to the Board. In response, Board member Alice Kaufman responded individually to the Town Manager without deliberation among a quorum of the Board. The Town Manager in turn replied to Ms. Kaufman, and copied Board Chair Jane Hotchkiss. Ms. Hotchkiss then replied. Ms. Kaufman and Mr. Whelan exchanged additional emails to revise the draft press release prepared by counsel. At no point did a quorum of the Board deliberate on the matter discussed in the email exchange. There was no violation of the OML.” (See Response ¶ 7; October 24-26, 2017; OML Compl. ¶ 20).

The complainants’ response:

For the reasons stated in OML Compl. ¶ 20, the board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

“If you don’t have a quorum, my personal view is, send everybody home, get the meeting scheduled again.” Michael Lawson, Concord Effective Governance Workshop, September 23, 2017, at 2:17:14, available at

https://www.youtube.com/watch?v=rFtoUUXMUz8&feature=youtu.be&list=PL1TTzrWEKOOm_KQO-AxcxJC6dk-PwKiIU&t=7896

“The new policy is the only thing you can discuss if you don’t have a quorum is scheduling a new meeting. That’s probably smart.” Michael Lawson, Concord Effective Governance Workshop, September 23, 2017, at 2:19:15.

The October 26, 2017, Open Meeting Law violation:

“21. On October 26, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with Concord Select Board members Jane Hotchkiss, Alice Kaufman, Michael Lawson, Steven Ng, and Thomas McKean regarding the subject: “Re: Concord – Estabrook Road”. Chris Whelan’s electronic mail stated: “SB: Attached is Kevin Batt’s letter to Harvard’s general counsel [Redacted].” Jane Hotchkiss opined: “Might be politic to cc Andy Biewinder (so?)” (See 6177). The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.”

The board’s denial of the October 26, 2017, Open Meeting Law violation:

“On October 26, 2017, in response to a draft letter from Town Counsel circulated to the Board by Mr. Whelan, Ms. Hotchkiss suggested an additional name be copied on the letter. This communication does not rise to the level of “deliberation” and should be regarded as an administrative procedural communication.” (See Response ¶ 8; October 26, 2017; OML Compl. ¶ 21).

The complainants’ response:

This communication was a deliberation. It should not be regarded as an administrative procedural communication.

The November 8, 2017, Open Meeting Law violation:

“22. On November 8, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: “Re: Live Estabrook Webcams”. Chris Whelan’s electronic mail stated: “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 on their privacy. Chris [http://www.saveourheritage.com/Estabrook Road.htm](http://www.saveourheritage.com/Estabrook_Road.htm)”. (See 6107). Michael Lawson responded, but complainants do not know what opinion Michael Lawson expressed because Concord redacted his response without any basis for doing so. The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.”

The board's denial of the November 8, 2017, Open Meeting Law violation:

"On November 8, 2017, in response to an email to the Board from Mr. Whelan, Mr. Lawson responded individually to Mr. Whelan. No other Board member was copied on Mr. Lawson's email to Mr. Whelan. There was no deliberation among a quorum of the Board and no OML violation by Mr. Lawson." (See Response ¶ 9; November 8, 2017; OML Compl. ¶ 22).

The complainants' response:

For the reasons stated in OML Compl. ¶ 22, the board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. Complainants still do not know what opinion Lawson expressed because the entirety of Revised 6107 is still redacted.

The January 5, 2018, Open Meeting Law violation:

"24. On January 5, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: "FW: FY18 Supplemental Appropriation – Legal Expenses", in which he discussed "a warrant article requesting a supplemental appropriation for legal service expenses in the current fiscal year. . . . The primary issue is the Estabrook matter, and there has been some interest in settlement. . . . Would you please let me or Jane know individually if you agree." (See 6040-6041). Michael Lawson opined: "Chris I support your point of view. Your remark about some interest in settlement surprised me. I've heard nothing. Mike" (See 6040). Chris Whelan responded. Then Michael Lawson responded, but complainants do not know what opinion Michael Lawson expressed because Concord redacted his response without any basis for doing so. Thomas McKean opined: "I agree with Chris's analysis and see little advantage in raising an issue that is likely to get sidetracked into a debate on Estabrook." (See 6136). Jane Hotchkiss opined: "Agreed!" (See 6136). Alice Kaufman opined: "I am glad to hear that there is some positive movement towards settlement regarding Estabrook. Have there been further conversations since our attorney's reached out to Mintz Levin and the abutters just before the holidays? [Redacted] I trust that you and Kerry have talked through our needs to support the various active cases and have determined that there is no need for a supplemental appropriations for legal services. Do we have a Plan B should we not reach agreement on Estabrook and proceed to court?" (See 6167). Complainants do not know the entirety of Alice Kaufman's opinion because Concord redacted her response without any basis for doing so. The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

The board's denial of the January 5, 2018, Open Meeting Law violation:

"On January 5, 2018, Town Manager Chris Whelan sent an email to the Board, providing information on the then current legal budget and expenditures and seeking direction for staff on whether to prepare a draft warrant article for a supplemental appropriation for legal expenses, asking that Board members respond individually to him or the Chair Jane Hotchkiss, so as to avoid any violation of the OML. Board members Lawson, McKean and Kaufman all responded

and adhered to Mr. Whelan's request to respond individually. The warrant, including the article to be drafted, would be discussed in open session at an upcoming meeting. No quorum of the Board deliberated in these email exchanges, all of which engaged with the Town Manager individually (with copies in some cases to the Chair) on matters within Mr. Whelan's purview. There was no OML violation." (See Response ¶ 11; January 5, 2018; OML Compl. ¶ 24).

The complainants' response:

For the reasons stated in OML Compl. ¶ 24, the board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. Complainants still do not know what opinion Lawson expressed because the Revised 6040 is still redacted.

The February 7, 2018, Open Meeting Law violation:

"26. On February 7, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board, and stated: "Select Board: Here's the answers from respondents on the Estabrook matter. Chris". (See 6108). Concord failed to produce any of the board members' responses. The Concord Select Board probably engaged in serial deliberation via electronic mail in response to Chris Whelan's e-mail, in violation of the Open Meeting Law."

The board's denial of the February 7, 2018, Open Meeting Law violation:

"On February 7, 2018, Mr. Whelan sent to Board members by email the Answer, Affirmative Defenses and Counterclaims from defendants in the Estabrook Road litigation. No Board members responded, no deliberation took place, and no violation of the OML occurred." (See Response ¶ 26; February 7, 2018; OML Compl. ¶ 26).

The complainants' response:

This matter warrants further investigation by the Attorney General to determine the accuracy of the board's representations.

The February 21, 2018, Open Meeting Law violation:

"27. On February 21, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: "FW: Mediation screening - privileged and confidential". (See 6062). Complainants do not know the contents of the e-mail because Concord redacted the e-mail without any basis for doing so. (See 6062-6063). Michael Lawson responded: "I can be available if needed." (See 6042). The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public."

The board's denial of the February 21, 2018, Open Meeting Law violation:

“On February 21, 2018, Mr. Whelan forwarded an email from Town Counsel concerning mediation screening ordered by the Land Court, including a date for the screening. Mr. Lawson responded to Mr. Whelan without copying other Board members and advised of his availability for the mediation screening date. No deliberation among a Board quorum and no violation of the OML occurred. Because Mr. Lawson’s email advised about a scheduling matter, it would not have fallen within the definition of deliberation even if a quorum of the Board had been copied.” (See Response ¶ 14; February 21, 2018; OML Compl. ¶ 27).

The complainants’ response:

The content of Revised 6062-6063 is still redacted, and there is no basis for the redaction. If the e-mail communications were merely concerning a scheduling matter, as the board purports, then the board should have no concerns about producing unredacted copies of those documents. Because the board continues to redact these e-mails, this matter warrants further investigation by the Attorney General to determine the accuracy of the board’s representations.

The May 9, 2018, Open Meeting Law violation:

“28. On May 9, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: “SB Meeting next Monday Concerning Estabrook?” (See 6151, 6176). Chris Whelan’s e-mail informed Tom McKean that Alice Kaufman, Michael Lawson, and Chris Whelan “spent all day in mediation yesterday on the Estabrook matter.” (See 6176). Chris Whelan’s e-mail stated further: “Although the board voted to authorize Mike and Alice to act on behalf of the board to settle the case, we think it would be beneficial to discuss some of the things we heard yesterday. Would you be willing to schedule a meeting next Monday, May 14 at 8:00 a.m. [Redacted] [Redacted] If that is agreeable, could Linda and Jane advise on whether they are available to meet next Monday. (We would meet first in open session, then adjourn to executive session to discuss this matter only) Thanks!” (See 6130, 6176). Jane Hotchkiss responded: “I will be there.” (See 6176). Tom McKean responded: “I will be there as well. Tom”. (See 6151). Concord redacted a portion of Chris Whelan’s electronic mail communication to the Select Board without any basis for doing so. Additionally, Concord failed to produce the responses of any other Select Board members. The Concord Select Board probably engaged in serial deliberation via electronic mail in response to Chris Whelan’s redacted e-mail, in violation of the Open Meeting Law. The Concord Select Board did meet in executive session on May 14, 2018, at eight o’clock in the morning. Although the meeting notice for the May 14, 2018, meeting referenced the Estabrook Road litigation, it failed to include topics that were evidently discussed in the executive session, such as mediation, settlement, and the redacted portion of Chris Whelan’s electronic mail. Complainants did not know that the Concord Select Board planned to discuss those topics in executive session on May 14, 2018, until Concord produced Chris Whelan’s May 9, 2018, e-mail.”

The board’s denial of the May 9, 2018, Open Meeting Law violation:

“On May 9, 2018, Mr. Whelan wrote to the Board reporting that mediation had taken place, including the attendance of Board members Kaufman and Lawson, as previously authorized by the Board. He then asked about availability of the Board to meet to discuss information learned at the mediation session. Board members confirmed their availability. No opinions were expressed. The Board’s email communications are exempt from the definition of deliberation as “scheduling information.” No OML violation occurred.” (See Response ¶ 15; May 9, 2018; OML Compl. ¶ 28).

The complainants’ response:

For the reasons stated in OML Compl. ¶ 28, the board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. Contrary to the board’s assertion, the e-mail communications were not simply “scheduling information.” Revised 6130 and 6176 are still redacted, and there is no basis for the redaction. If the e-mail communications were merely concerning a scheduling matter, as the board purports, then the board should have no concerns about producing unredacted copies of those documents. Because the board continues to redact these e-mails, this matter warrants further investigation by the Attorney General to determine the accuracy of the board’s representations.

The May 14, 2018, Open Meeting Law violation:

“29. On May 14, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with Michael Lawson, Alice Kaufman, and Jane Hotchkiss, a quorum of the Concord Select Board regarding the subject: “FW: CR’s Along Estabrook Road?” (See 6152, 6155). Complainants do not know what Chris Whelan communicated to them because Concord redacted his e-mail without any basis for doing so. (See 6152). Michael Lawson responded: “Thanks Chris. Mike”. (See 6152). Jane Hotchkiss responded: “Hope it goes well tomorrow will keep My fingers crossed”. (See 6152). Complainants do not know whether Alice Kaufman responded. The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.”

The board’s denial of the May 14, 2018, Open Meeting Law violation:

“On May 14, 2018, Mr. Whelan transmitted information protected by attorney client and work product privileges to Mr. Lawson and Ms. Kaufman, copying Chair Hotchkiss. The responses from Mr. Lawson and Ms. Hotchkiss were inconsequential and non-substantive acknowledgments of Mr. Whelan’s email, and do not rise to the level of deliberation on public business. There was no OML violation.” (See Response ¶ 16; May 14, 2018; OML Compl. ¶ 29).

The complainants’ response:

For the reasons stated in OML Compl. ¶ 29, the board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the

public. Complainants still do not know what Whelan communicated because Revised 6152 is still redacted.

The July 25, 2016, Open Meeting Law violation:

“30. Additionally, Concord’s production of documents on April 19, 2019, establishes that the Concord Select Board conducted illegal executive sessions concerning Estabrook Road on or about July 25, 2016 (see 5944-5946); September 20, 2016 (see 5944-5946); November 29, 2016 (see 5989); December 12, 2016 (see 5993); March 27, 2017 (see 5983); June 19, 2017 (see 5985); and October 16, 2017 (see 6110). On multiple occasions, the Concord Select Board deceitfully posted notices which stated it intended to discuss “litigation”, or “ongoing litigation”, “litigation strategy”, or “land acquisition”, when the Concord Select Board was actually discussing “Estabrook Road” more than a year before there was any litigation concerning Estabrook Road.

31. On or about July 25, 2016, the Concord Select Board conducted an executive session concerning “Estabrook Road”. The Concord Select Board posted no notice that it would meet concerning “Estabrook Road”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced an e-mail dated November 22, 2016, from Concord Select Board member Jane Hotchkiss to Concord Town Manager Chris Whelan. (See 5944-5946). The subject is: “RE: Estabrook Road”. In the e-mail, Jane Hotchkiss asks: “Have there been any other legal engagements since July or the September update?” A review of the Concord Select Board’s meeting notices for July 2016, shows no mention of a meeting concerning “Estabrook Road” in either open session or executive session. The Concord Select Board did enter executive session on July 25, 2016, to consider matters of land acquisition, improperly. In any event, complainants are not certain whether “Estabrook Road” was discussed in this particular executive session, because the Concord Select Board has never released the executive session minutes from July 25, 2016.”

The board failed to respond the July 25, 2016, Open Meeting Law violation. The board’s response ¶ 17, appears to deny an Open Meeting Law violation on November 22, 2016. Complainants did not allege a violation on November 22, 2016. They alleged a violation on July 25, 2016. (See OML Compl. ¶¶ 30-31).

The September 20, 2016, Open Meeting Law violation:

“32. On or about September 20, 2016, the Concord Select Board conducted an executive session concerning “Estabrook Road”. The Concord Select Board posted no notice that it would meet concerning “Estabrook Road”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced an e-mail dated November 22, 2016, from Concord Select Board member Jane Hotchkiss to Concord Town Manager Chris Whelan. (See 5944-5946). The subject is: “RE: Estabrook Road”. In the e-mail, Jane Hotchkiss asks: “Have there been any other legal engagements since July or the September update?” A review of the Concord Select Board’s meeting notices for September 2016, shows no mention of a meeting concerning “Estabrook Road” in either open session or

executive session. The Concord Select Board did enter executive session on September 20, 2016, to consider matters of land acquisition, improperly. In any event, complainants are not certain whether “Estabrook Road” was discussed in this particular executive session, because the Concord Select Board has never released the executive session minutes from September 20, 2016.

The November 29, 2016, Open Meeting Law violation:

“33. On November 29, 2016, the Concord Select Board conducted an executive session concerning “Estabrook”. The Concord Select Board posted no notice that it would meet concerning “Estabrook”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced e-mail correspondence dated November 21, 28-29, 2016, from Concord Town Manager Chris Whelan to Andrew Mara, Kevin D. Batt, and Andrew W. Fowler. (See 5989). The subject is: “FW: Meet with Select Board on Estabrook?”.

On November 21, 2016, Chris Whelan wrote:

“Andrew,
Would you please check with the Select Board to see if they are available to meet with town counsel on the Estabrook Road matter on Tuesday, November 29. Please remind members that the public hearing for the December 8 Special Town Meeting is also scheduled for 11/29 at 7:00 p.m. I think having an executive session before the hearing, from 530 to 630 or from 600 to 645, would work. Would you please check and see if members are available? Thanks!

Chris”

On November 22, 2016, Concord Senior Administrative Assistant Andrew Mara e-mailed Concord Town Manager Chris Whelan, “RE: Estabrook Road”, to inform him that “Jane and Mike, and Steve can do Executive Session”. (See 5954).

On November 28, 2016, Kevin D. Batt wrote: “Chris, do we have a meeting confirmed for tomorrow? (See 5989).

On November 29, 2016, Chris Whelan wrote:

“Kevin,
Yes. The board is posted for an exec session discussion with town counsel at 6:00 p.m. in the Select Board room of the Town House. I had thought a 4:00 p.m. site visit before dark might be useful, but it sounds like rain all day tomorrow. Let me know if you'd like to see conditions on the ground and I will arrange to have someone meet you out there. Thanks!

Chris” (See 5989).

A review of the Concord Select Board’s meeting notice for November 29, 2016, shows no mention of a meeting concerning “Estabrook” or “Estabrook Road” in either open session or executive session. The Concord Select Board did enter executive session on November 29, 2016, to consider matters of litigation. There was no litigation concerning “Estabrook Road” until October 24, 2017, when Concord sued the complainants. The Concord Select Board has never released the minutes from its illegal executive session on November 29, 2016.

The December 12, 2016, Open Meeting Law violation:

“34. On December 12, 2016, the Concord Select Board conducted an executive session concerning “Estabrook”. The Concord Select Board posted no notice that it would meet concerning “Estabrook”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced e-mails dated November 17-18, 2016, between Concord Town Manager Chris Whelan and Concord town counsel Kevin D. Batt. (See 5993). The subject is: “RE: Meet with Select Board on Estabrook?”. Kevin D. Batt wrote: “Chris, would you prefer we come on a Monday? If so, we could make it on December 12. Or please let us know if another weekday would work and we can check our schedules.” (See 5993). Chris Whelan responded: “Kevin, Thanks for getting back to me. The meeting need not be a Monday, so Mike Lawson will check with members and offer a couple of dates that might work. I will be back to you when we have some dates to suggest. Thanks! Chris” (See 5993). A review of the Concord Select Board’s meeting notices for December 2016, shows no mention of a meeting concerning “Estabrook” in either open session or executive session. The Concord Select Board did enter executive session on December 12, 2016, “for the purposes of discussing ongoing litigation”, improperly. See the meeting notice, which is available at https://concordma.gov/AgendaCenter/ViewFile/Agenda/_12122016-4802. There was no litigation concerning “Estabrook” until October 24, 2017, when Concord sued the complainants. The Concord Select Board has never released the minutes from its illegal executive session on December 12, 2016.”

The March 27, 2017, Open Meeting Law violation:

“35. On March 27, 2017, the Concord Select Board conducted an executive session concerning “Estabrook Updates”. The Concord Select Board posted no notice that it would meet concerning “Estabrook Updates”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced an e-mail dated March 13, 2017, from Concord Select Board member Jane Hotchkiss to Concord Select Board member Michael Lawson and Concord Town Manager Chris Whelan. (See 5983). The subject is: “Estabrook Updates”. Jane Hotchkiss wrote: “I met with Sally and Polly on Thursday and we’d like to tee a follow up discussion led by Delia on the recommendations the SB passed for our March 27 meeting. [Redacted]” (See 5983). A review of the Concord Select Board’s meeting notices for March 2017, shows no mention of a meeting concerning “Estabrook

Updates” in either open session or executive session. The Concord Select Board did enter executive session on March 27, 2017, “for the purposes of discussing litigation strategy”, improperly. See the meeting notice, which is available at https://concordma.gov/AgendaCenter/ViewFile/Agenda/_03272017-5105.

There was no litigation concerning “Estabrook” until October 24, 2017, when Concord sued the complainants. The Concord Select Board has never released the minutes from its illegal executive session on March 27, 2017.”

The June 19, 2017, Open Meeting Law violation:

“36. On June 19, 2017, the Concord Select Board conducted an executive session “discussion of the Estabrook Road matter”. (See 5985). The Concord Select Board posted no notice that it would conduct an executive session “discussion of the Estabrook Road matter”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced e-mail correspondence dated May 31, 2017, with the subject: “RE: Available for Concord SB Meeting on Estabrook?” (See 5985). Concord’s counsel wrote to Concord Town Manager Chris Whelan: “Chris, Kevin and I are available on Monday, June 19th to discuss the Town’s next steps. An 8:30pm meeting? Sincerely, Andrew” (See 5985). Chris Whelan wrote to Concord Select Board member Jane Hotchkiss: “Jane Andrew and Kevin are available to join you on 6/19 for an exec session discussion of the Estabrook Road matter. I will ask Andrew Mara to share with Kevin and Andrew the four letters we received from abutters. Chris” (See 5985). Jane Hotchkiss responded: “Thank you Chris”. A review of the Concord Select Board’s meeting notices for June 19, 2017, shows no mention of any “discussion of the Estabrook Road matter” in either open session or executive session. The Concord Select Board did enter executive session on June 19, 2017, “to discuss litigation and land acquisition”, improperly. See the meeting notice, which is available at https://concordma.gov/AgendaCenter/ViewFile/Agenda/_06192017-5285. There was no litigation concerning “the Estabrook Road matter” until October 24, 2017, when Concord sued the complainants. The Concord Select Board has never released the minutes from its illegal executive session on June 19, 2017.

The October 16, 2017, Open Meeting Law violation:

“37. On October 16, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with Concord Select Board members Alice Kaufman, Jane Hotchkiss, Michael Lawson, Steven Ng, and Thomas McKean regarding the subject: “Draft lawsuit from Mintz Levin on Estabrook Road”. Although Concord redacted a portion of the email without any basis for doing so, the unredacted portion states: “We are scheduled for an exec session tonight, so we can discuss at that time.” (See 6110).

The board’s denial of the September 20, 2016, November 29, 2016, December 12, 2016, March 27, 2017, June 19, 2017, and October 16, 2017, Open Meeting Law violations:

“The OML Complaint alleges inadequate notice on meeting agendas for the above dates that the Board would enter into executive session to discuss litigation concerning Estabrook Road, specifying only litigation as the subject of the executive sessions. In a number of executive sessions in late 2016 and 2017, the Board deliberated on how to resolve a longstanding dispute with landowners along the unpaved portion of Estabrook Road regarding public access to the Road, including whether it would be necessary to initiate litigation against the landowners. The Town eventually commenced a lawsuit against your clients and others on October 24, 2017. Thus, on each of the above dates, except September 20, 2016, counsel met with the Board to review litigation strategy concerning Estabrook Road.

Prior to commencing litigation, the Board was under no obligation to telegraph to potential defendants its intentions by further describing the subject matter of the litigation. Stating the subject matter of the litigation, prior to its commencement, would reveal information that would “compromis[e] the purpose for which the executive session was called.” G.L. c. 30A, §21(b)(3). It is, indeed, astonishing that counsel for litigants would espouse the view that public entities are required to give advance notice to potential parties to litigation prior to service of a judicial complaint - a rule that would generally serve to tip the balance of justice against public interests and in favor of private interests. The OML was not intended to do so.”

The complainants’ response:

For the reasons stated in OML Compl. ¶¶ 30-37, the board conducted illegal executive sessions concerning Estabrook Road, and on multiple occasions deceitfully posted notices which stated it intended to discuss “litigation”, or “ongoing litigation”, “litigation strategy”, or “land acquisition”, when the Concord Select Board was actually discussing “Estabrook Road” more than a year before there was any litigation concerning Estabrook Road. The board’s reliance on G. L. c. 30A, § 21 (b) (3), is misplaced, both procedurally and substantively. The board suggests that it is astonishing that litigants would espouse the view that public entities are required to give advance notice to potential parties to litigation prior to service of a judicial complaint.

In reality, the board’s view is astonishing. The board’s view suggests that it can plot secretly to sue private citizens without notice. The board’s view suggests that it can develop and implement public policy in secret without providing any notice to the public or to the private citizens who will be most affected. The board’s view suggests that it can engage in deception in an attempt to bypass the requirements of the Open Meeting Law.

