

Exploring How Municipal Boards Can Settle Appeals of Their Land Use Decisions Within the Framework of the Massachusetts Open Meeting Law

R. Lisle Baker¹

I. INTRODUCTION

One of the enduring issues in zoning law is how to resolve appeals involving the grant of zoning special permits or other discretionary decisions made by the municipal boards that have jurisdiction over some aspect of the private use of land. While their decisions are made in public, and the appeals of these decisions are also decided by a public process, such as a court or an administrative agency, the resolution of these appeals without litigation or administrative appeal poses challenges because resolution without adjudication traditionally requires some confidentiality in order to encourage frank conversation about how a settlement might be achieved.

While private lawsuits are settled all the time outside of public view, such settlement poses special problems for municipal boards and commissions making land use decisions because as public bodies, under the provisions of the Massachusetts “sunshine law” requiring open meetings, they are expected to make their decisions in public following prescribed procedures.² Because of this open meeting requirement, the give and take of settlement can be difficult to do, meaning that playing an appeal out in court or the relevant appellate

1. Copyright 2011, R. Lisle Baker, Professor of Law, Suffolk University Law School; President, Newton Board of Aldermen 2004-2009. The author wishes to acknowledge the help of Suffolk University Law School student research assistants John Mahoney, Class of 2010; Jonathan Hunter, Class of 2011; Kevin Oneal, Class of 2011; and Kyle Wibby, Class of 2011; as well as Bob Ritchie, General Counsel for the Massachusetts Department of Agricultural Resources (MDAR); Jessica Burgess, Assistant General Counsel for the MDAR; Daniel Funk, former Newton City Solicitor; Ouida Young, current Associate Newton City Solicitor; and Jeanie Fallon, Suffolk University Law Library Reference Staff, in the preparation of this article. Any errors, however, are the responsibility of the author.

2. MASS. GEN. LAWS ch. 30A, §§ 18-25 (2010) (replacing MASS. GEN. LAWS ch. 39, §§ 23A-23C) (establishing new open meeting law provisions for local government). References made in this article to the Open Meeting Law (OML) will be to the current Massachusetts law unless the context or citation indicates that the prior version was involved. *See infra* Parts I-IV. Attorney General Martha Coakley has issued regulations that her office will use in both implementing and enforcing the new OML. *See* 940 MASS CODE REGS. 29.00-.09 (2010). These regulations specify the procedures for filing and posting meeting notices, filing and investigating complaints, resolving OML violations, and issuing advisory rulings. *See id.* *See generally* OFFICE OF ATTORNEY GEN. MARTHA COAKLEY, OPEN MEETING LAW GUIDE (2010), available at http://www.mass.gov/Cago/docs/Government/OML_Guide_07012010.pdf. The Attorney General has also established a new Division of Open Government and appointed Amy Nable as its Director.

agency appears to be the only alternative to resolve the matter at hand. But these appellate processes are costly, time-consuming, and likely to make the appellant, the members of the board, or the affected public unhappy with the outcome.

Settling these cases, rather than going to court or through an administrative review, therefore remains an alternative worth pursuing. Abraham Lincoln said: “Discourage litigation. Persuade your neighbors to compromise whenever you can. . . . As a peacemaker the lawyer has superior opportunity of being a good man.”³ But how is the municipal lawyer for the local board, or even the lawyer for the appellant, to follow Lincoln’s advice so that zoning and other land use appeals can be settled productively by the local body that made the original decision?

The limited available scholarship has focused primarily on what happens after settlement.⁴ This article is an attempt to explore issues involved in the settlement process itself, as well as its aftermath. It draws on the experience of one municipality—Newton, Massachusetts—in which this author worked to assist successful settlements while serving as the President of the Board of Aldermen (the Board). The article also discusses the Open Meeting Law (OML), including some of the recently enacted changes to it. This article concludes with some recommendations about how the Attorney General—now charged with advising, interpreting, and enforcing the new OML—can play a positive role in encouraging the settlement of land use appeals.