“In particular, we interpret the open meeting law as continuing to be a statute ‘designed to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based.’ Ghiglione v. School Comm. of Southbridge, 376 Mass. 70, 72 (1978). And the new version of the statute does not alter our belief that ‘[i]t is essential to a democratic form of government that the public have broad access to the decisions made by its elected officials and to the way in which the decisions are reached.’ Foudy v. Amherst-Pelham Regional Sch. Comm., 402 Mass. 179, 184 (1988).” Revere v. Massachusetts Gaming Comm’n, 476 Mass. 591, 610 (2017).

Hon. Maura T. Healey
July 18, 2019
Page 29

“A precise statement of the reason for convening in executive session is necessary under the open meeting law because that is the only notification given to the public that the [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.” District Attorney for the N. Dist. v. School Comm. of Wayland, 455 Mass. 561, 567 (2009).

WHEREFORE, the complainants respectfully request that the Attorney General conduct an investigation pursuant to 940 Code Mass. Regs. § 29.06, and resolve the investigation pursuant to 940 Code Mass. Regs. § 29.07, and order all appropriate relief.

Thanks for your attention to this matter.

Yours truly,



Robert Nislick

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

Michael Lawson, Chair
Concord Select Board
22 Monument Square
P.O. Box 535
Concord, MA 01742

Kaari Mai Tari, Town Clerk, Records Access Officer
Town of Concord
22 Monument Square
P.O. Box 535
Concord, MA 01742

A

ROBERT NISLICK

Attorney at Law
P.O. Box 5207
Framingham, MA 01701
(508) 405-1238
rob@nislick.com

May 16, 2019

Michael Lawson, Chair
Concord Select Board
22 Monument Square
P.O. Box 535
Concord, MA 01742

Kaari Mai Tari, Town Clerk
Town of Concord
22 Monument Square
P.O. Box 535
Concord, MA 01742

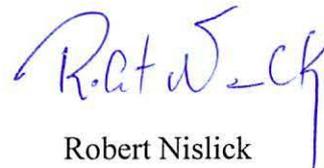
Re: Open Meeting Law Complaint

Dear Gentlepersons:

On behalf of complainants Brooks S. Read, Susannah Kay, Leslee Robb, and Russell Robb, III, enclosed please find an Open Meeting Law Complaint.

Thanks for your attention to this matter.

Yours truly,



Robert Nislick

cc: Attorney General's Division of Open Government
One Ashburton Place, 18th Floor
Boston, MA 02108

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



OPEN MEETING LAW COMPLAINT FORM

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

Please note that all fields are required unless otherwise noted.

Your Contact Information:

First Name: Robert Last Name: Nislick (BBO #664414)

Address: P.O. Box 5207

City: Framingham State: MA Zip Code: 01701

Phone Number: +1 (508) 405-1238 Ext. _____

Email: rob@nislick.com

Organization or Media Affiliation (if any): Attorney for Brooks S. Read, Susannah Kay, Leslee Robb, Russell Robb, III

Are you filing the complaint in your capacity as an individual, representative of an organization, or media?

(For statistical purposes only)

Individual Organization Media

Public Body that is the subject of this complaint:

City/Town County Regional/District State

Name of Public Body (including city/town, county or region, if applicable): Concord Select Board

Specific person(s), if any, you allege committed the violation: Carmin Reiss, Michael Lawson, Alice Kaufman, Steven Ng, Jane Hotchkiss, Thomas McKean, Linda Escobedo

Date of alleged violation: See Ex. "A"

Description of alleged violation:

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

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

1. On April 19, 2019, Concord produced Town of Concord's Third Supplemental Production of Documents in the case Town of Concord vs. Neil E. Rasmussen, et al, Land Court Case No. 17 MISC 000605 (HPS). The documents produced were Bates stamped with numbers from CONCORD_0005743 through CONCORD_0006202. (Copies of the documents cited herein are attached hereto as Exhibit "B").

2. Certain documents that Concord produced on April 19, 2019, establish that a quorum of the Concord Select Board deliberated and held meetings via electronic mail communication in violation of the Open Meeting Law on March 29-30, 2016 (see 5951); April 6, 2016 (see 5947); August 2, 2016 (see 5961); June 9, 2017 (see 5972, 5981); September 12, 2017 (see 6082, 6159, 6175); October 19, 2017 (see 6179); October 24-26, 2017 (see 6092, 6095, 6096, 6117, 6118); October 26, 2017 (see 6177); November 8, 2017 (see 6107); November 16, 2017 (see 6048, 6116); January 5, 2018 (see 6040, 6136, 6167); January 12, 2018 (see 6158, 6172); February 7, 2018 (see 6108); and February 21, 2018 (see 6042, 6062-6063).

3. The violations were not known and could not reasonably have been known to complainants until April 19, 2019. See 940 Code Mass. Regs. § 29.05(4). Complainants discovered the violations when Concord produced heavily redacted copies of electronic mail written communications to them on April 19, 2019.

[Please see Exhibit "A" attached hereto for the complete description of the alleged violations.]

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

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

1. Declare the executive sessions invalid because they failed to comply with the Open Meeting Law.
2. Acknowledge that all matters within the executive sessions are public.
3. Release all executive session minutes and audiovisual recordings from the executive sessions, and unredacted copies of all cited electronic mail correspondence forthwith.
4. Acknowledge that it repeatedly intentionally violated the Open Meeting Law.
5. Such other and further relief as may be appropriate

Review, sign, and submit your complaint

I. Disclosure of Your Complaint.

Public Record. Under most circumstances, your complaint, and any documents submitted with your complaint, is considered a public record and will be available to any member of the public upon request.

Publication to Website. As part of the Open Data Initiative, the AGO will publish to its website certain information regarding your complaint, including your name and the name of the public body. The AGO will not publish your contact information.

II. Consulting With a Private Attorney.

The AGO cannot give you legal advice and is not able to be your private attorney, but represents the public interest. If you have any questions concerning your individual legal rights or responsibilities you should contact a private attorney.

III. Submit Your Complaint to the Public Body.

The complaint must be filed first with the public body. If you have any questions, please contact the Division of Open Government by calling (617) 963-2540 or by email to openmeeting@state.ma.us.

By signing below, I acknowledge that I have read and understood the provisions above and certify that the information I have provided is true and correct to the best of my knowledge.

Signed: Robert Nislick
ROBERT NISLICK (BB#664414)

Date: 5/16/19

For Use By Public Body Date Received by Public Body:	For Use By AGO Date Received by AGO:
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Page 2

P.O. BOX 5207
FRAMINGHAM MA 01701
508-405-1238 rob@nislick.com, as attorney for
Brooks S. Read, Susannah Kay, Leslie Robb, Russell Robb III

A

Exhibit "A"

Dates of Alleged Violations

March 29-30, 2016; April 6, 2016; July 25, 2016; August 2, 2016; September 20, 2016; November 29, 2016; December 12, 2016; March 27, 2017; June 9, 2017; June 19, 2017; September 12, 2017; October 16, 2017; October 19, 2017; October 24-26, 2017; October 26, 2017; November 8, 2017; November 16, 2017; January 5, 2018; January 12, 2018; February 7, 2018; and February 21, 2018.

Description of Alleged Violations

1. On April 19, 2019, Concord produced Town of Concord's Third Supplemental Production of Documents in the case Town of Concord vs. Neil E. Rasmussen, et al, Land Court Case No. 17 MISC 000605 (HPS). The documents produced were Bates stamped with numbers from CONCORD_0005743 through CONCORD_0006202. (Copies of the documents cited herein are attached hereto as Exhibit "B").
2. Certain documents that Concord produced on April 19, 2019, establish that a quorum of the Concord Select Board deliberated and held meetings via electronic mail communication in violation of the Open Meeting Law on March 29-30, 2016 (see 5951); April 6, 2016 (see 5947); August 2, 2016 (see 5961); June 9, 2017 (see 5972, 5981); September 12, 2017 (see 6082, 6159, 6175); October 19, 2017 (see 6179); October 24-26, 2017 (see 6092, 6095, 6096, 6117, 6118); October 26, 2017 (see 6177); November 8, 2017 (see 6107); November 16, 2017 (see 6048, 6116); January 5, 2018 (see 6040, 6136, 6167); January 12, 2018 (see 6158, 6172); February 7, 2018 (see 6108); and February 21, 2018 (see 6042, 6062-6063).
3. The violations were not known and could not reasonably have been known to complainants until April 19, 2019. See 940 Code Mass. Regs. § 29.05(4). Complainants discovered the violations when Concord produced heavily redacted copies of electronic mail written communications to them on April 19, 2019.
4. The Open Meeting Law was enacted "to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based." Ghiglione v. School Comm. of Southbridge, 376 Mass. 70, 72 (1978).
5. "The 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." OML 2018-118 at 2. The law defines a "meeting" as, "a deliberation by a public body with respect to any matter within the body's jurisdiction." G. L. c. 30A, § 18. A "deliberation" is defined 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 other procedural meeting or the distribution of reports or documents

that may be discussed at a meeting, provided that no opinion of a member is expressed.” G. L. c. 30A, § 18.

6. “Governmental bodies may not circumvent the requirements of the open meeting law by conducting deliberations via private messages, whether electronically, in person, over the telephone, or in any other form.” District Attorney for the N. Dist. v. School Comm. of Wayland, 455 Mass. 561, 570-571 (2009).

7. The Massachusetts open meeting law, G. L. c. 30A, §§ 18 and 20 (a), “requires public bodies to make their meetings, including ‘deliberations,’ open to the public.” Boelter v. Board of Selectmen of Wayland, 479 Mass. 233, 234 (2018).

8. “[I]n recognition that the overarching purpose of the open meeting law is to ensure transparency in governmental decision-making, the Legislature specified that no opinion of a board member could be expressed in any documents circulated to a quorum prior to an open meeting.” Boelter v. Board of Selectmen of Wayland, 479 Mass. 233, 241 (2018).

9. “In Boelter, the Court concluded that the Wayland Board of Selectmen violated the Open Meeting Law by distributing to its members employee performance evaluations that included opinions of individual Board members. Communication of these opinions by email constituted ‘deliberation’ by the Board members that may occur only during a properly noticed meeting. This decision establishes that public body members may not send opinions to each other . . . outside of a noticed meeting.” OML 2018-38.

10. “Orchestrated private exchanges of opinions . . . between individual members of a public body and its chair . . . are prohibited.” Boelter v. Wayland Board of Selectmen, Middlesex Superior Court No. 14-CV-0591-H (Curran, J.) (June 29, 2016).

11. The Town of Concord Committee Handbook, § VII.1 Appendix Q. Use of Electronic Mail (APP #50), states in pertinent part:

“COMMITTEE USE OF ELECTRONIC MAIL

In order to assist members of governmental bodies to comply with the Open Meeting Law in their use of this technology, the Middlesex District Attorney's Office has established guidelines for committees’ use of electronic mail. The guidelines reaffirm that **no substantive discussion by a quorum of members of a governmental body about public business within the jurisdiction of the governmental body is permissible except at a meeting held in compliance with the requirements of the Open Meeting Law. Like private conversations held in person or over the telephone, e-mail conversations among a quorum of members of a governmental body that relate to public business violate the Open Meeting Law, as the public is deprived of the opportunity to attend and monitor the e-mail ‘meeting.’**

Despite the convenience and speed of communication by e-mail, its use by members of a governmental body carries a high risk of violating the Open Meeting Law. Not only do **private e-mail communications deprive the public of the chance contemporaneously to monitor the discussion,** but by excluding non-participating members, such communications are also inconsistent with the collegial character of governmental bodies. For these reasons, the Middlesex District Attorney cautions that **e-mail messages among members of governmental bodies are best avoided except for matters of a purely housekeeping or administrative nature.**”

(See Town of Concord Committee Handbook, § VII.1 Appendix Q. Use of Electronic Mail (APP #50) at 103-104 (Oct. 2018), available at <https://concordma.gov/DocumentCenter/View/17369/2018-Oct-Committee-Handbook---OML-Updates>) (emphasis added).

12. On March 29-30, 2016, Concord Select Board members Carmin Reiss, Michael Lawson, Alice Kaufman, Steven Ng, and Jane Hotchkiss communicated by electronic mail and expressed opinions concerning Estabrook Road. Carmin Reiss opined that she disagreed with Neil Rasmussen (a private citizen that the Town of Concord sued concerning Estabrook Road) concerning whether landowners have the right to post their land and that there is no public right of access to Estabrook Road. Michael Lawson replied to all members of the Concord Select Board, however, Concord redacted his response without any basis for doing so. The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. (See 5951).

13. On April 6, 2016, Concord Select Board members Carmin Reiss, Michael Lawson, Alice Kaufman, Steven Ng, and Jane Hotchkiss communicated by electronic mail and expressed opinions concerning Estabrook Road. Michael Lawson opined: “I agree.” Their e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. Complainants do not know what Michael Lawson was agreeing with because Concord redacted his response without any basis for doing so. The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. (See 5947).

14. On August 2, 2016, Concord Select Board members Thomas McKean, Michael Lawson, Alice Kaufman, Jane Hotchkiss, and Steven Ng communicated by electronic mail and expressed opinions concerning Estabrook Road. Thomas McKean opined: “Seems pretty straight forward and on point. Tom”. Complainants do not know what Thomas McKean thought was pretty straightforward and on point because Concord redacted his response without any basis for doing so. The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. (See 5961).

15. On June 9, 2017, Concord Select Board members Jane Hotchkiss, Alice Kaufman, Michael Lawson, Steven Ng, and Thomas McKean communicated by electronic mail in response to an e-mail from Concord Natural Resources Director Delia Kaye to Concord Town Manager Chris Whelan concerning Neil Rasmussen's sign posted along Estabrook Road notifying trail users of leash restrictions on his property. Complainants do not know what opinion Jane Hotchkiss expressed to the Concord Select Board because Concord redacted her response without any basis for doing so. The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. (See 5972, 5981).

16. On September 12, 2017, Concord Select Board members Thomas McKean, Alice Kaufman, Jane Hotchkiss, Michael Lawson, Steven Ng, communicated by electronic mail in response to an e-mail from Concord Town Manager Chris Whelan concerning the Estabrook Road draft complaint. Thomas McKean opined: "Timely. Tom". Michael Lawson responded as well, but complainants do not know what opinion Michael Lawson expressed because Concord redacted his response without any basis for doing so. The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. (See 6082, 6159, 6175).

17. On October 19, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with Concord Select Board members Alice Kaufman, Jane Hotchkiss, Michael Lawson, Steven Ng, and Thomas McKean regarding the subject: "CONFIDENTIAL Draft letter to accompany complaint." Chris Whelan stated: "Mike and SB, Would you please review this draft letter and let me know individually if you have any concerns. Kevin is hoping to send it out today. Chris". (See 6179).

18. Concord failed to produce any of the board members' responses. The Concord Select Board probably engaged in serial deliberation via electronic mail in response to Chris Whelan's e-mail request for individual responses from each member of the Concord Select Board, on dates between October 19-24, 2017. Concord town counsel did send a letter to the Rasmussens' counsel dated October 24, 2017, the same date on which Concord filed a complaint in the Land Court against the Rasmussens, Harvard University, and the complainants. (See 5622).

19. "[A] public body may not engage in a serial deliberation, whereby a quorum communicates in a non-contemporaneous manner outside of a meeting on a matter within the public body's jurisdiction." OML 2018-71 at 4. See McCrea v. Flaherty, 71 Mass. App. Ct. 637, 648-649 (2008).

20. On October 24-26, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with Concord Select Board members Alice Kaufman, Jane Hotchkiss, Michael Lawson, Steven Ng, and Thomas McKean regarding the subject: "FW: Estabrook Road Complaint Filed Today." Concord redacted the contents of Chris Whelan's electronic mail to the Concord Select Board. (See 6117-6118). Alice Kaufman opined: "This is an unusual press release in that it reads as an op-ed. It asserts opinion

that may serve to inflame the arguments with the abutters that I do not think is served in the Concord Journal. It is customary to use attribution for statements of interpretation or beliefs.” (See 6092, 6117). Chris Whelan replied that he would “prepare something and will review it with Jane.” (See 6117). Jane Hotchkiss opined: “I agree and look forward to your rewrite.” (See 6117). Alice Kaufman opined: “Chris Please see my comments to the draft. Take them or not as you see fit. I do not wish to fan flames at this point and suggest we be neutral in the language for the news release. It is probably not really necessary to wordsmith this further but a neutral written statement will have a lower probability of being misconstrued when Henry or someone else writes the story. Your quote looks good and I agree that we should delete the reference to call counsel. Should you receive calls, you can advise the caller who to contact. I would not be surprised if you receive a call from the Globe and perhaps local TV too. Alice”. (See 6056, 6096). Chris Whelan replied: “Thanks Alice! I have accepted your changes in the document and forwarded it to Erin requesting that she try to get it out today. Chris”. (See 6096). Jane Hotchkiss opined: “Thanks for moving this out Chris - we will undoubtedly see some response on Monday”. (See 6096). The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

21. On October 26, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with Concord Select Board members Jane Hotchkiss, Alice Kaufman, Michael Lawson, Steven Ng, and Thomas McKean regarding the subject: “Re: Concord – Estabrook Road”. Chris Whelan’s electronic mail stated: “SB: Attached is Kevin Batt’s letter to Harvard’s general counsel [Redacted].” Jane Hotchkiss opined: “Might be politic to cc Andy Biewinder (so?)” (See 6177). The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

22. On November 8, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: “Re: Live Estabrook Webcams”. Chris Whelan’s electronic mail stated: “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 on their privacy . Chris <http://www.saveourheritage.com/Estabrook Road.htm>”. (See 6107). Michael Lawson responded, but complainants do not know what opinion Michael Lawson expressed because Concord redacted his response without any basis for doing so. The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

23. On November 16, 2017, Concord Select Board members, Alice Kaufman, Michael Lawson, Steven Ng, Jane Hotchkiss, and Thomas McKean communicated by electronic mail concerning a letter that Alice Kaufman received “regarding Estabrook today”. (See 6116). Michael Lawson responded: “Hi Alice, Yes, I received the same, exact, letter. [Redacted] [Redacted]. Mike”. (See 6116). Complainants do not know what opinion Michael Lawson expressed concerning the letter he received regarding Estabrook, because Concord redacted his response without any basis for doing so. Steven Ng

responded: “I haven’t received anything.” (See 6116). Jane Hotchkiss responded: “I have not seen anything”. (See 6048). The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

24. On January 5, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: “FW: FY18 Supplemental Appropriation – Legal Expenses”, in which he discussed “a warrant article requesting a supplemental appropriation for legal service expenses in the current fiscal year. . . . The primary issue is the Estabrook matter, and there has been some interest in settlement. . . . Would you please let me or Jane know individually if you agree.” (See 6040-6041). Michael Lawson opined: “Chris I support your point of view. Your remark about some interest in settlement surprised me. I've heard nothing. Mike” (See 6040). Chris Whelan responded. Then Michael Lawson responded, but complainants do not know what opinion Michael Lawson expressed because Concord redacted his response without any basis for doing so. Thomas McKean opined: “I agree with Chris's analysis and see little advantage in raising an issue that is likely to get sidetracked into a debate on Estabrook.” (See 6136). Jane Hotchkiss opined: “Agreed!” (See 6136). Alice Kaufman opined: “I am glad to hear that there is some positive movement towards settlement regarding Estabrook. Have there been further conversations since our attorney's reached out to Mintz Levin and the abutters just before the holidays? [Redacted] I trust that you and Kerry have talked through our needs to support the various active cases and have determined that there is no need for a supplemental appropriations for legal services. Do we have a Plan B should we not reach agreement on Estabrook and proceed to court?” (See 6167). Complainants do not know the entirety of Alice Kaufman’s opinion because Concord redacted her response without any basis for doing so. The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

25. On January 12, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: “FW: Estabrook Road Litigation?”. (See 6158, 6172). Chris Whelan’s e-mail stated: “SB: FYI re proposal to mediate Estabrook Road matter.” (See 6158). Michael Lawson opined: “Good to hear. Michael Lawson” (See 6172). Alice Kaufman opined: “Small progress, thanks.” (See 6172). The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

26. On February 7, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board, and stated: “Select Board: Here’s the answers from respondents on the Estabrook matter. Chris”. (See 6108). Concord failed to produce any of the board members’ responses. The Concord Select Board probably engaged in serial deliberation via electronic mail in response to Chris Whelan’s e-mail, in violation of the Open Meeting Law.

27. On February 21, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: "FW: Mediation screening - privileged and confidential". (See 6062). Complainants do not know the contents of the e-mail because Concord redacted the e-mail without any basis for doing so. (See 6062-6063). Michael Lawson responded: "I can be available if needed." (See 6042). The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

28. On May 9, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: "SB Meeting next Monday Concerning Estabrook?" (See 6151, 6176). Chris Whelan's e-mail informed Tom McKean that Alice Kaufman, Michael Lawson, and Chris Whelan "spent all day in mediation yesterday on the Estabrook matter." (See 6176). Chris Whelan's e-mail stated further: "Although the board voted to authorize Mike and Alice to act on behalf of the board to settle the case, we think it would be beneficial to discuss some of the things we heard yesterday. Would you be willing to schedule a meeting next Monday, May 14 at 8:00 a.m. [Redacted] [Redacted] If that is agreeable, could Linda and Jane advise on whether they are available to meet next Monday. (We would meet first in open session, then adjourn to executive session to discuss this matter only) Thanks!" (See 6130, 6176). Jane Hotchkiss responded: "I will be there." (See 6176). Tom McKean responded: "I will be there as well. Tom". (See 6151). Concord redacted a portion of Chris Whelan's electronic mail communication to the Select Board without any basis for doing so. Additionally, Concord failed to produce the responses of any other Select Board members. The Concord Select Board probably engaged in serial deliberation via electronic mail in response to Chris Whelan's redacted e-mail, in violation of the Open Meeting Law. The Concord Select Board did meet in executive session on May 14, 2018, at eight o'clock in the morning. Although the meeting notice for the May 14, 2018, meeting referenced the Estabrook Road litigation, it failed to include topics that were evidently discussed in the executive session, such as mediation, settlement, and the redacted portion of Chris Whelan's electronic mail. Complainants did not know that the Concord Select Board planned to discuss those topics in executive session on May 14, 2018, until Concord produced Chris Whelan's May 9, 2018, e-mail.

29. On May 14, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with Michael Lawson, Alice Kaufman, and Jane Hotchkiss, a quorum of the Concord Select Board regarding the subject: "FW: CR's Along Estabrook Road?" (See 6152, 6155). Complainants do not know what Chris Whelan communicated to them because Concord redacted his e-mail without any basis for doing so. (See 6152). Michael Lawson responded: "Thanks Chris. Mike". (See 6152). Jane Hotchkiss responded: "Hope it goes well tomorrow will keep My fingers crossed". (See 6152). Complainants do not know whether Alice Kaufman responded. The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

30. Additionally, Concord's production of documents on April 19, 2019, establishes that the Concord Select Board conducted illegal executive sessions concerning Estabrook

Road on or about July 25, 2016 (see 5944-5946); September 20, 2016 (see 5944-5946); November 29, 2016 (see 5989); December 12, 2016 (see 5993); March 27, 2017 (see 5983); June 19, 2017 (see 5985); and October 16, 2017 (see 6110). On multiple occasions, the Concord Select Board deceitfully posted notices which stated it intended to discuss “litigation”, or “ongoing litigation”, “litigation strategy”, or “land acquisition”, when the Concord Select Board was actually discussing “Estabrook Road” more than a year before there was any litigation concerning Estabrook Road.