The approach recommended is a multi-step process, the background for which is discussed below. In summary, however, first, begin in an open meeting to allow the local board to go into executive session to lay the foundation for settlement discussions by exploring the risks and opportunities for settlement to be discussed candidly with municipal counsel. Second, undertake or respond to settlement overtures between counsel for the appellant and counsel for the local board, whose decision has been appealed, to lay the foundation for further settlement conversations either directly between appellant counsel and counsel for the local board or perhaps aided by one member of the board. If such conversations are to go on with the board as a whole, have them occur in an executive session with the assistance of a mediator. Third, return to the local board to discuss any proposed settlement with municipal counsel, again in executive session, without the appellant or its counsel present. Fourth, present the proposed settlement in an open meeting of the board, followed by a public hearing and subsequent public vote, with the same voting supermajority required for settlement as for the original decision. Last, present the settlement formally voted on to the court in which the appeal

3. ABRAHAM LINCOLN, *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 81 (Roy P. Basler ed., 1953).

4. See generally Richard S. Cohen et al., *Settling Land Use Litigation While Protecting the Public Interest: Whose Lawsuit is this Anyway?*, 23 SETON HALL L. REV. 844 (1993).

has been lodged, if the court has retained jurisdiction over the settlement, for ratification. Otherwise, simply have the appeal withdrawn or dismissed with consent of the appellant and the local board.

II. THE FRAMEWORK FOR DECISIONS ABOUT THE USE OF LAND INVOLVING LOCAL BOARDS

Massachusetts allows many local boards and commissions to make decisions about the use of land.⁵ When these local boards make decisions that produce an appeal, however, the usual outcome is governed by the provisions of law relating to administrative or judicial review of such decisions.⁶ Unfortunately, no clear path exists, short of litigation, for resolving such appeals. In order to provide one, it may be helpful to use the zoning special permit as an example, drawing on recent experience in Newton from two case studies of successful resolution.

A. The Zoning Special Permit as an Example

Special permits grant an applicant the opportunity to use land in a manner not available as of right under the municipal zoning ordinances or by-laws. Such permits involve the exercise of discretion by the special permit granting authority for the city or town.⁷

After an application for a special permit is filed, Massachusetts's zoning law requires that a public hearing be held regarding the site's proposed use within sixty-five days of the special permit application being filed with the city (or town) clerk. The local special permit granting authority (SPGA) must issue its formal decision within ninety days of the close of the public hearing on the application.⁸

Under Newton ordinances, the Board serves as the SPGA.⁹ The Board's Land Use Committee (the Committee), composed of eight of the twenty-four Board members, holds public hearings and makes preliminary decisions on a special permit application.¹⁰ The Committee customarily hears the applicant present the permit application, as well as testimony from the public. The

5. See MASS. GEN. LAWS ch. 40A, §§ 9-10 (2010) (outlining zoning special permits and zoning variances respectively).

6. See *id.* § 17 (providing for judicial review of zoning decisions); MASS. GEN. LAWS ch. 40C, § 12 (2010) (granting power to regional planning agencies for local historic district commissions appeals).

7. See ch. 40A, § 9.

8. *Id.*

9. See ch. 40A, § 1A (granting local zoning board authority). The statute defines a "[s]pecial permit granting authority" as including "the board of selectmen, city council, board of appeals, planning board, or zoning administrators as designated by [the municipality's] zoning ordinance or by-law for the issuance of special permits." *Id.*

10. See *id.* § 9 (granting local boards authority to make decisions contacting special permits). The statute allows "a city council having more than five members designated to act upon such application [to] appoint a committee of such council to hold the public hearing." *Id.*

Committee then closes the public hearing. Once the hearing is closed, the Committee meets in an open working session to decide how to proceed with the application, relying on advice from the Newton Planning and Law Departments. The Committee then makes recommendations and prepares Board orders relating to an application. These orders are then reported to the full Board for decision. Two-thirds of the full Board—sixteen aldermen—must vote in favor of the special permit application for it to be granted.¹¹

While the Newton Board is primarily a legislative body, composed of sixteen at-large and eight ward aldermen elected every two years, in its special permit-granting role the Board is acting in a “quasi-judicial” capacity.¹²

B. Introduction to the OML Applicable to Land Use Decisions and Appeals

In Massachusetts, as in many jurisdictions, the actions of public bodies, like the Board or its committees, have for years been subject to the OML.¹³ In Massachusetts, the OML has been applied to local land use decision-making—such as variances, extensions of non-conforming uses, and special permits—by a zoning board of appeals or other zoning decision-making body.¹⁴ The OML was most recently reviewed and revised, with new portions becoming effective on July 1, 2010.

More specifically, chapter 30A, section 18 of the Massachusetts General Laws defines a “public body”—to which the OML applies—as “a multiple-member board, commission, committee or subcommittee within the executive or legislative branch or within any county, district, city, region or town, however created, elected, appointed or otherwise constituted, established to serve a public purpose.”¹⁵ Section 20 of the same statute requires that “all

11. See MASS. GEN. LAWS ch. 40A, § 9 (2010) (authorizing local special permit votes). The statute provides “[a] special permit issued by a special permit granting authority shall require a two-thirds vote of boards with more than five members, a vote of at least four members of a five member board, and a unanimous vote of a three member board.” *Id.*; see also NEWTON, MASS., BD. OF ALDERMEN RULES & ORDERS art. X, §§ 1-6 (2010-2011) (providing detailed description of special permit process under Newton’s aldermanic rules); NEWTON, MASS., BD. OF ALDERMEN, STATEMENT OF GOOD PRACTICES FOR COMMUNICATIONS WITH ALDERMEN REGARDING LAND USE PETITIONS (2005), available at <http://www.newtonma.gov/Aldermen/LandUse/goodpractices-landuse.pdf>.

12. See *Mullin v. Planning Bd. of Brewster*, 456 N.E.2d 780, 782-83 (Mass. App. Ct. 1983) (determining Planning Board acted in quasi-judicial capacity when granting special permit because permitting process warrants adjudicative procedures due to effect on individual rights and substantial procedure involved); see also *Tenneco Oil Co. v. City Council of Springfield*, 549 N.E.2d 1135, 1137 (Mass. 1990) (holding decisions on special permit applications adjudicatory in nature); *infra* note 64 and accompanying text. See generally R. Lisle Baker, *Ethical Limits on Attorney Contact with Represented and Unrepresented Officials: The Example of Municipal Zoning Boards Making Site-Specific Land Use Decisions*, 31 SUFFOLK U. L. REV. 349 (1997) (discussing Massachusetts Rules of Professional Conduct 3.5 and 4.2 in quasi-judicial local governmental decision-making).

13. See MASS. GEN. LAWS ch. 39, §§ 23A-23C (repealed July 1, 2010).

14. See *Yaro v. Bd. of Appeals of Newburyport*, 410 N.E.2d 725, 728 (Mass. App. Ct. 1980) (holding chapter 39, section 23B requires zoning boards to deliberate and make decisions “under public observation”).

15. See MASS. GEN. LAWS ch. 30A, § 18 (2010) (effective July 1, 2010).

meetings of a public body shall be open to the public.”¹⁶ A “meeting” is further defined as “a deliberation by a public body with respect to any matter within the body’s jurisdiction,” with several exceptions, such as an onsite inspection of a project, or being in attendance at a meeting of another public body so long as members do not deliberate.¹⁷ “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.”¹⁸ “Quorum” is defined as “a simple majority of the members of the public body, unless otherwise provided in a general or special law, executive order or other authorizing provision.”¹⁹ If a meeting of a public body is held without reaching the required quorum, it still must meet OML requirements if it is just a subterfuge to avoid those requirements.²⁰ The net effect is to provide that—unless an open meeting exception applies—meetings of a majority of the members of a local board making land use decisions must be conducted in public.

The enforcement of the OML for local governments is now under the authority of the Attorney General’s office, rather than local district attorney’s offices, as in the past. The Attorney General has the ability to take and investigate complaints.²¹ The Attorney General—or a court that has the same

16. *See id.* § 20. In the process of enacting the new provisions, the legislature carried over the term of “governmental body” from prior law while it took pains elsewhere in the new text to define and use “public body” as the operative term. Because this seems to be an inadvertent difference, this article will assume that the definition of “public body” will control. Note also, as discussed below, this is a flaw that may be resolved by an interpretation of the new law by the Attorney General. *See* OFFICE OF ATTORNEY GEN. MARTHA COAKLEY, *supra* note 2, at 11 (noting Attorney General’s authority to issue advisory opinions).

17. Ch. 30A, § 18.

18. *See id.* Thus, under the revised law, members of a public body will need to be careful not to reach decisions through a chain of emails because these would qualify as a meeting subject to OML requirements, a new statutory requirement codifying prior case law. *See* Dist. Attorney v. Sch. Comm. of Wayland, 918 N.E.2d 796 (Mass. 2009). Under the new OML, however, “deliberation” does not include distribution of scheduling information, agendas, and reports to be discussed, “provided that no opinion of a member is expressed.” Ch. 30A, § 18. This definition raises an intriguing question: is there “deliberation” if a public body merely meets to hear information, testimony, or even legal advice, but defers any question, commentary, or discussion to a later time? While perhaps not the usual situation, having a valid public purpose to gain information quickly without giving public notice and complying with other procedures required by the OML may still be an important option for local public bodies. That is a separate question from whether in the land use context such “listening,” as opposed to public hearings, is consistent with the usual robust public process surrounding special permit proceedings and the procedural due process they provide.