31. On or about July 25, 2016, the Concord Select Board conducted an executive session concerning “Estabrook Road”. The Concord Select Board posted no notice that it would meet concerning “Estabrook Road”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced an e-mail dated November 22, 2016, from Concord Select Board member Jane Hotchkiss to Concord Town Manager Chris Whelan. (See 5944-5946). The subject is: “RE: Estabrook Road”. In the e-mail, Jane Hotchkiss asks: “Have there been any other legal engagements since July or the September update?” A review of the Concord Select Board’s meeting notices for July 2016, shows no mention of a meeting concerning “Estabrook Road” in either open session or executive session. The Concord Select Board did enter executive session on July 25, 2016, to consider matters of land acquisition, improperly. In any event, complainants are not certain whether “Estabrook Road” was discussed in this particular executive session, because the Concord Select Board has never released the executive session minutes from July 25, 2016.

32. On or about September 20, 2016, the Concord Select Board conducted an executive session concerning “Estabrook Road”. The Concord Select Board posted no notice that it would meet concerning “Estabrook Road”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced an e-mail dated November 22, 2016, from Concord Select Board member Jane Hotchkiss to Concord Town Manager Chris Whelan. (See 5944-5946). The subject is: “RE: Estabrook Road”. In the e-mail, Jane Hotchkiss asks: “Have there been any other legal engagements since July or the September update?” A review of the Concord Select Board’s meeting notices for September 2016, shows no mention of a meeting concerning “Estabrook Road” in either open session or executive session. The Concord Select Board did enter executive session on September 20, 2016, to consider matters of land acquisition, improperly. In any event, complainants are not certain whether “Estabrook Road” was discussed in this particular executive session, because the Concord Select Board has never released the executive session minutes from September 20, 2016.

33. On November 29, 2016, the Concord Select Board conducted an executive session concerning “Estabrook”. The Concord Select Board posted no notice that it would meet concerning “Estabrook”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced e-mail correspondence dated November 21, 28-29, 2016, from Concord Town Manager Chris Whelan to Andrew Mara, Kevin D. Batt, and Andrew W. Fowler. (See 5989). The subject is: “FW: Meet with Select Board on Estabrook?”.

On November 21, 2016, Chris Whelan wrote:

“Andrew,
Would you please check with the Select Board to see if they are available to meet with town counsel on the Estabrook Road matter on Tuesday, November 29. Please remind members that the public hearing for the December 8 Special Town Meeting is also scheduled for 11/29 at 7:00 p.m.

I think having an executive session before the hearing, from 530 to 630 or from 600 to 645, would work. Would you please check and see if members are available? Thanks!

Chris”

On November 22, 2016, Concord Senior Administrative Assistant Andrew Mara e-mailed Concord Town Manager Chris Whelan, “RE: Estabrook Road”, to inform him that “Jane and Mike, and Steve can do Executive Session”. (See 5954).

On November 28, 2016, Kevin D. Batt wrote: “Chris, do we have a meeting confirmed for tomorrow? (See 5989).

On November 29, 2016, Chris Whelan wrote:

“Kevin,
Yes. The board is posted for an exec session discussion with town counsel at 6:00 p.m. in the Select Board room of the Town House. I had thought a 4:00 p.m. site visit before dark might be useful, but it sounds like rain all day tomorrow. Let me know if you'd like to see conditions on the ground and I will arrange to have someone meet you out there. Thanks!

Chris” (See 5989).

A review of the Concord Select Board’s meeting notice for November 29, 2016, shows no mention of a meeting concerning “Estabrook” or “Estabrook Road” in either open session or executive session. The Concord Select Board did enter executive session on November 29, 2016, to consider matters of litigation. There was no litigation concerning “Estabrook Road” until October 24, 2017, when Concord sued the complainants. The Concord Select Board has never released the minutes from its illegal executive session on November 29, 2016.

34. On December 12, 2016, the Concord Select Board conducted an executive session concerning “Estabrook”. The Concord Select Board posted no notice that it would meet concerning “Estabrook”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced e-mails dated November 17-18, 2016, between Concord Town Manager Chris

Whelan and Concord town counsel Kevin D. Batt. (See 5993). The subject is: “RE: Meet with Select Board on Estabrook?”. Kevin D. Batt wrote: “Chris, would you prefer we come on a Monday? If so, we could make it on December 12. Or please let us know if another weekday would work and we can check our schedules.” (See 5993). Chris Whelan responded: “Kevin, Thanks for getting back to me. The meeting need not be a Monday, so Mike Lawson will check with members and offer a couple of dates that might work. I will be back to you when we have some dates to suggest. Thanks! Chris” (See 5993). A review of the Concord Select Board’s meeting notices for December 2016, shows no mention of a meeting concerning “Estabrook” in either open session or executive session. The Concord Select Board did enter executive session on December 12, 2016, “for the purposes of discussing ongoing litigation”, improperly. See the meeting notice, which is available at https://concordma.gov/AgendaCenter/ViewFile/Agenda/_12122016-4802. There was no litigation concerning “Estabrook” until October 24, 2017, when Concord sued the complainants. The Concord Select Board has never released the minutes from its illegal executive session on December 12, 2016.

35. On March 27, 2017, the Concord Select Board conducted an executive session concerning “Estabrook Updates”. The Concord Select Board posted no notice that it would meet concerning “Estabrook Updates”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced an e-mail dated March 13, 2017, from Concord Select Board member Jane Hotchkiss to Concord Select Board member Michael Lawson and Concord Town Manager Chris Whelan. (See 5983). The subject is: “Estabrook Updates”. Jane Hotchkiss wrote: “I met with Sally and Polly on Thursday and we’d like to tee a follow up discussion led by Delia on the recommendations the SB passed for our March 27 meeting. [Redacted]” (See 5983). A review of the Concord Select Board’s meeting notices for March 2017, shows no mention of a meeting concerning “Estabrook Updates” in either open session or executive session. The Concord Select Board did enter executive session on March 27, 2017, “for the purposes of discussing litigation strategy”, improperly. See the meeting notice, which is available at https://concordma.gov/AgendaCenter/ViewFile/Agenda/_03272017-5105. There was no litigation concerning “Estabrook” until October 24, 2017, when Concord sued the complainants. The Concord Select Board has never released the minutes from its illegal executive session on March 27, 2017.

36. On June 19, 2017, the Concord Select Board conducted an executive session “discussion of the Estabrook Road matter”. (See 5985). The Concord Select Board posted no notice that it would conduct an executive session “discussion of the Estabrook Road matter”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced e-mail correspondence dated May 31, 2017, with the subject: “RE: Available for Concord SB Meeting on Estabrook?” (See 5985). Concord’s counsel wrote to Concord Town Manager Chris Whelan: “Chris, Kevin and I are available on Monday, June 19th to discuss the Town’s next steps. An 8:30pm meeting? Sincerely, Andrew” (See 5985). Chris Whelan wrote to Concord Select Board member Jane Hotchkiss: “Jane Andrew

and Kevin are available to join you on 6/19 for an exec session discussion of the Estabrook Road matter. I will ask Andrew Mara to share with Kevin and Andrew the four letters we received from abutters. Chris” (See 5985). Jane Hotchkiss responded: “Thank you Chris”. A review of the Concord Select Board’s meeting notices for June 19, 2017, shows no mention of any “discussion of the Estabrook Road matter” in either open session or executive session. The Concord Select Board did enter executive session on June 19, 2017, “to discuss litigation and land acquisition”, improperly. See the meeting notice, which is available at https://concordma.gov/AgendaCenter/ViewFile/Agenda/_06192017-5285 There was no litigation concerning “the Estabrook Road matter” until October 24, 2017, when Concord sued the complainants. The Concord Select Board has never released the minutes from its illegal executive session on June 19, 2017.

37. On October 16, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with Concord Select Board members Alice Kaufman, Jane Hotchkiss, Michael Lawson, Steven Ng, and Thomas McKean regarding the subject: “Draft lawsuit from Mintz Levin on Estabrook Road”. Although Concord redacted a portion of the e-mail without any basis for doing so, the unredacted portion states: “We are scheduled for an exec session tonight, so we can discuss at that time.” (See 6110).

38. “Except in an emergency, in addition to any notice otherwise required by law, a public body shall post notice of every meeting at least 48 hours prior to such meeting, excluding Saturdays, Sundays and legal holidays. In an emergency, a public body shall post notice as soon as reasonably possible prior to such meeting. Notice shall be printed in a legible, easily understandable format and shall contain the date, time and place of such meeting and a listing of topics that the chair reasonably anticipates will be discussed at the meeting.” G. L. c. 30A, § 20 (b).

39. “Except in an emergency, public bodies shall file meeting notices sufficiently in advance of a public meeting to permit posting of the notice at least 48 hours in advance of the public meeting, excluding Saturdays, Sundays and legal holidays, in accordance with M.G.L. c. 30A, § 20. In an emergency, the notice shall be posted as soon as reasonably possible prior to such meeting.” 940 Code Mass. Regs. § 29.03 (1) (a).

40. “Meeting notices shall be printed or displayed in a legible, easily understandable format and shall contain the date, time and place of such meeting, and a listing of topics that the chair reasonably anticipates will be discussed at the meeting. The list of topics shall have sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting.” 940 Code Mass. Regs. § 29.03 (1) (b).

41. The Concord Select Board failed on multiple occasions to provide any notice to the public, or to complainants, that it would discuss Estabrook Road, or any topic related to Estabrook Road, in executive session, in violation of G. L. c. 30A, § 20 (b), 940 Code Mass. Regs. § 29.03 (1) (a), (b); G. L. c. 30A, § 21.

42. The complainants believe the Concord Select Board committed repeated intentional violations of the Open Meeting Law. See G. L. c. 30A, § 18. The Concord Select Board acted with specific intent to violate the law and/or with deliberate ignorance of the law's requirements. See 940 Code Mass. Regs. § 29.02 (a), (b). For more than a year before Concord sued complainants in the Land Court, the Concord Select Board and Concord's town manager clearly discussed Estabrook Road in multiple executive sessions, without notice to any of the parties that it sued. The Concord Select Board and Concord's town manager actively concealed the fact that they were conducting these secret meetings. They did so by posting meeting notices which represented that they planned to discuss "litigation", "litigation strategy", or "ongoing litigation", when, in fact, there was no litigation over Estabrook Road at the time. Concord conspired to sue, and in fact did sue, the complainants without providing them with any prior notice. Following Concord's commencement of this case, the Concord Select Board has repeatedly deliberated secretly by electronic mail, and without notice to the complainants.

Action That Complainants Want Concord Select Board To Take In Response to
Complaint

1. Declare the executive sessions invalid because they failed to comply with the Open Meeting Law.
2. Acknowledge that all matters within the executive sessions are public.
3. Release all executive session minutes and audiovisual recordings from the executive sessions, and unredacted copies of all cited electronic mail correspondence forthwith.
4. Acknowledge that it repeatedly intentionally violated the Open Meeting Law.
5. Such other and further relief as may be appropriate.

B

From: Austin Anderson aanderson@andersonkreiger.com 

Subject: Town's Supplemental Discovery Responses

Date: April 19, 2019 at 3:39 PM

To: Moore, M. Patrick pmoore@hembar.com, Tillotson, Diane C. dtillotson@hembar.com, Robert Nislick rob@nislick.com

Cc: Kevin D. Batt batt@andersonkreiger.com, Melissa C. Allison mallison@AndersonKreiger.com, Brett A. Roman broman@andersonkreiger.com



Counsel,

The Town's supplementary responses to Neil Rasmussen's, Susannah Kay's, and Leslee Robb's Interrogatories, Neil Rasmussen's Requests for Admission, and Susannah Kay's Request for Production of Documents are attached.

Our paralegal, Brett Roman, will send you an email shortly with a link to the document production. Also included at that link will be copies of our experts' reports. The experts' resumes are contained in the document production. We will provide hard copies of the reports, which will include full-sized plans, to each of you as soon as we have them, probably some time next week.

The link from Brett will also include higher-resolution native images of Concord_0005843-5845, which are in the production but are difficult to read. That way the documents will have Bates numbers, but you will be able to refer to the higher-resolution copies as needed to read the documents.

Please let us know if you have any questions.

Best,
Austin



Austin P. Anderson

T. 617.621.6576 | F. 617.621.6676

[Anderson & Kreiger LLP](#) | 50 Milk Street, 21st Floor, Boston, MA 02109



Town's Third
Suppl....5).pdf



Town's First
Suppl....5).pdf



Town's First
Suppl....5).pdf



Town's First
Suppl....5).pdf



Town's First
Suppl....5).pdf

From: Brett Roman broman@andersonkreiger.com 
Subject: Town's Supplemental Discovery Responses
Date: April 19, 2019 at 4:21 PM
To: Robert Nislick rob@nislick.com



You have been sent a secure document delivery from.

Sender : Brett Roman

Link : <https://securefiles.getsaas.com/bds/Login.do?id=A0514601204&p1=naj15iosbgcfhbcdbflibigjj20>

Sent To : dtillotson@hembar.com; Pat; Robert Nislick

Cc : Austin Anderson; Kevin Batt; Melissa Allison

Expires : 5/3/19 7:59:59 PM EDT

This delivery was made possible by SecureFiles. Learn more at <https://www.getsaas.com/securefiles>

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 11/22/2016 2:47:42 PM
To: Chris Whelan [cwhelan@concordma.gov]
BCC: Chris Whelan [cwhelan@concordma.gov]
Subject: RE: Estabrook Road

Have there been any other legal engagements since July or the September update?

Jane Hotchkiss
Concord Select Board
Concord, MA 01742
jhotchkiss@concordma.gov

Redacted

Redacted

Redacted

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

Redacted

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

Redacted

> 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

Redacted

Redacted

Redacted

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

Redacted

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: 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: 3/13/2017 11:35:39 AM
To: Michael Lawson [mlawson@concordma.gov]; Chris Whelan [cwhelan@concordma.gov]
Subject: Estabrook Updates

I met with Sally and Polly on Thursday and we'd like to tee a follow up discussion led by Delia on the recommendations the SB passed for our March 27 meeting.

Redacted

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 6/1/2017 11:12:25 AM
To: Chris Whelan [cwhelan@concordma.gov]; Thomas McKean [tmckean@concordma.gov]; Alice Kaufman [akaufman@concordma.gov]; Steven Ng [sng@concordma.gov]; Michael Lawson [mlawson@concordma.gov]
CC: Andrew Mara [amara@concordma.gov]
Subject: Re: Available for Concord SB Meeting on Estabrook?

Thank you Chris

From: Chris Whelan
Sent: Wednesday, May 31, 2017 6:37 PM
To: Jane Hotchkiss; Thomas McKean; Alice Kaufman; Steven Ng; Michael Lawson
Cc: Andrew Mara
Subject: Fwd: Available for Concord SB Meeting on Estabrook?

Jane
Andrew and Kevin are available to join you on 6/19 for an exec session discussion of the Estabrook Road matter. I will ask Andrew Mara to share with Kevin and Andrew the four letters we received from abutters.

Chris

Sent from my iPhone

Begin forwarded message:

From: "Andrew W. Fowler" <afowler@andersonkreiger.com>
Date: May 31, 2017 at 3:16:56 PM EDT
To: Chris Whelan <cwhelan@concordma.gov>, "Kevin D. Batt" <kbatt@AndersonKreiger.com>
Cc: Mina Makarious <mina@andersonkreiger.com>
Subject: RE: Available for Concord SB Meeting on Estabrook?

Chris,

Kevin and I are available on Monday, June 19th to discuss the Town's next steps. An 8:30pm meeting?

Sincerely,
Andrew

ANDERSON
KREIGER

Andrew Fowler, Associate
T. 617.621.6535 | F. 617.621.6501
[Anderson & Kreiger LLP](#) | 50 Milk Street, 21st Floor, Boston, MA 02109



Please consider the environment before printing this e-mail.

This electronic message contains information from the law firm of Anderson & Kreiger LLP that may be privileged. If you are not the intended recipient, note that any disclosure, copy, distribution or use of the contents of this message is prohibited and this message should be deleted.

Redacted

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 11/29/2016 12:47:21 AM
To: Kevin D. Batt [/O=FIRST ORGANIZATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Batt_AND000155d]; Andrew Mara [amara@concordma.gov]
CC: Andrew W. Fowler [/O=FIRST ORGANIZATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=AFowler_AND0001179]
Subject: RE: Meet with Select Board on Estabrook?

Kevin,

Yes. The board is posted for an exec session discussion with town counsel at 6:00 p.m. in the Select Board room of the Town House. I had thought a 4:00 p.m. site visit before dark might be useful, but it sounds like rain all day tomorrow. Let me know if you'd like to see conditions on the ground and I will arrange to have someone meet you out there. Thanks!

Chris

From: Kevin D. Batt [mailto:kbatt@AndersonKreiger.com] -
Sent: Monday, November 28, 2016 6:00 PM
To: Chris Whelan; Andrew Mara
Cc: Andrew W. Fowler
Subject: RE: Meet with Select Board on Estabrook?

Chris, do we have a meeting confirmed for tomorrow?

Sent with Good (www.good.com)

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

From: Chris Whelan [cwhelan@concordma.gov]
Sent: Monday, November 21, 2016 02:24 PM Eastern Standard Time
To: Andrew Mara
Cc: Kevin D. Batt; Andrew W. Fowler
Subject: FW: Meet with Select Board on Estabrook?

Andrew,

Would you please check with the Select Board to see if they are available to meet with town counsel on the Estabrook Road matter on Tuesday, November 29. Please remind members that the public hearing for the December 8 Special Town Meeting is also scheduled for 11/29 at 7:00 p.m.

I think having an executive session before the hearing, from 530 to 630 or from 600 to 645, would work. Would you please check and see if members are available? Thanks!

Chris

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 11/18/2016 2:23:58 PM
To: Kevin D. Batt [/O=FIRST ORGANIZATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Batt_AND000155d]; Andrew W. Fowler [/O=FIRST ORGANIZATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=AFowler_AND0001179]
Subject: RE: Meet with Select Board on Estabrook?

Kevin,

Thanks for getting back to me. The meeting need not be a Monday, so Mike Lawson will check with members and offer a couple of dates that might work. I will be back to you when we have some dates to suggest. Thanks!

Chris

From: Kevin D. Batt [mailto:kbatt@AndersonKreiger.com]
Sent: Thursday, November 17, 2016 9:35 PM
To: Chris Whelan; Andrew W. Fowler
Subject: RE: Meet with Select Board on Estabrook?

Chris, would you prefer we come on a Monday? If so, we could make it on December 12. Or please let us know if another weekday would work and we can check our schedules.

Kevin D. Batt

ANDERSON & KREIGER LLP

50 Milk Street, 21st Floor

Boston, MA 02109

t: 617-621-6514

f: 617-621-6614

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

Message

From: Michael Lawson [mlawson@concordma.gov]
Sent: 1/5/2018 8:55:56 AM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: FY18 Supplemental Appropriation - Legal Expenses

Redacted

From: Chris Whelan <cwhelan@concordma.gov>
Date: Friday, January 5, 2018 at 8:54 AM
To: Michael Lawson <mlawson@concordma.gov>
Subject: RE: FY18 Supplemental Appropriation - Legal Expenses

Mike,

My reference to settlement referred to the many residents who hope to see the matter resolved amicably. It is possible that public interest in a resolution could cause the parties that are most aggressive on the matter to consider settlement. Harvard has expressed a willingness to engage in discussions if the others do, and we'll see how the other parties respond.

Chris

From: Michael Lawson
Sent: Friday, January 05, 2018 8:44 AM
To: Chris Whelan
Subject: Re: FY18 Supplemental Appropriation - Legal Expenses

Chris

I support your point of view. Your remark about some interest in settlement surprised me. I've heard nothing. Mike

From: Chris Whelan <cwhelan@concordma.gov>
Date: Friday, January 5, 2018 at 8:42 AM
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>
Cc: Kerry Lafleur <klafleur@concordma.gov>
Subject: FW: FY18 Supplemental Appropriation - Legal Expenses

Select Board,

Kerry sent me the message below yesterday suggesting that we may want to have a warrant article requesting a supplemental appropriation for legal service expenses in the current fiscal year. The Reserve Fund should be able to cover the added expenses, but using those funds for legal services would likely deplete the fund so that there are no funds available for an unexpected situation.

We discussed earlier this year having a warrant article to appropriate additional legal funds for FY2019, and decided against doing that. I think I can tighten down on legal expenditures for the remainder of the year to try to limit the amount used from the Reserve Fund this year. Legal costs associated with Nagog will be paid from the Water Fund, so that is not an issue. And we have several cases being handled by our insurance carrier, MIIA. The primary issue is the Estabrook matter, and there has been some interest in settlement. So I would be inclined to NOT seek the supplemental appropriation.

Would you please let me or Jane know individually if you agree. Kerry raised this issue before the warrant deadline, so there should be no problem with the deadline if there is interest in seeking a supplemental appropriation. Thanks.

Chris

Redacted

Message

From: Michael Lawson [mlawson@concordma.gov]
Sent: 2/21/2018 9:13:06 AM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: Mediation screening - privileged and confidential

I can be available if needed.

Redacted

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:

Redacted

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: Chris Whelan [cwhelan@concordma.gov]

Sent: 2/21/2018 8:56:36 AM

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: Mediation screening - privileged and confidential

Redacted

Redacted

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 9/12/2017 8:37:04 AM
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: Estabrook Road draft Complaint - privileged and confidential
Attachments: Draft Complaint - Estabrook Road (A0447019-6xB0BA5).docx

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

Chris

Redacted

Message

From: Alice Kaufman [akaufman@concordma.gov]
Sent: 10/25/2017 7:26:28 AM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: Estabrook Road Complaint Filed Today

Chris

This is an unusual press release in that it reads as an op-ed. It asserts opinion that may serve to inflame the arguments with the abutters that I do not think is served in the Concord Journal. It is customary to use attribution for statements of interpretation or beliefs.

A.

From: Chris Whelan
Sent: Tuesday, October 24, 2017 4:57 PM
To: Alice Kaufman; Jane Hotchkiss; Michael Lawson; Steven Ng; Thomas McKean
Subject: FW: Estabrook Road Complaint Filed Today

Redacted

Redacted

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 10/25/2017 3:07:13 PM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: Estabrook Road

I will review this press release but in the meantime I would suggest as a separate matter you respond to Neil's email

Redacted

Sent from my iPhone

On Oct 25, 2017, at 2:49 PM, Chris Whelan <cwhelan@concordma.gov> wrote:

Jane and Alice,

We received a message from Neil just now expressing concern about the litigation. **Redacted**

Redacted

Redacted

I think the paragraphs providing background and recent history are helpful. And the paragraph mentioning the signs and gate explain why action is needed now. I could delete the sentence about the gate, but I think the explanation is helpful. Would you please edit this draft to suggest ways it could be improved, and I will try to get it out today. Thanks!

Chris

Redacted

Redacted

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 10/26/2017 11:32:55 AM
To: Chris Whelan [cwhelan@concordma.gov]
CC: Alice Kaufman [akaufman@concordma.gov]
Subject: Re: Estabrook Road

Thanks for moving this out Chris - we will undoubtedly see some response on Monday

Sent from my iPhone

On Oct 26, 2017, at 11:15 AM, Chris Whelan <cwhelan@concordma.gov> wrote:

Thanks Alice! I have accepted your changes in the document and forwarded it to Erin requesting that she try to get it out today.

Chris

From: Alice Kaufman
Sent: Wednesday, October 25, 2017 5:02 PM
To: Chris Whelan; Jane Hotchkiss
Subject: Re: Estabrook Road

Chris

Please see my comments to the draft. Take them or not as you see fit. I do not wish to fan flames at this point and suggest we be neutral in the language for the news release. It is probably not really necessary to wordsmith this further but a neutral written statement will have a lower probability of being misconstrued when Henry or someone else writes the story.

Your quote looks good and I agree that we should delete the reference to call counsel. Should you receive calls, you can advise the caller who to contact. I would not be surprised if you receive a call from the Globe and perhaps local TV too.

Alice

From: Chris Whelan
Sent: Wednesday, October 25, 2017 2:49 PM
To: Jane Hotchkiss; Alice Kaufman
Cc: Thomas McKean; Michael Lawson; Steven Ng
Subject: FW: Estabrook Road

Jane and Alice,

We received a message from Neil just now expressing concern about the litigation. **Redacted**

Redacted

Redacted I think the paragraphs providing background and recent history are helpful. And the paragraph mentioning the signs and gate explain why action is needed now. I could delete the sentence about the gate, but I think the explanation is helpful. Would you please edit this draft to suggest ways it could be improved, and I will try to get it out today. Thanks!

Chris

Redacted

Message

From: Michael Lawson [mlawson@concordma.gov]
Sent: 11/8/2017 6:10:07 PM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: Live Estabrook Webcams

Redacted

Michael Lawson

On Nov 8, 2017, at 5:19 PM, Chris Whelan <cwhelan@concordma.gov> wrote:

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 on their privacy.

Chris

http://www.saveourheritage.com/Estabrook_Road.htm

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 2/7/2018 10:05:32 AM
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: Estabrook: Response to Rasmussen and Read/Kay counterclaims - PRIVILEGED AND CONFIDENTIAL
Attachments: Answer, Affirmative Defenses and Counterclaim of Rasmussens 12.18.17 [compressed] (A0476364xB0BA5).pdf

Select Board:

Here's the answers from respondents on the Estabrook matter.

Chris

Redacted

Redacted

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 10/16/2017 4:56:26 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: Draft lawsuit from Mintz Levin on Estabrook Road

Redacted

Redacted

Redacted We are scheduled for an exec session tonight, so we can discuss at that time. I will send **Redacted** as soon as I see it.

Chris

Christopher Whelan
Town Manager
Concord, MA 01742

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 10/24/2017 4:57:19 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: Estabrook Road Complaint Filed Today
Attachments: Press statement on Estabrook Road lawsuit (A0456810-3xB0BA5).docx

Redacted

Message

From: Steven Ng [sng@concordma.gov]
Sent: 11/16/2017 3:46:20 PM
To: Michael Lawson [mlawson@concordma.gov]
CC: Alice Kaufman [akaufman@concordma.gov]; Jane Hotchkiss [jhotchkiss@concordma.gov]; Thomas McKean [tmckean@concordma.gov]; Chris Whelan [cwhelan@concordma.gov]
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: 10/25/2017 1:16:21 PM
To: Chris Whelan [cwhelan@concordma.gov]; Alice Kaufman [akaufman@concordma.gov]
Subject: Re: Estabrook Road Complaint Filed Today

I agree and look forward to your rewrite.

From: Chris Whelan
Sent: Wednesday, October 25, 2017 12:01 PM
To: Alice Kaufman
Cc: Jane Hotchkiss
Subject: RE: Estabrook Road Complaint Filed Today

Helpful comments, Jane. I will prepare something and will review it with Jane. Thanks.

Chris

From: Alice Kaufman
Sent: Wednesday, October 25, 2017 7:26 AM
To: Chris Whelan
Subject: Re: Estabrook Road Complaint Filed Today

Chris

This is an unusual press release in that it reads as an op-ed. It asserts opinion that may serve to inflame the arguments with the abutters that I do not think is served in the Concord Journal. It is customary to use attribution for statements of interpretation or beliefs.

A.

Redacted

Redacted

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 1/6/2018 2:28:36 PM
To: Thomas McKean [tmckean@concordma.gov]; Chris Whelan [cwhelan@concordma.gov]
Subject: Re: FY18 Supplemental Appropriation - Legal Expenses

Agreed!

From: Thomas McKean
Sent: Saturday, January 6, 2018 11:28 AM
To: Chris Whelan
Cc: Jane Hotchkiss
Subject: Re: FY18 Supplemental Appropriation - Legal Expenses

I agree with Chris's analysis and see little advantage in raising an issue that is likely to get sidetracked into a debate on Estabrook. I appreciate Kerry raising the issue, however. Tom

From: Chris Whelan
Sent: Friday, January 5, 2018 8:42 AM
To: Alice Kaufman; Jane Hotchkiss; Michael Lawson; Steven Ng; Thomas McKean
Cc: Kerry Lafleur
Subject: FW: FY18 Supplemental Appropriation - Legal Expenses

Select Board,

Kerry sent me the message below yesterday suggesting that we may want to have a warrant article requesting a supplemental appropriation for legal service expenses in the current fiscal year. The Reserve Fund should be able to cover the added expenses, but using those funds for legal services would likely deplete the fund so that there are no funds available for an unexpected situation.

We discussed earlier this year having a warrant article to appropriate additional legal funds for FY2019, and decided against doing that. I think I can tighten down on legal expenditures for the remainder of the year to try to limit the amount used from the Reserve Fund this year. Legal costs associated with Nagog will be paid from the Water Fund, so that is not an issue. And we have several cases being handled by our insurance carrier, MIA.

Redacted

Redacted

Would you please let me or Jane know individually if you agree. Kerry raised this issue before the warrant deadline, so there should be no problem with the deadline if there is interest in seeking a supplemental appropriation. Thanks.

Chris

From: Kerry Lafleur
Sent: Thursday, January 04, 2018 1:51 PM
To: Chris Whelan
Cc: Kerry Lafleur
Subject: FY18 Supplemental Appropriation - Legal Expenses

Chris,

As of 11/30/17, we have expended \$146k against a General Fund Legal Budget of \$225k, leaving a balance of \$79k for the remaining 7 months. The average monthly expenditure is about \$35k. Assuming that trend continues for the next 7 months, we can expect to spend an additional \$232k, putting our total expenditures at \$378k, resulting in a deficit of \$153k.

To date, there have been no claims on the Reserve Fund, leaving the full balance of \$225k. In theory, we should be fine, however, perhaps it makes sense to include a warrant article for a supplemental appropriation for legal expenses, while the warrant remains open, rather than be forced to request a special within the annual if we run into trouble. If you'd like to add this article, please let me know and I'll draft it up.

Kerry A. Lafleur

(formerly Kerry A. Speidel)

Finance Director/ Treasurer-Collector

Town of Concord

klafleur@concordma.gov

(978) 318-3090

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 1/12/2018 10:19:22 AM
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: Estabrook Road Litigation?

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?

Redacted

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?

Redacted

Chris

Christopher Whelan
Town Manager
Concord, MA 01742

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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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Message

From: Alice Kaufman [akaufman@concordma.gov]
Sent: 1/5/2018 9:22:20 AM
To: Chris Whelan [cwhelan@concordma.gov]; Jane Hotchkiss [jhotchkiss@concordma.gov]
CC: Kerry Lafleur [klafleur@concordma.gov]
Subject: Re: FY18 Supplemental Appropriation - Legal Expenses

I am glad to hear that there is some positive movement towards settlement regarding Estabrook. Have there been further conversations since our attorney's reached out to Mintz Levin and the abutters just before the holidays?

Redacted

I trust that you and Kerry have talked through our needs to support the various active cases and have determined that there is no need for a supplemental appropriations for legal services. Do we have a Plan B should we not reach agreement on Estabrook and proceed to court?

Please send our thanks to CMLP and CPW for expert management of yesterday's storm.

Alice

From: Chris Whelan
Sent: Friday, January 5, 2018 8:42 AM
To: Alice Kaufman; Jane Hotchkiss; Michael Lawson; Steven Ng; Thomas McKean
Cc: Kerry Lafleur
Subject: FW: FY18 Supplemental Appropriation - Legal Expenses

Select Board,

Kerry sent me the message below yesterday suggesting that we may want to have a warrant article requesting a supplemental appropriation for legal service expenses in the current fiscal year. The Reserve Fund should be able to cover the added expenses, but using those funds for legal services would likely deplete the fund so that there are no funds available for an unexpected situation.

We discussed earlier this year having a warrant article to appropriate additional legal funds for FY2019, and decided against doing that. I think I can tighten down on legal expenditures for the remainder of the year to try to limit the amount used from the Reserve Fund this year. Legal costs associated with Nagog will be paid from the Water Fund, so that is not an issue. And we have several cases being handled by our insurance carrier,

MIIA. **Redacted**

Redacted

Would you please let me or Jane know individually if you agree. Kerry raised this issue before the warrant deadline, so there should be no problem with the deadline if there is interest in seeking a supplemental appropriation. Thanks.

Chris

From: Kerry Lafleur
Sent: Thursday, January 04, 2018 1:51 PM
To: Chris Whelan

Cc: Kerry Lafleur

Subject: FY18 Supplemental Appropriation - Legal Expenses

Chris,

As of 11/30/17, we have expended \$146k against a General Fund Legal Budget of \$225k, leaving a balance of \$79k for the remaining 7 months. The average monthly expenditure is about \$35k. Assuming that trend continues for the next 7 months, we can expect to spend an additional \$232k, putting our total expenditures at \$378k, resulting in a deficit of \$153k.

To date, there have been no claims on the Reserve Fund, leaving the full balance of \$225k. In theory, we should be fine, however, perhaps it makes sense to include a warrant article for a supplemental appropriation for legal expenses, while the warrant remains open, rather than be forced to request a special within the annual if we run into trouble. If you'd like to add this article, please let me know and I'll draft it up.

Kerry A. Lafleur

(formerly Kerry A. Speidel)

Finance Director/ Treasurer-Collector

Town of Concord

klafleur@concordma.gov

(978) 318-3090

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

Redacted

Redacted

Message

From: Michael Lawson [mlawson@concordma.gov]
Sent: 9/12/2017 9:07:04 AM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: Estabrook Road draft Complaint - privileged and confidential

Chris

Thanks.

Redacted

Redacted

Mike

Michael Lawson

On Sep 12, 2017, at 8:37 AM, Chris Whelan <cwhelan@concordma.gov> wrote:

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

<image001.png>

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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Redacted

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 5/9/2018 8:43:40 AM
To: Chris Whelan [cwhelan@concordma.gov]; Thomas McKean [tmckean@concordma.gov]
CC: Michael Lawson [mlawson@concordma.gov]; Alice Kaufman [akaufman@concordma.gov]; Linda Escobedo [lescobedo@concordma.gov]; Andrew Mara [amara@concordma.gov]
Subject: Re: SB Meeting next Monday Concerning Estabrook?

I will be there

From: Chris Whelan
Sent: Wednesday, May 9, 2018 8:20 AM
To: Thomas McKean
Cc: Michael Lawson; Alice Kaufman; Jane Hotchkiss; Linda Escobedo; Andrew Mara
Subject: SB Meeting next Monday Concerning Estabrook?

Tom,

Alice, Mike and I spent all day in mediation yesterday on the Estabrook matter. We made some progress, but it isn't clear if a settlement can be reached. We have scheduled a second day of mediation next Tuesday. The defendants in the case proposed something for us to consider which we haven't discussed with the full board. Although the board voted to authorize Mike and Alice to act on behalf of the board to settle the case, we think it would be beneficial to discuss some of the things we heard yesterday. Would you be willing to schedule a meeting next Monday, May 14 at 8:00 a.m.

Redacted

Redacted

If that is agreeable, could Linda and Jane advise on whether they are available to meet next Monday. (We would meet first in open session, then adjourn to executive session to discuss this matter only) Thanks!

Chris

Christopher Whelan
Town Manager
Concord, MA 01742

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 10/26/2017 3:50:33 PM
To: Chris Whelan [cwhelan@concordma.gov]
CC: Alice Kaufman [akaufman@concordma.gov]; Michael Lawson [mlawson@concordma.gov]; Steven Ng [sng@concordma.gov]; Thomas McKean [tmckean@concordma.gov]
Subject: Re: Concord - Estabrook Road

Might be politic to cc Andy Biewinder (so?)

Sent from my iPhone

On Oct 26, 2017, at 3:42 PM, Chris Whelan <cwhelan@concordma.gov> wrote:

SB: Attached is Kevin Batt's letter to Harvard's general counsel

Redacted

Chris

From: Kevin D. Batt [<mailto:kbatt@AndersonKreiger.com>]
Sent: Thursday, October 26, 2017 3:37 PM
To: 'ranna_farzan@harvard.edu'
Cc: Melissa C. Allison; Chris Whelan
Subject: FW: Concord

Ms. Farzan:

Kindly direct the attached letter to the appropriate recipient at the General Counsel's office at Harvard. Thank you.

Kevin D. Batt
ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
Boston, MA 02109
t: 617-621-6514
f: 617-621-6614

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<Letter to Harvard re. Concord v. N. Rasmussen et. al. w- Complaint (A0463251xB0BA5).pdf>

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 10/19/2017 8:30:50 AM
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: CONFIDENTIAL Draft letter to accompany complaint
Attachments: Letter to Mintz Levin re Estabrook Road 10-18-17 (A0456104-3xB0BA5).docx

Mike and SB,

Would you please review this draft letter and let me know individually if you have any concerns. Kevin is hoping to send it out today.

Chris

From: Kevin D. Batt [mailto:kbatt@AndersonKreiger.com]
Sent: Wednesday, October 18, 2017 3:37 PM
To: Chris Whelan
Cc: Melissa C. Allison; Andrew W. Fowler
Subject: Draft letter to accompany complaint

Confidential
Attorney Client and Work Product Privileged

Redacted

Kevin D. Batt
ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
Boston, MA 02109
t: 617-621-6514
f: 617-621-6614

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B

ANDERSON KREIGER

KEVIN BATT

kbatt@andersonkreiger.com

T: 617-621-6514

F: 617-621-6614

June 6, 2019

VIA EMAIL AND FIRST CLASS MAIL

Robert Nislick
P.O. Box 5207
Framingham, MA 01701

RE: Response to Open Meeting Law Complaint dated May 16, 2019 (“OML Complaint”)

Attorney Nislick:

I am responding on behalf of the Town of Concord Select Board to your complaint dated May 16, 2019 against the Board pursuant to the Open Meeting Law, G. L. c. 30A, §§ 18–25 (“OML”) on behalf of your clients, Mr. Read, Dr. Kay, and Mr. and Mrs. Robb. See Attachment 1.

You allege that the Concord Select Board violated the OML by communicating electronically on matters that should have been the subject of a duly noticed meeting and on account of inadequate agenda postings of subjects of executive sessions. These allegations will be responded to, item by item, below.

First, however, the relief you have requested appears to largely reiterate the relief requested in previous OML Complaints dated April 23 and January 14, 2019, and December 6, 2018 – to declare executive sessions invalid, acknowledge such executive sessions are public and release all minutes from such executive sessions. The Board has already responded to these requests and will not repeat its previous responses with respect to such relief.

In addition, you request copies of unredacted email correspondence cited in the most recent OML Complaint. In conferring with you and Attorney M. Patrick Moore on discovery issues in *Town of Concord v. Rasmussen, et al.*, Land Court No. 17 Misc. 0000605-HPS, my colleague Melissa Allison agreed to review again the redactions in records provided to you pursuant to the defendants’ discovery requests in that litigation and to produce new copies with revised redactions, where appropriate, along with a privilege log. Some of those redacted records are referenced in your OML Complaint. The replacement records with the revised redactions will be produced to you as part of the *Rasmussen* litigation.

The Town's redactions concern information protected by the attorney-client and work product privileges. The Town will not waive these privileges, nor is such waiver an appropriate remedy for any minor infractions identified in your OML Complaint. *See* OML 2016-129 (recognizing that OML does not authorize Attorney General to assess claims of privilege); *see also* *Town of Hull, Bd. of Selectmen v. Healey*, 34 Mass. L. Rptr. 541, 2017 WL 6601467, at *7-8 (Mass. Super. Dec. 14, 2017) (overturning Attorney General's order to reveal information which might have detrimental effect on litigating position of public body). While you may challenge the Town's privilege assertions in the Land Court, an OML complaint is not the appropriate forum to seek such records. *See* OML 2016-129 (refusing to assess claim of privilege and noting that complainant "may be able to challenge" privilege assertion "in another forum"). The OML was never intended as a mechanism to allow litigants to bypass discovery procedures and judicial determinations in their litigation with public entities.

Finally, you request that the Board acknowledge that it intentionally violated the OML. That assertion is entirely unfounded. None of the incidents that you have cited evidence intent by any Board member to violate the OML, much less that the Board acted in concert to violate the OML. None of the alleged violations individually or collectively meet criteria outlined in the regulatory definition of "intentional violation." 940 CMR 29.02. Indeed, any infractions are isolated examples of inadvertent, technical violations, which were scattered over a period of almost two years.

Board's Response to Specific Allegations

1. March 29-30, 2016 (¶ 12 in OML Complaint)

The electronic communication dated March 29, 2016 from Carmin Reiss to Select Board members did not violate the OML. The definition of "deliberation" excludes the distribution of factual reports to a quorum of a public body. G.L. c. 30A, §18. Ms. Reiss made a factual report of a conversation she had with constituent Neil Rasmussen, now a defendant in the Estabrook Road litigation. Ms. Reiss was scheduled to depart from the Select Board within a week of the email date. She left office as a Select Board member on April 6, 2016. In her transition from office, Ms. Reiss acted responsibly in promptly reporting this conversation to the Town Manager and her colleagues. Ms. Reiss's report highlighted public safety concerns identified by Mr. Rasmussen, which warranted prompt communication to public officials.

Select Board member Michael Lawson responded by email on March 30. Motivated by his concerns for public safety, Mr. Lawson suggested that the police should be advised of Mr. Rasmussen's concerns. He should have refrained from expressing his opinion to other Board members, but his infraction is understandable in light of his imminent concerns.

2. April 6, 2016 (¶ 13 in OML Complaint)

In an email dated April 6, 2016, Mr. Lawson replied to an email from Ms. Reiss, in which she reflected on advice from counsel. Ms. Reiss's replacement Board member took office on April 6, and Ms. Reiss was no longer a Board member at the time of her email.

Mr. Lawson should have been more careful to confine his two -word response to Ms. Reiss's email to her and the Town Manager, rather than replying to all email recipients.

3. August 2, 2016 (¶ 14 in OML Complaint).

In an email dated August 2, 2016, Board members Tom McKean and Michael Lawson responded briefly to a receipt of a memorandum from Town Counsel containing attorney client privileged information. The Board members should not have shared any response to a quorum of the Board outside of a properly-noticed executive session.

4. June 9, 2017 (¶ 15 in OML Complaint)

As follow up to an email from the Town Manager notifying the Select Board of the subject matter intended for an upcoming executive session, the Board Chair Jane Hotchkiss further clarified the subject of the upcoming executive session. This email falls within the exception to the definition of "deliberation" as a procedural notice to Board members of the subject to be deliberated upon in the executive session. G.L. c. 30A, §18.

5. September 12, 2017 (¶ 16 in OML Complaint)

On September 12, 2017, Town Manager Chris Whelan transmitted information protected by attorney client and work product privilege to the Select Board. Select Board member Tom McKean made an inconsequential comment in response, copied to a quorum of the Board. Mr. Lawson responded to Mr. Whelan without copying any other Board members and did not violate the OML by doing so. No other Board members responded.

6. October 19, 2017 (¶¶ 17-18 in OML Complaint)

On October 19, 2017, Mr. Whelan distributed a letter drafted by Town Counsel seeking input on the draft from Board members, asking them to respond to him individually. No electronic communications were circulated among a quorum of Board members and no violation of the OML occurred.

7. October 24-26, 2017 (¶ 20 in OML Complaint)

On October 24, 2017, Mr. Whelan circulated a writing protected by attorney client and work product privilege to the Board. In response, Board member Alice Kaufman responded individually to the Town Manager without deliberation among a quorum of the Board. The Town Manager in turn replied to Ms. Kaufman, and copied Board Chair Jane Hotchkiss. Ms.

Hotchkiss then replied. Ms. Kaufman and Mr. Whelan exchanged additional emails to revise the draft press release prepared by counsel. At no point did a quorum of the Board deliberate on the matter discussed in the email exchange. There was no violation of the OML.

8. October 26, 2017 (¶ 21 in OML Complaint)

On October 26, 2017, in response to a draft letter from Town Counsel circulated to the Board by Mr. Whelan, Ms. Hotchkiss suggested an additional name be copied on the letter. This communication does not rise to the level of “deliberation” and should be regarded as an administrative procedural communication.

9. November 8, 2017 (¶ 22 in OML Complaint)

On November 8, 2017, in response to an email to the Board from Mr. Whelan, Mr. Lawson responded individually to Mr. Whelan. No other Board member was copied on Mr. Lawson’s email to Mr. Whelan. There was no deliberation among a quorum of the Board and no OML violation by Mr. Lawson.

10. November 16, 2017 (¶ 23 in OML Complaint).

On November 16, 2017, Board members exchanged emails to determine whether all members had received a letter. These communications largely involve confirming the distribution of a document to the Board, which is akin to a procedural communication exempt from the definition of deliberation. G.L. c. 30A, § 18. Redacted material from Mr. Lawson’s email involves advice he had requested from counsel. Mr. Lawson’s report to the Board that he had sought such advice from counsel is at most a minor infraction.

11. January 5, 2018 (¶ 24 in OML Complaint)

On January 5, 2018, Town Manager Chris Whelan sent an email to the Board, providing information on the then current legal budget and expenditures and seeking direction for staff on whether to prepare a draft warrant article for a supplemental appropriation for legal expenses, asking that Board members respond individually to him or the Chair Jane Hotchkiss, so as to avoid any violation of the OML. Board members Lawson, McKean and Kaufman all responded and adhered to Mr. Whelan’s request to respond individually. The warrant, including the article to be drafted, would be discussed in open session at an upcoming meeting. No quorum of the Board deliberated in these email exchanges, all of which engaged with the Town Manager individually (with copies in some cases to the Chair) on matters within Mr. Whelan’s purview. There was no OML violation.

12. January 12, 2018 (¶ 25 in OML Complaint)

On January 12, 2018, Mr. Whelan forwarded an email from Town Counsel concerning the Estabrook Road litigation. Mr. Lawson and Ms. Kaufman each responded with words of

acknowledgment of the message received, copying a quorum of the Board. Their comments were not substantive, and at most, are a minor infraction of the OML.

13. February 7, 2018 (¶ 26 in OML Complaint)

On February 7, 2018, Mr. Whelan sent to Board members by email the Answer, Affirmative Defenses and Counterclaims from defendants in the Estabrook Road litigation. No Board members responded, no deliberation took place, and no violation of the OML occurred.

14. February 21, 2018 (¶ 27 in OML Complaint)

On February 21, 2018, Mr. Whelan forwarded an email from Town Counsel concerning mediation screening ordered by the Land Court, including a date for the screening. Mr. Lawson responded to Mr. Whelan without copying other Board members and advised of his availability for the mediation screening date. No deliberation among a Board quorum and no violation of the OML occurred. Because Mr. Lawson's email advised about a scheduling matter, it would not have fallen within the definition of deliberation even if a quorum of the Board had been copied.

15. May 9, 2018 (¶ 28 in OML Complaint)

On May 9, 2018, Mr. Whelan wrote to the Board reporting that mediation had taken place, including the attendance of Board members Kaufman and Lawson, as previously authorized by the Board. He then asked about availability of the Board to meet to discuss information learned at the mediation session. Board members confirmed their availability. No opinions were expressed. The Board's email communications are exempt from the definition of deliberation as "scheduling information." No OML violation occurred.

16. May 14, 2018 (¶ 29 in OML Complaint)

On May 14, 2018, Mr. Whelan transmitted information protected by attorney client and work product privileges to Mr. Lawson and Ms. Kaufman, copying Chair Hotchkiss. The responses from Mr. Lawson and Ms. Hotchkiss were inconsequential and non-substantive acknowledgments of Mr. Whelan's email, and do not rise to the level of deliberation on public business. There was no OML violation.

17. November 22, 2016 (¶ 31 in OML Complaint)

On November 22, 2016, Ms. Hotchkiss asked Mr. Whelan by email whether there had been "other legal engagements since July or the September update." The OML Complaint speculates without any sound basis that the reference to July and September in the email indicates that the Board held executive sessions in those months concerning the Estabrook Road matter. It did not. Although the subject line in Ms. Hotchkiss's email says "Estabrook Road" because it responds to an email from Mr. Whelan forwarding memoranda from Town Counsel concerning the

Estabrook Road matter, her email asks about "other legal engagements". No violation of the OML occurred.

18. September 20, November 29 and December 12, 2016; March 27, June 19, 2017 and October 16 (¶¶ 32, 33, 34, 35, 36 and 37 in OML Complaint)

The OML Complaint alleges inadequate notice on meeting agendas for the above dates that the Board would enter into executive session to discuss litigation concerning Estabrook Road, specifying only litigation as the subject of the executive sessions. In a number of executive sessions in late 2016 and 2017, the Board deliberated on how to resolve a longstanding dispute with landowners along the unpaved portion of Estabrook Road regarding public access to the Road, including whether it would be necessary to initiate litigation against the landowners. The Town eventually commenced a lawsuit against your clients and others on October 24, 2017. Thus, on each of the above dates, except September 20, 2016, counsel met with the Board to review litigation strategy concerning Estabrook Road.

Prior to commencing litigation, the Board was under no obligation to telegraph to potential defendants its intentions by further describing the subject matter of the litigation. Stating the subject matter of the litigation, prior to its commencement, would reveal information that would "compromis[e] the purpose for which the executive session was called." G.L. c. 30A, §21(b)(3). It is, indeed, astonishing that counsel for litigants would espouse the view that public entities are required to give advance notice to potential parties to litigation prior to service of a judicial complaint -- a rule that would generally serve to tip the balance of justice against public interests and in favor of private interests. The OML was not intended to do so.

In summary, of the 23 or so allegations of OML violations, the Board acknowledges electronic communications among a quorum in six instances, all of which were de minimus communications of a few words, at most, during a period spanning most of 2016 and 2017. None of these communications reflect an intent to violate the OML.

As it had indicated it would do in response to your December 2018 OML complaint, the Board has recently undertaken additional training in compliance with the OML in order to try to prevent inadvertent OML violations. The training was scheduled to take place after spring elections and the arrival of new Board members to ensure that new office holders as well as those who continue service on the Board are aware of their responsibilities under the OML.

Robert Nislick
June 6, 2019
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We hope that this letter and the Board's recent training will serve to dispel your clients' apparent distrust of the Board's commitment to transparency in conducting the Town's business and adherence to procedural requirements when conducting any such business in private, as authorized under the OML.

Sincerely,



Kevin D. Batt

C: Attorney General, Division of Open Government
Michael Lawson, Chair, Concord Select Board
Melissa Allison, office of Town Counsel

A

ROBERT NISLICK

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Framingham, MA 01701
(508) 405-1238
rob@nislick.com

May 16, 2019

Michael Lawson, Chair
Concord Select Board
22 Monument Square
P.O. Box 535
Concord, MA 01742

Kaari Mai Tari, Town Clerk
Town of Concord
22 Monument Square
P.O. Box 535
Concord, MA 01742

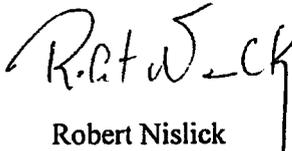
Re: Open Meeting Law Complaint

Dear Gentlepersons:

On behalf of complainants Brooks S. Read, Susannah Kay, Leslee Robb, and Russell Robb, III, enclosed please find an Open Meeting Law Complaint.

Thanks for your attention to this matter.

Yours truly,



Robert Nislick

cc: Attorney General's Division of Open Government
One Ashburton Place, 18th Floor
Boston, MA 02108

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



OPEN MEETING LAW COMPLAINT FORM

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

Please note that all fields are required unless otherwise noted.

Your Contact Information:

First Name: Robert Last Name: Nislick (BBO #664414)

Address: P.O. Box 5207

City: Framingham State: MA Zip Code: 01701

Phone Number: +1 (508) 405-1238 Ext. _____

Email: rob@nislick.com

Organization or Media Affiliation (if any): Attorney for Brooks S. Read, Susannah Kay, Leslee Robb, Russell Robb, III

Are you filing the complaint in your capacity as an individual, representative of an organization, or media?

(For statistical purposes only)

Individual Organization Media

Public Body that is the subject of this complaint:

City/Town County Regional/District State

Name of Public Body (including city/town, county or region, if applicable): Concord Select Board

Specific person(s), if any, you allege committed the violation: Carmin Reiss, Michael Lawson, Alice Kaufman, Steven Ng, Jane Hotchkiss, Thomas McKean, Linda Escobedo

Date of alleged violation: See Ex. "A"

Description of alleged violation:

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

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

1. On April 19, 2019, Concord produced Town of Concord's Third Supplemental Production of Documents in the case Town of Concord vs. Neil E. Rasmussen, et al, Land Court Case No. 17 MISC 000605 (HPS). The documents produced were Bates stamped with numbers from CONCORD_0005743 through CONCORD_0006202. (Copies of the documents cited herein are attached hereto as Exhibit "B").

2. Certain documents that Concord produced on April 19, 2019, establish that a quorum of the Concord Select Board deliberated and held meetings via electronic mail communication in violation of the Open Meeting Law on March 29-30, 2016 (see 5951); April 6, 2016 (see 5947); August 2, 2016 (see 5961); June 9, 2017 (see 5972, 5981); September 12, 2017 (see 6082, 6159, 6175); October 19, 2017 (see 6179); October 24-26, 2017 (see 6092, 6095, 6096, 6117, 6118); October 26, 2017 (see 6177); November 8, 2017 (see 6107); November 16, 2017 (see 6048, 6116); January 5, 2018 (see 6040, 6136, 6167); January 12, 2018 (see 6158, 6172); February 7, 2018 (see 6108); and February 21, 2018 (see 6042, 6062-6063).

3. The violations were not known and could not reasonably have been known to complainants until April 19, 2019. See 940 Code Mass. Regs. § 29.05(4). Complainants discovered the violations when Concord produced heavily redacted copies of electronic mail written communications to them on April 19, 2019.

[Please see Exhibit "A" attached hereto for the complete description of the alleged violations.]

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

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

1. Declare the executive sessions invalid because they failed to comply with the Open Meeting Law.
2. Acknowledge that all matters within the executive sessions are public.
3. Release all executive session minutes and audiovisual recordings from the executive sessions, and unredacted copies of all cited electronic mail correspondence forthwith.
4. Acknowledge that it repeatedly intentionally violated the Open Meeting Law.
5. Such other and further relief as may be appropriate

Review, sign, and submit your complaint

I. Disclosure of Your Complaint.

Public Record. Under most circumstances, your complaint, and any documents submitted with your complaint, is considered a public record and will be available to any member of the public upon request.

Publication to Website. As part of the Open Data Initiative, the AGO will publish to its website certain information regarding your complaint, including your name and the name of the public body. The AGO will not publish your contact information.

II. Consulting With a Private Attorney.

The AGO cannot give you legal advice and is not able to be your private attorney, but represents the public interest. If you have any questions concerning your individual legal rights or responsibilities you should contact a private attorney.

III. Submit Your Complaint to the Public Body.

The complaint must be filed first with the public body. If you have any questions, please contact the Division of Open Government by calling (617) 963-2540 or by email to openmeeting@state.ma.us.

By signing below, I acknowledge that I have read and understood the provisions above and certify that the information I have provided is true and correct to the best of my knowledge.

Signed: Robert Nislick
ROBERT NISLICK / (BB#664414)

Date: 5/16/19

Page 2

P.O. BOX 5207
FRAMINGHAM, MA 01701
508-405-1238 rob@nislick.com, as attorney for
Brooks S. Read, Susannah Kay, Leslee Robb, Russell Robb III

For Use By Public Body Date Received by Public Body: For Use By AGO Date Received by AGO:

A

Exhibit "A"

Dates of Alleged Violations

March 29-30, 2016; April 6, 2016; July 25, 2016; August 2, 2016; September 20, 2016; November 29, 2016; December 12, 2016; March 27, 2017; June 9, 2017; June 19, 2017; September 12, 2017; October 16, 2017; October 19, 2017; October 24-26, 2017; October 26, 2017; November 8, 2017; November 16, 2017; January 5, 2018; January 12, 2018; February 7, 2018; and February 21, 2018.

Description of Alleged Violations

1. On April 19, 2019, Concord produced Town of Concord's Third Supplemental Production of Documents in the case Town of Concord vs. Neil E. Rasmussen, et al., Land Court Case No. 17 MISC 000605 (HPS). The documents produced were Bates stamped with numbers from CONCORD_0005743 through CONCORD_0006202. (Copies of the documents cited herein are attached hereto as Exhibit "B").
2. Certain documents that Concord produced on April 19, 2019, establish that a quorum of the Concord Select Board deliberated and held meetings via electronic mail communication in violation of the Open Meeting Law on March 29-30, 2016 (see 5951); April 6, 2016 (see 5947); August 2, 2016 (see 5961); June 9, 2017 (see 5972, 5981); September 12, 2017 (see 6082, 6159, 6175); October 19, 2017 (see 6179); October 24-26, 2017 (see 6092, 6095, 6096, 6117, 6118); October 26, 2017 (see 6177); November 8, 2017 (see 6107); November 16, 2017 (see 6048, 6116); January 5, 2018 (see 6040, 6136, 6167); January 12, 2018 (see 6158, 6172); February 7, 2018 (see 6108); and February 21, 2018 (see 6042, 6062-6063).
3. The violations were not known and could not reasonably have been known to complainants until April 19, 2019. See 940 Code Mass. Regs. § 29.05(4). Complainants discovered the violations when Concord produced heavily redacted copies of electronic mail written communications to them on April 19, 2019.
4. The Open Meeting Law was enacted "to eliminate much of the secrecy surrounding deliberations and decisions on which public policy is based." Ghiglione v. School Comm. of Southbridge, 376 Mass. 70, 72 (1978).
5. "The 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." OML 2018-118 at 2. The law defines a "meeting" as, "a deliberation by a public body with respect to any matter within the body's jurisdiction." G. L. c. 30A, § 18. A "deliberation" is defined 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 other procedural meeting or the distribution of reports or documents

that may be discussed at a meeting, provided that no opinion of a member is expressed.” G. L. c. 30A, § 18.

6. “Governmental bodies may not circumvent the requirements of the open meeting law by conducting deliberations via private messages, whether electronically, in person, over the telephone, or in any other form.” District Attorney for the N. Dist. v. School Comm. of Wayland, 455 Mass. 561, 570-571 (2009).

7. The Massachusetts open meeting law, G. L. c. 30A, §§ 18 and 20 (a), “requires public bodies to make their meetings, including ‘deliberations,’ open to the public.” Boelter v. Board of Selectmen of Wayland, 479 Mass. 233, 234 (2018).

8. “[I]n recognition that the overarching purpose of the open meeting law is to ensure transparency in governmental decision-making, the Legislature specified that no opinion of a board member could be expressed in any documents circulated to a quorum prior to an open meeting.” Boelter v. Board of Selectmen of Wayland, 479 Mass. 233, 241 (2018).

9. “In Boelter, the Court concluded that the Wayland Board of Selectmen violated the Open Meeting Law by distributing to its members employee performance evaluations that included opinions of individual Board members. Communication of these opinions by email constituted ‘deliberation’ by the Board members that may occur only during a properly noticed meeting. This decision establishes that public body members may not send opinions to each other . . . outside of a noticed meeting.” OML 2018-38.

10. “Orchestrated private exchanges of opinions . . . between individual members of a public body and its chair . . . are prohibited.” Boelter v. Wayland Board of Selectmen, Middlesex Superior Court No. 14-CV-0591-H (Curran, J.) (June 29, 2016).

11. The Town of Concord Committee Handbook, § VII.1 Appendix Q. Use of Electronic Mail (APP #50), states in pertinent part:

“COMMITTEE USE OF ELECTRONIC MAIL

In order to assist members of governmental bodies to comply with the Open Meeting Law in their use of this technology, the Middlesex District Attorney's Office has established guidelines for committees' use of electronic mail. The guidelines reaffirm that **no substantive discussion by a quorum of members of a governmental body about public business within the jurisdiction of the governmental body is permissible except at a meeting held in compliance with the requirements of the Open Meeting Law. Like private conversations held in person or over the telephone, e-mail conversations among a quorum of members of a governmental body that relate to public business violate the Open Meeting Law, as the public is deprived of the opportunity to attend and monitor the e-mail ‘meeting.’**

Despite the convenience and speed of communication by e-mail, its use by members of a governmental body carries a high risk of violating the Open Meeting Law. Not only do private e-mail communications deprive the public of the chance contemporaneously to monitor the discussion, but by excluding non-participating members, such communications are also inconsistent with the collegial character of governmental bodies. For these reasons, the Middlesex District Attorney cautions that e-mail messages among members of governmental bodies are best avoided except for matters of a purely housekeeping or administrative nature.”

(See Town of Concord Committee Handbook, § VII.1 Appendix Q. Use of Electronic Mail (APP #50) at 103-104 (Oct. 2018), available at <https://concordma.gov/DocumentCenter/View/17369/2018-Oct-Committee-Handbook---OML-Updates>) (emphasis added).

12. On March 29-30, 2016, Concord Select Board members Carmin Reiss, Michael Lawson, Alice Kaufman, Steven Ng, and Jane Hotchkiss communicated by electronic mail and expressed opinions concerning Estabrook Road. Carmin Reiss opined that she disagreed with Neil Rasmussen (a private citizen that the Town of Concord sued concerning Estabrook Road) concerning whether landowners have the right to post their land and that there is no public right of access to Estabrook Road. Michael Lawson replied to all members of the Concord Select Board, however, Concord redacted his response without any basis for doing so. The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. (See 5951).

13. On April 6, 2016, Concord Select Board members Carmin Reiss, Michael Lawson, Alice Kaufman, Steven Ng, and Jane Hotchkiss communicated by electronic mail and expressed opinions concerning Estabrook Road. Michael Lawson opined: “I agree.” Their e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. Complainants do not know what Michael Lawson was agreeing with because Concord redacted his response without any basis for doing so. The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. (See 5947).

14. On August 2, 2016, Concord Select Board members Thomas McKean, Michael Lawson, Alice Kaufman, Jane Hotchkiss, and Steven Ng communicated by electronic mail and expressed opinions concerning Estabrook Road. Thomas McKean opined: “Seems pretty straight forward and on point. Tom”. Complainants do not know what Thomas McKean thought was pretty straightforward and on point because Concord redacted his response without any basis for doing so. The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. (See 5961).

15. On June 9, 2017, Concord Select Board members Jane Hotchkiss, Alice Kaufman, Michael Lawson, Steven Ng, and Thomas McKean communicated by electronic mail in response to an e-mail from Concord Natural Resources Director Delia Kaye to Concord Town Manager Chris Whelan concerning Neil Rasmussen's sign posted along Estabrook Road notifying trail users of leash restrictions on his property. Complainants do not know what opinion Jane Hotchkiss expressed to the Concord Select Board because Concord redacted her response without any basis for doing so. The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. (See 5972, 5981).

16. On September 12, 2017, Concord Select Board members Thomas McKean, Alice Kaufman, Jane Hotchkiss, Michael Lawson, Steven Ng, communicated by electronic mail in response to an e-mail from Concord Town Manager Chris Whelan concerning the Estabrook Road draft complaint. Thomas McKean opined: "Timely. Tom". Michael Lawson responded as well, but complainants do not know what opinion Michael Lawson expressed because Concord redacted his response without any basis for doing so. The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public. (See 6082, 6159, 6175).

17. On October 19, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with Concord Select Board members Alice Kaufman, Jane Hotchkiss, Michael Lawson, Steven Ng, and Thomas McKean regarding the subject: "CONFIDENTIAL Draft letter to accompany complaint." Chris Whelan stated: "Mike and SB, Would you please review this draft letter and let me know individually if you have any concerns. Kevin is hoping to send it out today. Chris". (See 6179).

18. Concord failed to produce any of the board members' responses. The Concord Select Board probably engaged in serial deliberation via electronic mail in response to Chris Whelan's e-mail request for individual responses from each member of the Concord Select Board, on dates between October 19-24, 2017. Concord town counsel did send a letter to the Rasmussens' counsel dated October 24, 2017, the same date on which Concord filed a complaint in the Land Court against the Rasmussens, Harvard University, and the complainants. (See 5622).

19. "[A] public body may not engage in a serial deliberation, whereby a quorum communicates in a non-contemporaneous manner outside of a meeting on a matter within the public body's jurisdiction." OML 2018-71 at 4. See McCrea v. Flaherty, 71 Mass. App. Ct. 637, 648-649 (2008).

20. On October 24-26, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with Concord Select Board members Alice Kaufman, Jane Hotchkiss, Michael Lawson, Steven Ng, and Thomas McKean regarding the subject: "FW: Estabrook Road Complaint Filed Today." Concord redacted the contents of Chris Whelan's electronic mail to the Concord Select Board. (See 6117-6118). Alice Kaufman opined: "This is an unusual press release in that it reads as an op-ed. It asserts opinion

that may serve to inflame the arguments with the abutters that I do not think is served in the Concord Journal. It is customary to use attribution for statements of interpretation or beliefs.” (See 6092, 6117). Chris Whelan replied that he would “prepare something and will review it with Jane.” (See 6117). Jane Hotchkiss opined: “I agree and look forward to your rewrite.” (See 6117). Alice Kaufman opined: “Chris Please see my comments to the draft. Take them or not as you see fit. I do not wish to fan flames at this point and suggest we be neutral in the language for the news release. It is probably not really necessary to wordsmith this further but a neutral written statement will have a lower probability of being misconstrued when Henry or someone else writes the story. Your quote looks good and I agree that we should delete the reference to call counsel. Should you receive calls, you can advise the caller who to contact. I would not be surprised if you receive a call from the Globe and perhaps local TV too. Alice”. (See 6056, 6096). Chris Whelan replied: “Thanks Alice! I have accepted your changes in the document and forwarded it to Erin requesting that she try to get it out today. Chris”. (See 6096). Jane Hotchkiss opined: “Thanks for moving this out Chris - we will undoubtedly see some response on Monday”. (See 6096). The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

21. On October 26, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with Concord Select Board members Jane Hotchkiss, Alice Kaufman, Michael Lawson, Steven Ng, and Thomas McKean regarding the subject: “Re: Concord – Estabrook Road”. Chris Whelan’s electronic mail stated: “SB: Attached is Kevin Batt’s letter to Harvard’s general counsel [Redacted].” Jane Hotchkiss opined: “Might be politic to cc Andy Biewinder (so?)” (See 6177). The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

22. On November 8, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: “Re: Live Estabrook Webcams”. Chris Whelan’s electronic mail stated: “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 on their privacy . Chris <http://www.saveourheritage.com/Estabrook Road.htm>”. (See 6107). Michael Lawson responded, but complainants do not know what opinion Michael Lawson expressed because Concord redacted his response without any basis for doing so. The Concord Select Board’s e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

23. On November 16, 2017, Concord Select Board members, Alice Kaufman, Michael Lawson, Steven Ng, Jane Hotchkiss, and Thomas McKean communicated by electronic mail concerning a letter that Alice Kaufman received “regarding Estabrook today”. (See 6116). Michael Lawson responded: “Hi Alice, Yes, I received the same, exact, letter. [Redacted] [Redacted]. Mike”. (See 6116). Complainants do not know what opinion Michael Lawson expressed concerning the letter he received regarding Estabrook, because Concord redacted his response without any basis for doing so. Steven Ng

responded: "I haven't received anything." (See 6116). Jane Hotchkiss responded: "I have not seen anything". (See 6048). The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

24. On January 5, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: "FW: FY18 Supplemental Appropriation – Legal Expenses", in which he discussed "a warrant article requesting a supplemental appropriation for legal service expenses in the current fiscal year. . . . The primary issue is the Estabrook matter, and there has been some interest in settlement. . . . Would you please let me or Jane know individually if you agree." (See 6040-6041). Michael Lawson opined: "Chris I support your point of view. Your remark about some interest in settlement surprised me. I've heard nothing. Mike" (See 6040). Chris Whelan responded. Then Michael Lawson responded, but complainants do not know what opinion Michael Lawson expressed because Concord redacted his response without any basis for doing so. Thomas McKean opined: "I agree with Chris's analysis and see little advantage in raising an issue that is likely to get sidetracked into a debate on Estabrook." (See 6136). Jane Hotchkiss opined: "Agreed!" (See 6136). Alice Kaufman opined: "I am glad to hear that there is some positive movement towards settlement regarding Estabrook. Have there been further conversations since our attorney's reached out to Mintz Levin and the abutters just before the holidays? [Redacted] I trust that you and Kerry have talked through our needs to support the various active cases and have determined that there is no need for a supplemental appropriations for legal services. Do we have a Plan B should we not reach agreement on Estabrook and proceed to court?" (See 6167). Complainants do not know the entirety of Alice Kaufman's opinion because Concord redacted her response without any basis for doing so. The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

25. On January 12, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: "FW: Estabrook Road Litigation?". (See 6158, 6172). Chris Whelan's e-mail stated: "SB: FYI re proposal to mediate Estabrook Road matter." (See 6158). Michael Lawson opined: "Good to hear. Michael Lawson" (See 6172). Alice Kaufman opined: "Small progress, thanks." (See 6172). The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

26. On February 7, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board, and stated: "Select Board: Here's the answers from respondents on the Estabrook matter. Chris". (See 6108). Concord failed to produce any of the board members' responses. The Concord Select Board probably engaged in serial deliberation via electronic mail in response to Chris Whelan's e-mail, in violation of the Open Meeting Law.

27. On February 21, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: "FW: Mediation screening - privileged and confidential". (See 6062). Complainants do not know the contents of the e-mail because Concord redacted the e-mail without any basis for doing so. (See 6062-6063). Michael Lawson responded: "I can be available if needed." (See 6042). The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

28. On May 9, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with the Concord Select Board regarding the subject: "SB Meeting next Monday Concerning Estabrook?" (See 6151, 6176). Chris Whelan's e-mail informed Tom McKean that Alice Kaufman, Michael Lawson, and Chris Whelan "spent all day in mediation yesterday on the Estabrook matter." (See 6176). Chris Whelan's e-mail stated further: "Although the board voted to authorize Mike and Alice to act on behalf of the board to settle the case, we think it would be beneficial to discuss some of the things we heard yesterday. Would you be willing to schedule a meeting next Monday, May 14 at 8:00 a.m. [Redacted] [Redacted] If that is agreeable, could Linda and Jane advise on whether they are available to meet next Monday. (We would meet first in open session, then adjourn to executive session to discuss this matter only) Thanks!" (See 6130, 6176). Jane Hotchkiss responded: "I will be there." (See 6176). Tom McKean responded: "I will be there as well. Tom". (See 6151). Concord redacted a portion of Chris Whelan's electronic mail communication to the Select Board without any basis for doing so. Additionally, Concord failed to produce the responses of any other Select Board members. The Concord Select Board probably engaged in serial deliberation via electronic mail in response to Chris Whelan's redacted e-mail, in violation of the Open Meeting Law. The Concord Select Board did meet in executive session on May 14, 2018, at eight o'clock in the morning. Although the meeting notice for the May 14, 2018, meeting referenced the Estabrook Road litigation, it failed to include topics that were evidently discussed in the executive session, such as mediation, settlement, and the redacted portion of Chris Whelan's electronic mail. Complainants did not know that the Concord Select Board planned to discuss those topics in executive session on May 14, 2018, until Concord produced Chris Whelan's May 9, 2018, e-mail.

29. On May 14, 2018, Concord Town Manager Chris Whelan communicated by electronic mail with Michael Lawson, Alice Kaufman, and Jane Hotchkiss, a quorum of the Concord Select Board regarding the subject: "FW: CR's Along Estabrook Road?" (See 6152, 6155). Complainants do not know what Chris Whelan communicated to them because Concord redacted his e-mail without any basis for doing so. (See 6152). Michael Lawson responded: "Thanks Chris. Mike". (See 6152). Jane Hotchkiss responded: "Hope it goes well tomorrow will keep My fingers crossed". (See 6152). Complainants do not know whether Alice Kaufman responded. The Concord Select Board's e-mail correspondence violated the Open Meeting Law because it was a deliberation and a meeting which was not open to the public.

30. Additionally, Concord's production of documents on April 19, 2019, establishes that the Concord Select Board conducted illegal executive sessions concerning Estabrook

Road on or about July 25, 2016 (see 5944-5946); September 20, 2016 (see 5944-5946); November 29, 2016 (see 5989); December 12, 2016 (see 5993); March 27, 2017 (see 5983); June 19, 2017 (see 5985); and October 16, 2017 (see 6110). On multiple occasions, the Concord Select Board deceitfully posted notices which stated it intended to discuss “litigation”, or “ongoing litigation”, “litigation strategy”, or “land acquisition”, when the Concord Select Board was actually discussing “Estabrook Road” more than a year before there was any litigation concerning Estabrook Road.

31. On or about July 25, 2016, the Concord Select Board conducted an executive session concerning “Estabrook Road”. The Concord Select Board posted no notice that it would meet concerning “Estabrook Road”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced an e-mail dated November 22, 2016, from Concord Select Board member Jane Hotchkiss to Concord Town Manager Chris Whelan. (See 5944-5946). The subject is: “RE: Estabrook Road”. In the e-mail, Jane Hotchkiss asks: “Have there been any other legal engagements since July or the September update?” A review of the Concord Select Board’s meeting notices for July 2016, shows no mention of a meeting concerning “Estabrook Road” in either open session or executive session. The Concord Select Board did enter executive session on July 25, 2016, to consider matters of land acquisition, improperly. In any event, complainants are not certain whether “Estabrook Road” was discussed in this particular executive session, because the Concord Select Board has never released the executive session minutes from July 25, 2016.

32. On or about September 20, 2016, the Concord Select Board conducted an executive session concerning “Estabrook Road”. The Concord Select Board posted no notice that it would meet concerning “Estabrook Road”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced an e-mail dated November 22, 2016, from Concord Select Board member Jane Hotchkiss to Concord Town Manager Chris Whelan. (See 5944-5946). The subject is: “RE: Estabrook Road”. In the e-mail, Jane Hotchkiss asks: “Have there been any other legal engagements since July or the September update?” A review of the Concord Select Board’s meeting notices for September 2016, shows no mention of a meeting concerning “Estabrook Road” in either open session or executive session. The Concord Select Board did enter executive session on September 20, 2016, to consider matters of land acquisition, improperly. In any event, complainants are not certain whether “Estabrook Road” was discussed in this particular executive session, because the Concord Select Board has never released the executive session minutes from September 20, 2016.

33. On November 29, 2016, the Concord Select Board conducted an executive session concerning “Estabrook”. The Concord Select Board posted no notice that it would meet concerning “Estabrook”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced e-mail correspondence dated November 21, 28-29, 2016, from Concord Town Manager Chris Whelan to Andrew Mara, Kevin D. Batt, and Andrew W. Fowler. (See 5989). The subject is: “FW: Meet with Select Board on Estabrook?”.

On November 21, 2016, Chris Whelan wrote:

“Andrew,
Would you please check with the Select Board to see if they are available to meet with town counsel on the Estabrook Road matter on Tuesday, November 29. Please remind members that the public hearing for the December 8 Special Town Meeting is also scheduled for 11/29 at 7:00 p.m.

I think having an executive session before the hearing, from 530 to 630 or from 600 to 645, would work. Would you please check and see if members are available? Thanks!

Chris”

On November 22, 2016, Concord Senior Administrative Assistant Andrew Mara e-mailed Concord Town Manager Chris Whelan, “RE: Estabrook Road”, to inform him that “Jane and Mike, and Steve can do Executive Session”. (See 5954).

On November 28, 2016, Kevin D. Batt wrote: “Chris, do we have a meeting confirmed for tomorrow? (See 5989).

On November 29, 2016, Chris Whelan wrote:

“Kevin,
Yes. The board is posted for an exec session discussion with town counsel at 6:00 p.m. in the Select Board room of the Town House. I had thought a 4:00 p.m. site visit before dark might be useful, but it sounds like rain all day tomorrow. Let me know if you'd like to see conditions on the ground and I will arrange to have someone meet you out there. Thanks!

Chris” (See 5989).

A review of the Concord Select Board’s meeting notice for November 29, 2016, shows no mention of a meeting concerning “Estabrook” or “Estabrook Road” in either open session or executive session. The Concord Select Board did enter executive session on November 29, 2016, to consider matters of litigation. There was no litigation concerning “Estabrook Road” until October 24, 2017, when Concord sued the complainants. The Concord Select Board has never released the minutes from its illegal executive session on November 29, 2016.

34. On December 12, 2016, the Concord Select Board conducted an executive session concerning “Estabrook”. The Concord Select Board posted no notice that it would meet concerning “Estabrook”. Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced e-mails dated November 17-18, 2016, between Concord Town Manager Chris

Whelan and Concord town counsel Kevin D. Batt. (See 5993). The subject is: "RE: Meet with Select Board on Estabrook?". Kevin D. Batt wrote: "Chris, would you prefer we come on a Monday? If so, we could make it on December 12. Or please let us know if another weekday would work and we can check our schedules." (See 5993). Chris Whelan responded: "Kevin, Thanks for getting back to me. The meeting need not be a Monday, so Mike Lawson will check with members and offer a couple of dates that might work. I will be back to you when we have some dates to suggest. Thanks! Chris" (See 5993). A review of the Concord Select Board's meeting notices for December 2016, shows no mention of a meeting concerning "Estabrook" in either open session or executive session. The Concord Select Board did enter executive session on December 12, 2016, "for the purposes of discussing ongoing litigation", improperly. See the meeting notice, which is available at https://concordma.gov/AgendaCenter/ViewFile/Agenda/_12122016-4802. There was no litigation concerning "Estabrook" until October 24, 2017, when Concord sued the complainants. The Concord Select Board has never released the minutes from its illegal executive session on December 12, 2016.

35. On March 27, 2017, the Concord Select Board conducted an executive session concerning "Estabrook Updates". The Concord Select Board posted no notice that it would meet concerning "Estabrook Updates". Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced an e-mail dated March 13, 2017, from Concord Select Board member Jane Hotchkiss to Concord Select Board member Michael Lawson and Concord Town Manager Chris Whelan. (See 5983). The subject is: "Estabrook Updates". Jane Hotchkiss wrote: "I met with Sally and Polly on Thursday and we'd like to tee a follow up discussion led by Delia on the recommendations the SB passed for our March 27 meeting. [Redacted]" (See 5983). A review of the Concord Select Board's meeting notices for March 2017, shows no mention of a meeting concerning "Estabrook Updates" in either open session or executive session. The Concord Select Board did enter executive session on March 27, 2017, "for the purposes of discussing litigation strategy", improperly. See the meeting notice, which is available at https://concordma.gov/AgendaCenter/ViewFile/Agenda/_03272017-5105. There was no litigation concerning "Estabrook" until October 24, 2017, when Concord sued the complainants. The Concord Select Board has never released the minutes from its illegal executive session on March 27, 2017.

36. On June 19, 2017, the Concord Select Board conducted an executive session "discussion of the Estabrook Road matter". (See 5985). The Concord Select Board posted no notice that it would conduct an executive session "discussion of the Estabrook Road matter". Complainants did not know and could not have known that the Concord Select Board conducted this meeting until April 19, 2019, when Concord produced e-mail correspondence dated May 31, 2017, with the subject: "RE: Available for Concord SB Meeting on Estabrook?" (See 5985). Concord's counsel wrote to Concord Town Manager Chris Whelan: "Chris, Kevin and I are available on Monday, June 19th to discuss the Town's next steps. An 8:30pm meeting? Sincerely, Andrew" (See 5985). Chris Whelan wrote to Concord Select Board member Jane Hotchkiss: "Jane Andrew

and Kevin are available to join you on 6/19 for an exec session discussion of the Estabrook Road matter. I will ask Andrew Mara to share with Kevin and Andrew the four letters we received from abutters. Chris” (See 5985). Jane Hotchkiss responded: “Thank you Chris”. A review of the Concord Select Board’s meeting notices for June 19, 2017, shows no mention of any “discussion of the Estabrook Road matter” in either open session or executive session. The Concord Select Board did enter executive session on June 19, 2017, “to discuss litigation and land acquisition”, improperly. See the meeting notice, which is available at

https://concordma.gov/AgendaCenter/ViewFile/Agenda/_06192017-5285

There was no litigation concerning “the Estabrook Road matter” until October 24, 2017, when Concord sued the complainants. The Concord Select Board has never released the minutes from its illegal executive session on June 19, 2017.

37. On October 16, 2017, Concord Town Manager Chris Whelan communicated by electronic mail with Concord Select Board members Alice Kaufman, Jane Hotchkiss, Michael Lawson, Steven Ng, and Thomas McKean regarding the subject: “Draft lawsuit from Mintz Levin on Estabrook Road”. Although Concord redacted a portion of the e-mail without any basis for doing so, the unredacted portion states: “We are scheduled for an exec session tonight, so we can discuss at that time.” (See 6110).

38. “Except in an emergency, in addition to any notice otherwise required by law, a public body shall post notice of every meeting at least 48 hours prior to such meeting, excluding Saturdays, Sundays and legal holidays. In an emergency, a public body shall post notice as soon as reasonably possible prior to such meeting. Notice shall be printed in a legible, easily understandable format and shall contain the date, time and place of such meeting and a listing of topics that the chair reasonably anticipates will be discussed at the meeting.” G. L. c. 30A, § 20 (b).

39. “Except in an emergency, public bodies shall file meeting notices sufficiently in advance of a public meeting to permit posting of the notice at least 48 hours in advance of the public meeting, excluding Saturdays, Sundays and legal holidays, in accordance with M.G.L. c. 30A, § 20. In an emergency, the notice shall be posted as soon as reasonably possible prior to such meeting.” 940 Code Mass. Regs. § 29.03 (1) (a).

40. “Meeting notices shall be printed or displayed in a legible, easily understandable format and shall contain the date, time and place of such meeting, and a listing of topics that the chair reasonably anticipates will be discussed at the meeting. The list of topics shall have sufficient specificity to reasonably advise the public of the issues to be discussed at the meeting.” 940 Code Mass. Regs. § 29.03 (1) (b).

41. The Concord Select Board failed on multiple occasions to provide any notice to the public, or to complainants, that it would discuss Estabrook Road, or any topic related to Estabrook Road, in executive session, in violation of G. L. c. 30A, § 20 (b), 940 Code Mass. Regs. § 29.03 (1) (a), (b); G. L. c. 30A, § 21.

42. The complainants believe the Concord Select Board committed repeated intentional violations of the Open Meeting Law. See G. L. c. 30A, § 18. The Concord Select Board acted with specific intent to violate the law and/or with deliberate ignorance of the law's requirements. See 940 Code Mass. Regs. § 29.02 (a), (b). For more than a year before Concord sued complainants in the Land Court, the Concord Select Board and Concord's town manager clearly discussed Estabrook Road in multiple executive sessions, without notice to any of the parties that it sued. The Concord Select Board and Concord's town manager actively concealed the fact that they were conducting these secret meetings. They did so by posting meeting notices which represented that they planned to discuss "litigation", "litigation strategy", or "ongoing litigation", when, in fact, there was no litigation over Estabrook Road at the time. Concord conspired to sue, and in fact did sue, the complainants without providing them with any prior notice. Following Concord's commencement of this case, the Concord Select Board has repeatedly deliberated secretly by electronic mail, and without notice to the complainants.

Action That Complainants Want Concord Select Board To Take In Response to
Complaint

1. Declare the executive sessions invalid because they failed to comply with the Open Meeting Law.
2. Acknowledge that all matters within the executive sessions are public.
3. Release all executive session minutes and audiovisual recordings from the executive sessions, and unredacted copies of all cited electronic mail correspondence forthwith.
4. Acknowledge that it repeatedly intentionally violated the Open Meeting Law.
5. Such other and further relief as may be appropriate.

B

From: Austin Anderson aanderson@andersonkreiger.com 

Subject: Town's Supplemental Discovery Responses

Date: April 19, 2019 at 3:39 PM

To: Moore, M. Patrick pmoore@hembar.com, Tillotson, Diane C. dtillotson@hembar.com, Robert Nislick rob@nislick.com

Cc: Kevin D. Batt batt@andersonkreiger.com, Melissa C. Allison mallison@AndersonKreiger.com, Brett A. Roman broman@andersonkreiger.com



Counsel,

The Town's supplementary responses to Neil Rasmussen's, Susannah Kay's, and Leslee Robb's Interrogatories, Neil Rasmussen's Requests for Admission, and Susannah Kay's Request for Production of Documents are attached.

Our paralegal, Brett Roman, will send you an email shortly with a link to the document production. Also included at that link will be copies of our experts' reports. The experts' resumes are contained in the document production. We will provide hard copies of the reports, which will include full-sized plans, to each of you as soon as we have them, probably some time next week.

The link from Brett will also include higher-resolution native images of Concord_0005843-5845, which are in the production but are difficult to read. That way the documents will have Bates numbers, but you will be able to refer to the higher-resolution copies as needed to read the documents.

Please let us know if you have any questions.

Best,
Austin

**ANDERSON
KREIGER**

Austin P. Anderson
T. 617.621.6576 | F. 617.621.6676
Anderson & Kreiger LLP | 50 Milk Street, 21st Floor, Boston, MA 02109



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From: Brett Roman broman@andersonkreiger.com 
Subject: Town's Supplemental Discovery Responses
Date: April 19, 2019 at 4:21 PM
To: Robert Nistlick rob@nistlick.com



You have been sent a secure document delivery from.

Sender : Brett Roman

Link : <https://securefiles.getsaas.com/bds/Login.do?id=A0514601204&p1=naj15iosbgcfhbcdbflibijj20>

Sent To : dtillotson@hembar.com; Pat; Robert Nistlick

Cc : Austin Anderson; Kevin Batt; Melissa Allison

Expires : 5/3/19 7:59:59 PM EDT

This delivery was made possible by SecureFiles. Learn more at <https://www.getsaas.com/securefiles>

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 11/22/2016 2:47:42 PM
To: Chris Whelan [cwhelan@concordma.gov]
BCC: Chris Whelan [cwhelan@concordma.gov]
Subject: RE: Estabrook Road

Have there been any other legal engagements since July or the September update?

Jane Hotchkiss
Concord Select Board
Concord, MA 01742
jhotchkiss@concordma.gov

Redacted

Redacted

Redacted

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

Redacted

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

Redacted

> 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

Redacted

Redacted

Redacted

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

Redacted

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: 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: 3/13/2017 11:35:39 AM
To: Michael Lawson [mlawson@concordma.gov]; Chris Whelan [cwhelan@concordma.gov]
Subject: Estabrook Updates

I met with Sally and Polly on Thursday and we'd like to tee a follow up discussion led by Delia on the recommendations the SB passed for our March 27 meeting.

Redacted

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 6/1/2017 11:12:25 AM
To: Chris Whelan [cwhelan@concordma.gov]; Thomas McKean [tmckean@concordma.gov]; Alice Kaufman [akaufman@concordma.gov]; Steven Ng [sng@concordma.gov]; Michael Lawson [mlawson@concordma.gov]
CC: Andrew Mara [amara@concordma.gov]
Subject: Re: Available for Concord SB Meeting on Estabrook?

Thank you Chris

From: Chris Whelan
Sent: Wednesday, May 31, 2017 6:37 PM
To: Jane Hotchkiss; Thomas McKean; Alice Kaufman; Steven Ng; Michael Lawson
Cc: Andrew Mara
Subject: Fwd: Available for Concord SB Meeting on Estabrook?

Jane

Andrew and Kevin are available to join you on 6/19 for an exec session discussion of the Estabrook Road matter. I will ask Andrew Mara to share with Kevin and Andrew the four letters we received from abutters.

Chris

Sent from my iPhone

Begin forwarded message:

From: "Andrew W. Fowler" <afowler@andersonkreiger.com>
Date: May 31, 2017 at 3:16:56 PM EDT
To: Chris Whelan <cwhelan@concordma.gov>, "Kevin D. Batt" <kbatt@AndersonKreiger.com>
Cc: Mina Makarious <mina@andersonkreiger.com>
Subject: RE: Available for Concord SB Meeting on Estabrook?

Chris,

Kevin and I are available on Monday, June 19th to discuss the Town's next steps. An 8:30pm meeting?

Sincerely,
Andrew

ANDERSON Andrew Fowler, Associate
KREIGER T. 617.621.6535 | F. 617.621.6501
Anderson & Kreiger LLP | 50 Milk Street, 21st Floor, Boston, MA 02109



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Redacted

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 11/29/2016 12:47:21 AM
To: Kevin D. Batt [/O=FIRST ORGANIZATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Batt_AND000155d]; Andrew Mara [amara@concordma.gov]
CC: Andrew W. Fowler [/O=FIRST ORGANIZATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=AFowler_AND0001179]
Subject: RE: Meet with Select Board on Estabrook?

Kevin,

Yes. The board is posted for an exec session discussion with town counsel at 6:00 p.m. in the Select Board room of the Town House. I had thought a 4:00 p.m. site visit before dark might be useful, but it sounds like rain all day tomorrow. Let me know if you'd like to see conditions on the ground and I will arrange to have someone meet you out there. Thanks!

Chris

From: Kevin D. Batt [mailto:kbatt@AndersonKreiger.com]
Sent: Monday, November 28, 2016 6:00 PM
To: Chris Whelan; Andrew Mara
Cc: Andrew W. Fowler
Subject: RE: Meet with Select Board on Estabrook?

Chris, do we have a meeting confirmed for tomorrow?

Sent with Good (www.good.com)

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

From: Chris Whelan [cwhelan@concordma.gov]
Sent: Monday, November 21, 2016 02:24 PM Eastern Standard Time
To: Andrew Mara
Cc: Kevin D. Batt; Andrew W. Fowler
Subject: FW: Meet with Select Board on Estabrook?

Andrew,

Would you please check with the Select Board to see if they are available to meet with town counsel on the Estabrook Road matter on Tuesday, November 29. Please remind members that the public hearing for the December 8 Special Town Meeting is also scheduled for 11/29 at 7:00 p.m.

I think having an executive session before the hearing, from 530 to 630 or from 600 to 645, would work. Would you please check and see if members are available? Thanks!

Chris

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 11/18/2016 2:23:58 PM
To: Kevin D. Batt [/O=FIRST ORGANIZATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Batt_AND000155d]; Andrew W. Fowler [/O=FIRST ORGANIZATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=AFowler_AND0001179]
Subject: RE: Meet with Select Board on Estabrook?

Kevin,

Thanks for getting back to me. The meeting need not be a Monday, so Mike Lawson will check with members and offer a couple of dates that might work. I will be back to you when we have some dates to suggest. Thanks!

Chris

From: Kevin D. Batt [mailto:kbatt@AndersonKreiger.com]
Sent: Thursday, November 17, 2016 9:35 PM
To: Chris Whelan; Andrew W. Fowler
Subject: RE: Meet with Select Board on Estabrook?

Chris, would you prefer we come on a Monday? If so, we could make it on December 12. Or please let us know if another weekday would work and we can check our schedules.

Kevin D. Batt

ANDERSON & KREIGER LLP

50 Milk Street, 21st Floor

Boston, MA 02109

t: 617-621-6514

f: 617-621-6614

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

Message

From: Michael Lawson [mlawson@concordma.gov]
Sent: 1/5/2018 8:55:56 AM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: FY18 Supplemental Appropriation - Legal Expenses

Redacted

From: Chris Whelan <cwhelan@concordma.gov>
Date: Friday, January 5, 2018 at 8:54 AM
To: Michael Lawson <mlawson@concordma.gov>
Subject: RE: FY18 Supplemental Appropriation - Legal Expenses

Mike,

My reference to settlement referred to the many residents who hope to see the matter resolved amicably. It is possible that public interest in a resolution could cause the parties that are most aggressive on the matter to consider settlement. Harvard has expressed a willingness to engage in discussions if the others do, and we'll see how the other parties respond.

Chris

From: Michael Lawson
Sent: Friday, January 05, 2018 8:44 AM
To: Chris Whelan
Subject: Re: FY18 Supplemental Appropriation - Legal Expenses

Chris

I support your point of view. Your remark about some interest in settlement surprised me. I've heard nothing.
Mike

From: Chris Whelan <cwhelan@concordma.gov>
Date: Friday, January 5, 2018 at 8:42 AM
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>
Cc: Kerry Lafleur <klafleur@concordma.gov>
Subject: FW: FY18 Supplemental Appropriation - Legal Expenses

Select Board,

Kerry sent me the message below yesterday suggesting that we may want to have a warrant article requesting a supplemental appropriation for legal service expenses in the current fiscal year. The Reserve Fund should be able to cover the added expenses, but using those funds for legal services would likely deplete the fund so that there are no funds available for an unexpected situation.

We discussed earlier this year having a warrant article to appropriate additional legal funds for FY2019, and decided against doing that. I think I can tighten down on legal expenditures for the remainder of the year to try to limit the amount used from the Reserve Fund this year. Legal costs associated with Nagog will be paid from the Water Fund, so that is not an issue. And we have several cases being handled by our insurance carrier, MIIA. The primary issue is the Estabrook matter, and there has been some interest in settlement. So I would be inclined to NOT seek the supplemental appropriation.

Would you please let me or Jane know individually if you agree. Kerry raised this issue before the warrant deadline, so there should be no problem with the deadline if there is interest in seeking a supplemental appropriation. Thanks.

Chris

Redacted

Message

From: Michael Lawson [mlawson@concordma.gov]
Sent: 2/21/2018 9:13:06 AM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: Mediation screening - privileged and confidential

I can be available if needed.

Redacted

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:

Redacted

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: Chris Whelan [cwhelan@concordma.gov]
Sent: 2/21/2018 8:56:36 AM
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: Mediation screening - privileged and confidential

Redacted

Redacted

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 9/12/2017 8:37:04 AM
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: Estabrook Road draft Complaint - privileged and confidential
Attachments: Draft Complaint - Estabrook Road (A0447019-6x80BA5).docx

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

Chris

Redacted

Message

From: Alice Kaufman [akaufman@concordma.gov]
Sent: 10/25/2017 7:26:28 AM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: Estabrook Road Complaint Filed Today

Chris

This is an unusual press release in that it reads as an op-ed. It asserts opinion that may serve to inflame the arguments with the abutters that I do not think is served in the Concord Journal. It is customary to use attribution for statements of interpretation or beliefs.

A.

From: Chris Whelan
Sent: Tuesday, October 24, 2017 4:57 PM
To: Alice Kaufman; Jane Hotchkiss; Michael Lawson; Steven Ng; Thomas McKean
Subject: FW: Estabrook Road Complaint Filed Today

Redacted

Redacted

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 10/25/2017 3:07:13 PM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: Estabrook Road

I will review this press release but in the meantime I would suggest as a separate matter you respond to Neil's email

Redacted

Sent from my iPhone

On Oct 25, 2017, at 2:49 PM, Chris Whelan <cwhelan@concordma.gov> wrote:

Jane and Alice,

We received a message from Neil just now expressing concern about the litigation **Redacted**

Redacted

Redacted

I think the paragraphs providing background and recent history are helpful. And the paragraph mentioning the signs and gate explain why action is needed now. I could delete the sentence about the gate, but I think the explanation is helpful. Would you please edit this draft to suggest ways it could be improved, and I will try to get it out today. Thanks!

Chris

Redacted

Redacted

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 10/26/2017 11:32:55 AM
To: Chris Whelan [cwhelan@concordma.gov]
CC: Alice Kaufman [akaufman@concordma.gov]
Subject: Re: Estabrook Road

Thanks for moving this out Chris - we will undoubtedly see some response on Monday

Sent from my iPhone

On Oct 26, 2017, at 11:15 AM, Chris Whelan <cwhelan@concordma.gov> wrote:

Thanks Alice! I have accepted your changes in the document and forwarded it to Erin requesting that she try to get it out today.

Chris

From: Alice Kaufman
Sent: Wednesday, October 25, 2017 5:02 PM
To: Chris Whelan; Jane Hotchkiss
Subject: Re: Estabrook Road

Chris

Please see my comments to the draft. Take them or not as you see fit. I do not wish to fan flames at this point and suggest we be neutral in the language for the news release. It is probably not really necessary to wordsmith this further but a neutral written statement will have a lower probability of being misconstrued when Henry or someone else writes the story.

Your quote looks good and I agree that we should delete the reference to call counsel. Should you receive calls, you can advise the caller who to contact. I would not be surprised if you receive a call from the Globe and perhaps local TV too.

Alice

From: Chris Whelan
Sent: Wednesday, October 25, 2017 2:49 PM
To: Jane Hotchkiss; Alice Kaufman
Cc: Thomas McKean; Michael Lawson; Steven Ng
Subject: FW: Estabrook Road

Jane and Alice,

We received a message from Neil just now expressing concern about the litigation. [Redacted]

[Redacted]

[Redacted] I think the paragraphs providing background and recent history are helpful. And the paragraph mentioning the signs and gate explain why action is needed now. I could delete the sentence about the gate, but I think the explanation is helpful. Would you please edit this draft to suggest ways it could be improved, and I will try to get it out today. Thanks!

Chris

Redacted

Message

From: Michael Lawson [mlawson@concordma.gov]
Sent: 11/8/2017 6:10:07 PM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: Live Estabrook Webcams

Redacted

Michael Lawson

On Nov 8, 2017, at 5:19 PM, Chris Whelan <cwhelan@concordma.gov> wrote:

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 on their privacy.

Chris

http://www.saveourheritage.com/Estabrook_Road.htm

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 2/7/2018 10:05:32 AM
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: Estabrook: Response to Rasmussen and Read/Kay counterclaims - PRIVILEGED AND CONFIDENTIAL
Attachments: Answer, Affirmative Defenses and Counterclaim of Rasmussens 12.18.17 [compressed] (A0476364x80BA5).pdf

Select Board:

Here's the answers from respondents on the Estabrook matter.

Chris

Redacted

Redacted

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 10/16/2017 4:56:26 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: Draft lawsuit from Mintz Levin on Estabrook Road

Redacted

Redacted

Redacted We are scheduled for an exec session tonight, so we can discuss at that time. I will send Redacted as soon as I see it.

Chris

Christopher Whelan
Town Manager
Concord, MA 01742

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 10/24/2017 4:57:19 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: Estabrook Road Complaint Filed Today
Attachments: Press statement on Estabrook Road lawsuit (A0456810-3xBOBA5).docx

Redacted

Message

From: Steven Ng [sng@concordma.gov]
Sent: 11/16/2017 3:46:20 PM
To: Michael Lawson [mlawson@concordma.gov]
CC: Alice Kaufman [akaufman@concordma.gov]; Jane Hotchkiss [jhotchkiss@concordma.gov]; Thomas McKean [tmckean@concordma.gov]; Chris Whelan [cwhelan@concordma.gov]
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: 10/25/2017 1:16:21 PM
To: Chris Whelan [cwhelan@concordma.gov]; Alice Kaufman [akaufman@concordma.gov]
Subject: Re: Estabrook Road Complaint Filed Today

I agree and look forward to your rewrite.

From: Chris Whelan
Sent: Wednesday, October 25, 2017 12:01 PM
To: Alice Kaufman
Cc: Jane Hotchkiss
Subject: RE: Estabrook Road Complaint Filed Today

Helpful comments, Jane. I will prepare something and will review it with Jane. Thanks.

Chris

From: Alice Kaufman
Sent: Wednesday, October 25, 2017 7:26 AM
To: Chris Whelan
Subject: Re: Estabrook Road Complaint Filed Today

Chris

This is an unusual press release in that it reads as an op-ed. It asserts opinion that may serve to inflame the arguments with the abutters that I do not think is served in the Concord Journal. It is customary to use attribution for statements of interpretation or beliefs.

A.

Redacted

Redacted

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 1/6/2018 2:28:36 PM
To: Thomas McKean [tmckean@concordma.gov]; Chris Whelan [cwhelan@concordma.gov]
Subject: Re: FY18 Supplemental Appropriation - Legal Expenses

Agreed!

From: Thomas McKean
Sent: Saturday, January 6, 2018 11:28 AM
To: Chris Whelan
Cc: Jane Hotchkiss
Subject: Re: FY18 Supplemental Appropriation - Legal Expenses

I agree with Chris's analysis and see little advantage in raising an issue that is likely to get sidetracked into a debate on Estabrook. I appreciate Kerry raising the issue, however. Tom

From: Chris Whelan
Sent: Friday, January 5, 2018 8:42 AM
To: Alice Kaufman; Jane Hotchkiss; Michael Lawson; Steven Ng; Thomas McKean
Cc: Kerry Lafleur
Subject: FW: FY18 Supplemental Appropriation - Legal Expenses

Select Board,

Kerry sent me the message below yesterday suggesting that we may want to have a warrant article requesting a supplemental appropriation for legal service expenses in the current fiscal year. The Reserve Fund should be able to cover the added expenses, but using those funds for legal services would likely deplete the fund so that there are no funds available for an unexpected situation.

We discussed earlier this year having a warrant article to appropriate additional legal funds for FY2019, and decided against doing that. I think I can tighten down on legal expenditures for the remainder of the year to try to limit the amount used from the Reserve Fund this year. Legal costs associated with Nagog will be paid from the Water Fund, so that is not an issue. And we have several cases being handled by our insurance carrier,

MIIA. Redacted

Redacted

Would you please let me or Jane know individually if you agree. Kerry raised this issue before the warrant deadline, so there should be no problem with the deadline if there is interest in seeking a supplemental appropriation. Thanks.

Chris

From: Kerry Lafleur
Sent: Thursday, January 04, 2018 1:51 PM
To: Chris Whelan
Cc: Kerry Lafleur
Subject: FY18 Supplemental Appropriation - Legal Expenses

Chris,

As of 11/30/17, we have expended \$146k against a General Fund Legal Budget of \$225k, leaving a balance of \$79k for the remaining 7 months. The average monthly expenditure is about \$35k. Assuming that trend continues for the next 7 months, we can expect to spend an additional \$232k, putting our total expenditures at \$378k, resulting in a deficit of \$153k.

To date, there have been no claims on the Reserve Fund, leaving the full balance of \$225k. In theory, we should be fine, however, perhaps it makes sense to include a warrant article for a supplemental appropriation for legal expenses, while the warrant remains open, rather than be forced to request a special within the annual if we run into trouble. If you'd like to add this article, please let me know and I'll draft it up.

Kerry A. Lafleur

(formerly Kerry A. Speidel)

Finance Director/ Treasurer-Collector

Town of Concord

klafleur@concordma.gov

(978) 318-3090

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 1/12/2018 10:19:22 AM
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: Estabrook Road Litigation?

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?

Redacted

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?

Redacted

Chris

Christopher Whelan
Town Manager
Concord, MA 01742

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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 **Melissa Cook Allison**
KREIGER T. 617.621.6512 | F. 617.621.6612
Anderson & Kreiger LLP | 50 Milk Street, 21st Floor, Boston, MA 02109

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Message

From: Alice Kaufman [akaufman@concordma.gov]
Sent: 1/5/2018 9:22:20 AM
To: Chris Whelan [cwhelan@concordma.gov]; Jane Hotchkiss [jhotchkiss@concordma.gov]
CC: Kerry Lafleur [klafleur@concordma.gov]
Subject: Re: FY18 Supplemental Appropriation - Legal Expenses

I am glad to hear that there is some positive movement towards settlement regarding Estabrook. Have there been further conversations since our attorney's reached out to Mintz Levin and the abutters just before the holidays?

Redacted

I trust that you and Kerry have talked through our needs to support the various active cases and have determined that there is no need for a supplemental appropriations for legal services. Do we have a Plan B should we not reach agreement on Estabrook and proceed to court?

Please send our thanks to CMLP and CPW for expert management of yesterday's storm.

Alice

From: Chris Whelan
Sent: Friday, January 5, 2018 8:42 AM
To: Alice Kaufman; Jane Hotchkiss; Michael Lawson; Steven Ng; Thomas McKean
Cc: Kerry Lafleur
Subject: FW: FY18 Supplemental Appropriation - Legal Expenses

Select Board,

Kerry sent me the message below yesterday suggesting that we may want to have a warrant article requesting a supplemental appropriation for legal service expenses in the current fiscal year. The Reserve Fund should be able to cover the added expenses, but using those funds for legal services would likely deplete the fund so that there are no funds available for an unexpected situation.

We discussed earlier this year having a warrant article to appropriate additional legal funds for FY2019, and decided against doing that. I think I can tighten down on legal expenditures for the remainder of the year to try to limit the amount used from the Reserve Fund this year. Legal costs associated with Nagog will be paid from the Water Fund, so that is not an issue. And we have several cases being handled by our insurance carrier, MIIA. Redacted

Redacted

Would you please let me or Jane know individually if you agree. Kerry raised this issue before the warrant deadline, so there should be no problem with the deadline if there is interest in seeking a supplemental appropriation. Thanks.

Chris

From: Kerry Lafleur
Sent: Thursday, January 04, 2018 1:51 PM
To: Chris Whelan

Cc: Kerry Lafleur

Subject: FY18 Supplemental Appropriation - Legal Expenses

Chris,

As of 11/30/17, we have expended \$146k against a General Fund Legal Budget of \$225k, leaving a balance of \$79k for the remaining 7 months. The average monthly expenditure is about \$35k. Assuming that trend continues for the next 7 months, we can expect to spend an additional \$232k, putting our total expenditures at \$378k, resulting in a deficit of \$153k.

To date, there have been no claims on the Reserve Fund, leaving the full balance of \$225k. In theory, we should be fine, however, perhaps it makes sense to include a warrant article for a supplemental appropriation for legal expenses, while the warrant remains open, rather than be forced to request a special within the annual if we run into trouble. If you'd like to add this article, please let me know and I'll draft it up.

Kerry A. Lafleur

(formerly Kerry A. Speidel)

Finance Director/ Treasurer-Collector

Town of Concord

klafleur@concordma.gov

(978) 318-3090

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

Redacted

Redacted

Message

From: Michael Lawson [mlawson@concordma.gov]
Sent: 9/12/2017 9:07:04 AM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: Estabrook Road draft Complaint - privileged and confidential

Chris

Thanks.

Redacted

Redacted

Mike

Michael Lawson

On Sep 12, 2017, at 8:37 AM, Chris Whelan <cwhelan@concordma.gov> wrote:

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

<image001.png>

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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Redacted

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 5/9/2018 8:43:40 AM
To: Chris Whelan [cwhelan@concordma.gov]; Thomas McKean [tmckean@concordma.gov]
CC: Michael Lawson [mlawson@concordma.gov]; Alice Kaufman [akaufman@concordma.gov]; Linda Escobedo [lescobedo@concordma.gov]; Andrew Mara [amara@concordma.gov]
Subject: Re: SB Meeting next Monday Concerning Estabrook?

I will be there

From: Chris Whelan
Sent: Wednesday, May 9, 2018 8:20 AM
To: Thomas McKean
Cc: Michael Lawson; Alice Kaufman; Jane Hotchkiss; Linda Escobedo; Andrew Mara
Subject: SB Meeting next Monday Concerning Estabrook?

Tom,

Alice, Mike and I spent all day in mediation yesterday on the Estabrook matter. We made some progress, but it isn't clear if a settlement can be reached. We have scheduled a second day of mediation next Tuesday. The defendants in the case proposed something for us to consider which we haven't discussed with the full board. Although the board voted to authorize Mike and Alice to act on behalf of the board to settle the case, we think it would be beneficial to discuss some of the things we heard yesterday. Would you be willing to schedule a meeting next Monday, May 14 at 8:00 a.m.

Redacted

Redacted

If that is agreeable, could Linda and Jane advise on whether they are available to meet next Monday. (We would meet first in open session, then adjourn to executive session to discuss this matter only) Thanks!

Chris

Christopher Whelan
Town Manager
Concord, MA 01742

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 10/26/2017 3:50:33 PM
To: Chris Whelan [cwhelan@concordma.gov]
CC: Alice Kaufman [akaufman@concordma.gov]; Michael Lawson [mlawson@concordma.gov]; Steven Ng [sng@concordma.gov]; Thomas McKean [tmckean@concordma.gov]
Subject: Re: Concord - Estabrook Road

Might be politic to cc Andy Biewinder (so?)

Sent from my iPhone

On Oct 26, 2017, at 3:42 PM, Chris Whelan <cwhelan@concordma.gov> wrote:

SB: Attached is Kevin Batt's letter to Harvard's general counsel

Redacted

Chris

From: Kevin D. Batt [mailto:kbatt@AndersonKreiger.com]
Sent: Thursday, October 26, 2017 3:37 PM
To: 'ranna_farzan@harvard.edu'
Cc: Melissa C. Allison; Chris Whelan
Subject: FW: Concord

Ms. Farzan:

Kindly direct the attached letter to the appropriate recipient at the General Counsel's office at Harvard. Thank you.

Kevin D. Batt
ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
Boston, MA 02109
t: 617-621-6514
f: 617-621-6614

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<Letter to Harvard re. Concord v. N. Rasmussen et. al. w- Complaint (A0463251xB0BA5).pdf>

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 10/19/2017 8:30:50 AM
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: CONFIDENTIAL Draft letter to accompany complaint
Attachments: Letter to Mintz Levin re Estabrook Road 10-18-17 (A0456104-3xB0BA5).docx

Mike and SB,

Would you please review this draft letter and let me know individually if you have any concerns. Kevin is hoping to send it out today.

Chris

From: Kevin D. Batt [mailto:kbatt@AndersonKreiger.com]
Sent: Wednesday, October 18, 2017 3:37 PM
To: Chris Whelan
Cc: Melissa C. Allison; Andrew W. Fowler
Subject: Draft letter to accompany complaint

Confidential
Attorney Client and Work Product Privileged

Redacted

Kevin D. Batt
ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
Boston, MA 02109
t: 617-621-6514
f: 617-621-6614

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C

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 11/22/2016 2:47:42 PM
To: Chris Whelan [cwhelan@concordma.gov]
BCC: Chris Whelan [cwhelan@concordma.gov]
Subject: RE: Estabrook Road

Have there been any other legal engagements since July or the September update?

Jane Hotchkiss
Concord Select Board
Concord, MA 01742
jhotchkiss@concordma.gov

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

From: Chris Whelan
Sent: Tue 11/22/2016 9:13 AM
To: Alice Kaufman (akaufman@concordma.gov); Jane Hotchkiss (jhotchkiss@concordma.gov); Michael Lawson; Steve Ng (SNg@concordma.gov); Thomas McKean
Cc: Andrew Mara
Subject: FW: Estabrook Road

SB: Mike has requested that I share with the documents I have concerning the use and control of the abandoned section of Estabrook Road. The two documents I have are: (1) Town Counsel's memo on the abandonments and public rights of access question plus attachments; and (2) an email from Atty Andrew Fowler in response to me question [Redacted]

[Redacted]

I believe we will be meeting on Tuesday, November 29 at 5:00 p.m. in executives session. [Redacted]
[Redacted] Please let me know if you have any questions. Thanks!

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

Redacted

REVISED

CONCORD_0005945

Redacted

Kevin D. Batt

ANDERSON & KREIGER LLP

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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: 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

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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

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: 3/13/2017 11:35:39 AM
To: Michael Lawson [mlawson@concordma.gov]; Chris Whelan [cwhelan@concordma.gov]
Subject: Estabrook Updates

I met with Sally and Polly on Thursday and we'd like to tee a follow up discussion led by Delia on the recommendations the SB passed for our March 27 meeting.

Redacted

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 6/1/2017 11:12:25 AM
To: Chris Whelan [cwhelan@concordma.gov]; Thomas McKean [tmckean@concordma.gov]; Alice Kaufman [akaufman@concordma.gov]; Steven Ng [sng@concordma.gov]; Michael Lawson [mlawson@concordma.gov]
CC: Andrew Mara [amara@concordma.gov]
Subject: Re: Available for Concord SB Meeting on Estabrook?

Thank you Chris

From: Chris Whelan
Sent: Wednesday, May 31, 2017 6:37 PM
To: Jane Hotchkiss; Thomas McKean; Alice Kaufman; Steven Ng; Michael Lawson
Cc: Andrew Mara
Subject: Fwd: Available for Concord SB Meeting on Estabrook?

Jane

Andrew and Kevin are available to join you on 6/19 for an exec session discussion of the Estabrook Road matter. I will ask Andrew Mara to share with Kevin and Andrew the four letters we received from abutters.

Chris

Sent from my iPhone

Begin forwarded message:

From: "Andrew W. Fowler" <afowler@andersonkreiger.com>
Date: May 31, 2017 at 3:16:56 PM EDT
To: Chris Whelan <cwhelan@concordma.gov>, "Kevin D. Batt" <kbatt@AndersonKreiger.com>
Cc: Mina Makarios <mina@andersonkreiger.com>
Subject: RE: Available for Concord SB Meeting on Estabrook?

Chris,

Kevin and I are available on Monday, June 19th to discuss the Town's next steps. An 8:30pm meeting?

Sincerely,
Andrew

ANDERSON Andrew Fowler, Associate
KREIGER T. 617.621.6535 | F. 617.621.6501
Anderson & Kreiger LLP | 50 Milk Street, 21st Floor, Boston, MA 02109



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From: Chris Whelan [mailto:cwhelan@concordma.gov]
Sent: Tuesday, May 30, 2017 3:10 PM
To: Kevin D. Batt; Andrew W. Fowler
Cc: Mina Makarios
Subject: Available for Concord SB Meeting on Estabrook?

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 11/29/2016 12:47:21 AM
To: Kevin D. Batt [/O=FIRST ORGANIZATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Batt_AND000155d]; Andrew Mara [amara@concordma.gov]
CC: Andrew W. Fowler [/O=FIRST ORGANIZATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=AFowler_AND0001179]
Subject: RE: Meet with Select Board on Estabrook?

Kevin,

Yes. The board is posted for an exec session discussion with town counsel at 6:00 p.m. in the Select Board room of the Town House. I had thought a 4:00 p.m. site visit before dark might be useful, but it sounds like rain all day tomorrow. Let me know if you'd like to see conditions on the ground and I will arrange to have someone meet you out there. Thanks!

Chris

From: Kevin D. Batt [mailto:kbatt@AndersonKreiger.com]
Sent: Monday, November 28, 2016 6:00 PM
To: Chris Whelan; Andrew Mara
Cc: Andrew W. Fowler
Subject: RE: Meet with Select Board on Estabrook?

Chris, do we have a meeting confirmed for tomorrow?

Sent with Good (www.good.com)

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

From: Chris Whelan [cwhelan@concordma.gov]
Sent: Monday, November 21, 2016 02:24 PM Eastern Standard Time
To: Andrew Mara
Cc: Kevin D. Batt; Andrew W. Fowler
Subject: FW: Meet with Select Board on Estabrook?

Andrew,

Would you please check with the Select Board to see if they are available to meet with town counsel on the Estabrook Road matter on Tuesday, November 29. Please remind members that the public hearing for the December 8 Special Town Meeting is also scheduled for 11/29 at 7:00 p.m.

I think having an executive session before the hearing, from 530 to 630 or from 600 to 645, would work. Would you please check and see if members are available? Thanks!

Chris

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 11/18/2016 2:23:58 PM
To: Kevin D. Batt [/O=FIRST ORGANIZATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Batt_AND000155d]; Andrew W. Fowler [/O=FIRST ORGANIZATION/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=AFowler_AND0001179]
Subject: RE: Meet with Select Board on Estabrook?

Kevin,

Thanks for getting back to me. The meeting need not be a Monday, so Mike Lawson will check with members and offer a couple of dates that might work. I will be back to you when we have some dates to suggest. Thanks!

Chris

From: Kevin D. Batt [mailto:kbatt@AndersonKreiger.com]
Sent: Thursday, November 17, 2016 9:35 PM
To: Chris Whelan; Andrew W. Fowler
Subject: RE: Meet with Select Board on Estabrook?

Chris, would you prefer we come on a Monday? If so, we could make it on December 12. Or please let us know if another weekday would work and we can check our schedules.

Kevin D. Batt

ANDERSON & KREIGER LLP

50 Milk Street, 21st Floor

Boston, MA 02109

t: 617-621-6514

f: 617-621-6614

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Message

From: Michael Lawson [mlawson@concordma.gov]
Sent: 1/5/2018 8:55:56 AM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: FY18 Supplemental Appropriation - Legal Expenses

Thanks Chris.

Redacted

Mike

From: Chris Whelan <cwhelan@concordma.gov>
Date: Friday, January 5, 2018 at 8:54 AM
To: Michael Lawson <mlawson@concordma.gov>
Subject: RE: FY18 Supplemental Appropriation - Legal Expenses

Mike,

My reference to settlement referred to the many residents who hope to see the matter resolved amicably. It is possible that public interest in a resolution could cause the parties that are most aggressive on the matter to consider settlement. Harvard has expressed a willingness to engage in discussions if the others do, and we'll see how the other parties respond.

Chris

From: Michael Lawson
Sent: Friday, January 05, 2018 8:44 AM
To: Chris Whelan
Subject: Re: FY18 Supplemental Appropriation - Legal Expenses

Chris

I support your point of view. Your remark about some interest in settlement surprised me. I've heard nothing.
Mike

From: Chris Whelan <cwhelan@concordma.gov>
Date: Friday, January 5, 2018 at 8:42 AM
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>
Cc: Kerry Lafleur <klafleur@concordma.gov>
Subject: FW: FY18 Supplemental Appropriation - Legal Expenses

Select Board,

Kerry sent me the message below yesterday suggesting that we may want to have a warrant article requesting a supplemental appropriation for legal service expenses in the current fiscal year. The Reserve Fund should be able to cover the added expenses, but using those funds for legal services would likely deplete the fund so that there are no funds available for an unexpected situation.

We discussed earlier this year having a warrant article to appropriate additional legal funds for FY2019, and decided against doing that. I think I can tighten down on legal expenditures for the remainder of the year to try to limit the amount used from the Reserve Fund this year. Legal costs associated with Nagog will be paid from the Water Fund, so that is not an issue. And we have several cases being handled by our insurance carrier, MIIA. The primary issue is the Estabrook matter, and there has been some interest in settlement. So I would be inclined to NOT seek the supplemental appropriation.

Would you please let me or Jane know individually if you agree. Kerry raised this issue before the warrant deadline, so there should be no problem with the deadline if there is interest in seeking a supplemental appropriation. Thanks.

Chris

From: Kerry Lafleur
Sent: Thursday, January 04, 2018 1:51 PM
To: Chris Whelan
Cc: Kerry Lafleur
Subject: FY18 Supplemental Appropriation - Legal Expenses

Chris,

As of 11/30/17, we have expended \$146k against a General Fund Legal Budget of \$225k, leaving a balance of \$79k for the remaining 7 months. The average monthly expenditure is about \$35k. Assuming that trend continues for the next 7 months, we can expect to spend an additional \$232k, putting our total expenditures at \$378k, resulting in a deficit of \$153k.

To date, there have been no claims on the Reserve Fund, leaving the full balance of \$225k. In theory, we should be fine, however, perhaps it makes sense to include a warrant article for a supplemental appropriation for legal expenses, while the warrant remains open, rather than be forced to request a special within the annual if we run into trouble. If you'd like to add this article, please let me know and I'll draft it up.

Kerry A. Lafleur
(formerly Kerry A. Speidel)
Finance Director/ Treasurer-Collector
Town of Concord
klafleur@concordma.gov
(978) 318-3090

Message

From: Michael Lawson [mlawson@concordma.gov]
Sent: 2/21/2018 9:13:06 AM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: Mediation screening - privileged and confidential

I can be available if needed.

From: Chris Whelan <cwhelan@concordma.gov>
Date: Wednesday, February 21, 2018 at 8:56 AM
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: Mediation screening - privileged and confidential

SB: FYI. 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 in Boston. Redacted

Redacted

Chris

From: Melissa C. Allison [mailto:mallison@AndersonKreiger.com]
Sent: Tuesday, February 20, 2018 7:01 PM
To: Chris Whelan
Subject: Mediation screening - privileged and confidential

Chris,

Redacted

Melissa

Sent with Good (www.good.com)

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: Chris Whelan [cwhelan@concordma.gov]
Sent: 2/21/2018 8:56:36 AM
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: Mediation screening - privileged and confidential

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Redacted

Chris

From: Melissa C. Allison [mailto:mallison@AndersonKreiger.com]
Sent: Tuesday, February 20, 2018 7:01 PM
To: Chris Whelan
Subject: Mediation screening - privileged and confidential

Chris,

Redacted

Melissa

Sent with Good (www.good.com)

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 10/30/2017 12:38:10 PM
To: Andrew Mara [amara@concordma.gov]
Subject: FW: Article in Journal re Estabrook

Andrew:

Redacted

Redacted

Chris

From: Kevin D. Batt [mailto:kbatt@AndersonKreiger.com]
Sent: Wednesday, October 25, 2017 4:30 PM
To: Chris Whelan
Cc: Melissa C. Allison
Subject: RE: Article in Journal re Estabrook

Thanks, Chris,

Redacted

Kevin D. Batt
ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
Boston, MA 02109
t: 617-621-6514
f: 617-621-6614



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From: Chris Whelan [mailto:cwhelan@concordma.gov]
Sent: Wednesday, October 25, 2017 3:54 PM
To: Kevin D. Batt
Cc: Michael Lawson; Jane Hotchkiss
Subject: FW: Article in Journal re Estabrook

Kevin,

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 9/12/2017 8:37:04 AM
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: Estabrook Road draft Complaint - privileged and confidential
Attachments: Draft Complaint - Estabrook Road (A0447019-6xB0BA5).docx

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

Chris,

Redacted

Melissa

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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Message

From: Alice Kaufman [akaufman@concordma.gov]
Sent: 10/25/2017 7:26:28 AM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: Estabrook Road Complaint Filed Today

Chris

This is an unusual press release in that it reads as an op-ed. It asserts opinion that may serve to inflame the arguments with the abutters that I do not think is served in the Concord Journal. It is customary to use attribution for statements of interpretation or beliefs.

A.

From: Chris Whelan
Sent: Tuesday, October 24, 2017 4:57 PM
To: Alice Kaufman; Jane Hotchkiss; Michael Lawson; Steven Ng; Thomas McKean
Subject: FW: Estabrook Road Complaint Filed Today

SB: Redacted

Redacted

Chris

From: Kevin D. Batt [mailto:kbatt@AndersonKreiger.com]
Sent: Tuesday, October 24, 2017 4:44 PM
To: Chris Whelan
Cc: Melissa C. Allison; Andrew W. Fowler
Subject: Estabrook Road

Chris,

Redacted

Kevin D. Batt
ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
Boston, MA 02109
t: 617-621-6514
f: 617-621-6614



Please consider the environment before printing this e-mail.

Redacted

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 10/25/2017 3:07:13 PM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: Estabrook Road

I will review this press release but in the meantime I would suggest as a separate matter you respond to Neil's email

Redacted

Sent from my iPhone

On Oct 25, 2017, at 2:49 PM, Chris Whelan <cwhelan@concordma.gov> wrote:

Jane and Alice,

We received a message from Neil just now expressing concern about the litigation **Redacted**

Redacted

Redacted

I think the paragraphs providing background and recent history are helpful. And the paragraph mentioning the signs and gate explain why action is needed now. I could delete the sentence about the gate, but I think the explanation is helpful. Would you please edit this draft to suggest ways it could be improved, and I will try to get it out today. Thanks!

Chris

From: Kevin D. Batt [mailto:kbatt@AndersonKreiger.com]

Sent: Tuesday, October 24, 2017 4:44 PM

To: Chris Whelan

Cc: Melissa C. Allison; Andrew W. Fowler

Subject: Estabrook Road

Chris,

Redacted

Kevin D. Batt
ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
1 Boston, MA 02109
t: 617-621-6514
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Redacted

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 10/26/2017 11:32:55 AM
To: Chris Whelan [cwhelan@concordma.gov]
CC: Alice Kaufman [akaufman@concordma.gov]
Subject: Re: Estabrook Road

Thanks for moving this out Chris - we will undoubtedly see some response on Monday

Sent from my iPhone

On Oct 26, 2017, at 11:15 AM, Chris Whelan <cwhelan@concordma.gov> wrote:

Thanks Alice! I have accepted your changes in the document and forwarded it to Erin requesting that she try to get it out today.

Chris

From: Alice Kaufman
Sent: Wednesday, October 25, 2017 5:02 PM
To: Chris Whelan; Jane Hotchkiss
Subject: Re: Estabrook Road

Chris

Please see my comments to the draft. Take them or not as you see fit. I do not wish to fan flames at this point and suggest we be neutral in the language for the news release. It is probably not really necessary to wordsmith this further but a neutral written statement will have a lower probability of being misconstrued when Henry or someone else writes the story.

Your quote looks good and I agree that we should delete the reference to call counsel. Should you receive calls, you can advise the caller who to contact. I would not be surprised if you receive a call from the Globe and perhaps local TV too.

Alice

From: Chris Whelan
Sent: Wednesday, October 25, 2017 2:49 PM
To: Jane Hotchkiss; Alice Kaufman
Cc: Thomas McKean; Michael Lawson; Steven Ng
Subject: FW: Estabrook Road

Jane and Alice,

We received a message from Neil just now expressing concern about the litigation. Redacted

Redacted

Redacted I think the paragraphs providing background and recent history are helpful. And the paragraph mentioning the signs and gate explain why action is needed now. I could delete the sentence about the gate, but I think the explanation is helpful. Would you please edit this draft to suggest ways it could be improved, and I will try to get it out today. Thanks!

Chris

Message

From: Michael Lawson [mlawson@concordma.gov]
Sent: 11/8/2017 6:10:07 PM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: Live Estabrook Webcams

Redacted

Michael Lawson

On Nov 8, 2017, at 5:19 PM, Chris Whelan <cwhelan@concordma.gov> wrote:

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 on their privacy.

Chris

http://www.saveourheritage.com/Estabrook_Road.htm

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 2/7/2018 10:05:32 AM
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: Estabrook: Response to Rasmussen and Read/Kay counterclaims - PRIVILEGED AND CONFIDENTIAL
Attachments: Answer, Affirmative Defenses and Counterclaim of Rasmussens 12.18.17 [compressed] (A0476364xB0BA5).pdf

Select Board:

Here's the answers from respondents on the Estabrook matter.

Chris

From: Melissa C. Allison [mailto:mallison@AndersonKreiger.com]
Sent: Tuesday, January 30, 2018 10:50 AM
To: Chris Whelan
Cc: Kevin D. Batt; Andrew W. Fowler
Subject: RE: Estabrook: Response to Rasmussen and Read/Kay counterclaims - PRIVILEGED AND CONFIDENTIAL

Chris,

Redacted

Melissa

From: Melissa C. Allison
Sent: Monday, January 29, 2018 9:43 PM
To: Chris Whelan
Cc: Kevin D. Batt; Andrew W. Fowler
Subject: FW: Estabrook: Response to Rasmussen and Read/Kay counterclaims - PRIVILEGED AND CONFIDENTIAL

Chris,

Redacted

Melissa

Sent with Good (www.good.com)

From: Melissa C. Allison
Sent: Friday, January 26, 2018 5:21:38 PM
To: 'Chris Whelan'
Cc: Kevin D. Batt; Andrew W. Fowler
Subject: Estabrook: Response to Rasmussen and Read/Kay counterclaims - PRIVILEGED AND CONFIDENTIAL

Chris,

Redacted

Melissa

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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Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 10/16/2017 4:56:26 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: Draft lawsuit from Mintz Levin on Estabrook Road

Redacted

Redacted

Redacted We are scheduled for an exec session tonight, so we can discuss at that time. I will send Redacted as soon as I see it.

Chris

Christopher Whelan
Town Manager
Concord, MA 01742

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 10/24/2017 4:57:19 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: Estabrook Road Complaint Filed Today
Attachments: Press statement on Estabrook Road lawsuit (A0456810-3xB0BA5).docx

Redacted

Chris

From: Kevin D. Batt [mailto:kbatt@AndersonKreiger.com]
Sent: Tuesday, October 24, 2017 4:44 PM
To: Chris Whelan
Cc: Melissa C. Allison; Andrew W. Fowler
Subject: Estabrook Road

Chris,

Redacted

Kevin D. Batt
ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
1Boston, MA 02109
t: 617-621-6514
f: 617-621-6614



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Message

From: Steven Ng [sng@concordma.gov]
Sent: 11/16/2017 3:46:20 PM
To: Michael Lawson [mlawson@concordma.gov]
CC: Alice Kaufman [akaufman@concordma.gov]; Jane Hotchkiss [jhotchkiss@concordma.gov]; Thomas McKean [tmckean@concordma.gov]; Chris Whelan [cwhelan@concordma.gov]
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: 10/25/2017 1:16:21 PM
To: Chris Whelan [cwhelan@concordma.gov]; Alice Kaufman [akaufman@concordma.gov]
Subject: Re: Estabrook Road Complaint Filed Today

I agree and look forward to your rewrite.

From: Chris Whelan
Sent: Wednesday, October 25, 2017 12:01 PM
To: Alice Kaufman
Cc: Jane Hotchkiss
Subject: RE: Estabrook Road Complaint Filed Today

Helpful comments, Jane. I will prepare something and will review it with Jane. Thanks.

Chris

From: Alice Kaufman
Sent: Wednesday, October 25, 2017 7:26 AM
To: Chris Whelan
Subject: Re: Estabrook Road Complaint Filed Today

Chris

This is an unusual press release in that it reads as an op-ed. It asserts opinion that may serve to inflame the arguments with the abutters that I do not think is served in the Concord Journal. It is customary to use attribution for statements of interpretation or beliefs.

A.

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Sent: Tuesday, October 24, 2017 4:57 PM
To: Alice Kaufman; Jane Hotchkiss; Michael Lawson; Steven Ng; Thomas McKean
Subject: FW: Estabrook Road Complaint Filed Today

SB

Redacted

Redacted

Chris

From: Kevin D. Batt [mailto:kbatt@AndersonKreiger.com]
Sent: Tuesday, October 24, 2017 4:44 PM
To: Chris Whelan
Cc: Melissa C. Allison; Andrew W. Fowler
Subject: Estabrook Road

Chris,

Redacted

Kevin D. Batt
ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
1Boston, MA 02109
t: 617-621-6514
f: 617-621-6614



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Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 1/6/2018 2:28:36 PM
To: Thomas McKean [tmckean@concordma.gov]; Chris Whelan [cwhelan@concordma.gov]
Subject: Re: FY18 Supplemental Appropriation - Legal Expenses

Agreed!

From: Thomas McKean
Sent: Saturday, January 6, 2018 11:28 AM
To: Chris Whelan
Cc: Jane Hotchkiss
Subject: Re: FY18 Supplemental Appropriation - Legal Expenses

I agree with Chris's analysis and see little advantage in raising an issue that is likely to get sidetracked into a debate on Estabrook. I appreciate Kerry raising the issue, however. Tom

From: Chris Whelan
Sent: Friday, January 5, 2018 8:42 AM
To: Alice Kaufman; Jane Hotchkiss; Michael Lawson; Steven Ng; Thomas McKean
Cc: Kerry Lafleur
Subject: FW: FY18 Supplemental Appropriation - Legal Expenses

Select Board,

Kerry sent me the message below yesterday suggesting that we may want to have a warrant article requesting a supplemental appropriation for legal service expenses in the current fiscal year. The Reserve Fund should be able to cover the added expenses, but using those funds for legal services would likely deplete the fund so that there are no funds available for an unexpected situation.

We discussed earlier this year having a warrant article to appropriate additional legal funds for FY2019, and decided against doing that. I think I can tighten down on legal expenditures for the remainder of the year to try to limit the amount used from the Reserve Fund this year. Legal costs associated with Nagog will be paid from the Water Fund, so that is not an issue. And we have several cases being handled by our insurance carrier, MIIA. The primary issue is the Estabrook matter, and there has been some interest in settlement. So I would be inclined to NOT seek the supplemental appropriation.

Would you please let me or Jane know individually if you agree. Kerry raised this issue before the warrant deadline, so there should be no problem with the deadline if there is interest in seeking a supplemental appropriation. Thanks.

Chris

From: Kerry Lafleur
Sent: Thursday, January 04, 2018 1:51 PM
To: Chris Whelan
Cc: Kerry Lafleur
Subject: FY18 Supplemental Appropriation - Legal Expenses

Chris,

As of 11/30/17, we have expended \$146k against a General Fund Legal Budget of \$225k, leaving a balance of \$79k for the remaining 7 months. The average monthly expenditure is about \$35k. Assuming that trend continues for the next 7 months, we can expect to spend an additional \$232k, putting our total expenditures at \$378k, resulting in a deficit of \$153k.

To date, there have been no claims on the Reserve Fund, leaving the full balance of \$225k. In theory, we should be fine, however, perhaps it makes sense to include a warrant article for a supplemental appropriation for legal expenses, while the warrant remains open, rather than be forced to request a special within the annual if we run into trouble. If you'd like to add this article, please let me know and I'll draft it up.

Kerry A. Lafleur

(formerly Kerry A. Speidel)

Finance Director/ Treasurer-Collector

Town of Concord

klafleur@concordma.gov

(978) 318-3090

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 1/12/2018 10:19:22 AM
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: Estabrook Road Litigation?

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

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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

Chris,

Redacted

Melissa

ANDERSON **Melissa Cook Allison**
KREIGER T. 617.621.6512 | F. 617.621.6612
 Anderson & Kreiger LLP | 50 Milk Street, 21st Floor, Boston, MA 02109

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Message

From: Alice Kaufman [akaufman@concordma.gov]
Sent: 1/5/2018 9:22:20 AM
To: Chris Whelan [cwhelan@concordma.gov]; Jane Hotchkiss [jhotchkiss@concordma.gov]
CC: Kerry Lafleur [klafleur@concordma.gov]
Subject: Re: FY18 Supplemental Appropriation - Legal Expenses

I am glad to hear that there is some positive movement towards settlement regarding Estabrook. Have there been further conversations since our attorney's reached out to Mintz Levin and the abutters just before the holidays?

I am also curious to know if we have heard anything from WR Grace. They seemed itchy to move things along quickly and would have a response to us within a couple of weeks.

I trust that you and Kerry have talked through our needs to support the various active cases and have determined that there is no need for a supplemental appropriations for legal services. Do we have a Plan B should we not reach agreement on Estabrook and proceed to court?

Please send our thanks to CMLP and CPW for expert management of yesterday's storm.

Alice

From: Chris Whelan
Sent: Friday, January 5, 2018 8:42 AM
To: Alice Kaufman; Jane Hotchkiss; Michael Lawson; Steven Ng; Thomas McKean
Cc: Kerry Lafleur
Subject: FW: FY18 Supplemental Appropriation - Legal Expenses

Select Board,

Kerry sent me the message below yesterday suggesting that we may want to have a warrant article requesting a supplemental appropriation for legal service expenses in the current fiscal year. The Reserve Fund should be able to cover the added expenses, but using those funds for legal services would likely deplete the fund so that there are no funds available for an unexpected situation.

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Would you please let me or Jane know individually if you agree. Kerry raised this issue before the warrant deadline, so there should be no problem with the deadline if there is interest in seeking a supplemental appropriation. Thanks.

Chris

From: Kerry Lafleur
Sent: Thursday, January 04, 2018 1:51 PM
To: Chris Whelan

Cc: Kerry Lafleur
Subject: FY18 Supplemental Appropriation - Legal Expenses

Chris,

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Kerry A. Lafleur

(formerly Kerry A. Speidel)

Finance Director/ Treasurer-Collector

Town of Concord

klafleur@concordma.gov

(978) 318-3090

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

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Message

From: Michael Lawson [mlawson@concordma.gov]
Sent: 9/12/2017 9:07:04 AM
To: Chris Whelan [cwhelan@concordma.gov]
Subject: Re: Estabrook Road draft Complaint - privileged and confidential

Chris

Thanks.

Redacted

Redacted

Mike

Michael Lawson

On Sep 12, 2017, at 8:37 AM, Chris Whelan <cwhelan@concordma.gov> wrote:

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

Chris,

Redacted

Melissa

<image001.png>

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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Redacted

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 5/9/2018 8:43:40 AM
To: Chris Whelan [cwhelan@concordma.gov]; Thomas McKean [tmckean@concordma.gov]
CC: Michael Lawson [mlawson@concordma.gov]; Alice Kaufman [akaufman@concordma.gov]; Linda Escobedo [lescobedo@concordma.gov]; Andrew Mara [amara@concordma.gov]
Subject: Re: SB Meeting next Monday Concerning Estabrook?

I will be there

From: Chris Whelan
Sent: Wednesday, May 9, 2018 8:20 AM
To: Thomas McKean
Cc: Michael Lawson; Alice Kaufman; Jane Hotchkiss; Linda Escobedo; Andrew Mara
Subject: SB Meeting next Monday Concerning Estabrook?

Tom,

Alice, Mike and I spent all day in mediation yesterday on the Estabrook matter.

Redacted

Redacted

We have scheduled a second day of mediation next Tuesday. The defendants in the case proposed something for us to consider which we haven't discussed with the full board. Although the board voted to authorize Mike and Alice to act on behalf of the board to settle the case, we think it would be beneficial to discuss some of the things we heard yesterday. Would you be willing to schedule a meeting next Monday, May 14 at 8:00 a.m.

Redacted

Redacted

If that is agreeable, could Linda and Jane advise on whether they are available to meet next Monday. (We would meet first in open session, then adjourn to executive session to discuss this matter only) Thanks!

Chris

Christopher Whelan
Town Manager
Concord, MA 01742

Message

From: Jane Hotchkiss [jhotchkiss@concordma.gov]
Sent: 10/26/2017 3:50:33 PM
To: Chris Whelan [cwhelan@concordma.gov]
CC: Alice Kaufman [akaufman@concordma.gov]; Michael Lawson [mlawson@concordma.gov]; Steven Ng [sng@concordma.gov]; Thomas McKean [tmckean@concordma.gov]
Subject: Re: Concord - Estabrook Road

Might be politic to cc Andy Biewinder (so?)

Sent from my iPhone

On Oct 26, 2017, at 3:42 PM, Chris Whelan <cwhelan@concordma.gov> wrote:

SB: Attached is Kevin Batt's letter to Harvard's general counsel

Redacted

Chris

From: Kevin D. Batt [mailto:kbatt@AndersonKreiger.com]
Sent: Thursday, October 26, 2017 3:37 PM
To: 'ranna_farzan@harvard.edu'
Cc: Melissa C. Allison; Chris Whelan
Subject: FW: Concord

Ms. Farzan:

Kindly direct the attached letter to the appropriate recipient at the General Counsel's office at Harvard. Thank you.

Kevin D. Batt
ANDERSON & KREIGER LLP
50 Milk Street, 21st Floor
Boston, MA 02109
t: 617-621-6514
f: 617-621-6614

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<Letter to Harvard re. Concord v. N. Rasmussen et. al. w- Complaint (A0463251xB0BA5).pdf>

Message

From: Chris Whelan [cwhelan@concordma.gov]
Sent: 10/19/2017 8:30:50 AM
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: CONFIDENTIAL Draft letter to accompany complaint
Attachments: Letter to Mintz Levin re Estabrook Road 10-18-17 (A0456104-3xBOBA5).docx

Mike and SB,

Would you please review this draft letter and let me know individually if you have any concerns. Kevin is hoping to send it out today.

Chris

From: Kevin D. Batt [mailto:kbatt@AndersonKreiger.com]
Sent: Wednesday, October 18, 2017 3:37 PM
To: Chris Whelan
Cc: Melissa C. Allison; Andrew W. Fowler
Subject: Draft letter to accompany complaint

Confidential
Attorney Client and Work Product Privileged

Chris,

Redacted

Thanks

Kevin D. Batt
ANDERSON & KREIGER LLP
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