19. Ch. 30A, § 18. This understanding is supplemented by other provisions of the *Massachusetts General Laws* providing that “[w]ords purporting to give a joint authority to, or to direct any act by, three or more public officers or other persons shall be construed as giving such authority to, or directing such act by, a majority of such officers or persons.” MASS. GEN. LAWS ch. 4, § 6 (2010).

20. *See* *McCrea v. Flaherty*, 885 N.E.2d 836, 846-47 (Mass. App. Ct. 2008). In *McCrea*, the court held that the Boston City Council violated the OML by controlling how many councilors attended a meeting by posting a guard at the door of a private room and maintaining a careful headcount of meeting participants in order to ensure a minority of participants were physically present. *See id.*

21. *See* MASS. GEN. LAWS ch. 30A, § 23 (2010) (granting enforcement authority to Attorney General’s office). The 2010 changes remove such enforcement authority from the district attorneys’ offices, revoking

powers as the Attorney General—may enter an order requiring compliance with the law at future meetings.²² Furthermore, the Attorney General may enter an order invalidating any action taken at any meeting in which the law has been violated.²³ Also, the Attorney General may compel compliance, mandate training, or impose a civil penalty upon the public body up to \$1000 in the case of an intentional violation.²⁴ Finally, in addition to the Attorney General's power to interpret or make rules relating to the OML, the Attorney General may issue written rulings or advisory opinions.²⁵

C. Exceptions to the OML Requirements Relevant to Settling Land Use Appeals: The Need for Confidentiality as well as Transparency

The challenge that the OML poses is that it effects a legislative policy “which requires the members of a board or a commission sitting in a quasi-judicial capacity to debate the merits of a proposition in a fishbowl.”²⁶ At the same time, the settlement of appeals—and litigation generally—has occurred with an understanding that recognizes the need for confidentiality in the give and take of resolution, just as the need for transparency and open decision-making exists in other contexts.

The process of settlement has longstanding protection from evidentiary disclosure. For example, the local rules of the Federal District Court of Massachusetts require the plaintiff to send a settlement proposal to all defendants prior to beginning trial.²⁷ In addition, the Federal Rules of Evidence and proposed Massachusetts Rules of Evidence provide that offers to compromise or settle are typically inadmissible.²⁸ Further, the state courts of Massachusetts have also supported this policy of aiding settlement, declaring that the evidentiary “rule [against disclosure] is founded in policy, that there may be no discouragement to amicable adjustment of disputes, by a fear, that if not completed, the party amicably disposed [sic] may be injured.”²⁹

These policies have been extended to public bodies. For example, the Massachusetts Appeals Court stated on the issue of the labor bargaining

chapter 39, section 23B. *See id.*

22. *Id.* § 23(c)(1).

23. *See id.* § 23(c)(3).

24. *Id.* § 23(c)(1)-(2), (4).

25. Ch. 30A, § 25.

26. *Yaro v. Bd. of Appeals of Newburyport*, 410 N.E.2d 725, 728 n.6 (Mass. App. Ct. 1980).

27. D. MASS. R. 16.1(c).

28. *See* FED. R. EVID. 408; MASS. R. EVID. 408 (proposed Massachusetts rule substantially codifying existing Massachusetts case law). *See generally* MARK S. BRODIN & MICHAEL AVERY, HANDBOOK OF MASSACHUSETTS EVIDENCE § 4.6 (8th ed. 2007).

29. *See Strauss v. Skurnik*, 116 N.E. 404, 404 (Mass. 1917) (quoting *Gerrish v. Sweetser*, 21 Mass. (4 Pick.) 374, 392 (1826)); *see also* *Morea v. Cosco, Inc.*, 664 N.E.2d 822, 824-25 (Mass. 1996) (holding discussion of settlement inadmissible as to liability or amount of damages); 15A AM. JUR. 2D *Compromise and Settlement* § 5 (2010).

executive session exception to the OML:

[T]he very fact that an exception for collective bargaining appears in the statute evidences a legislative judgment that there is something to be said for closed door labor negotiations. . . . The reason underlying this conclusion is that the presence of press and public induces rigidity and posturing by the negotiating teams and provokes in them anxiety that compromise will look like retreat.³⁰

Despite the many benefits of settlement, which include time savings, cost savings, preservation of relationships, opportunities for joint gains, and increased party satisfaction with the outcome, some significant challenges are involved.³¹ These challenges can include overcoming strong emotional issues between the parties and finding solutions that meet the underlying interests of both sides. Such discussions often require parties to listen carefully, talk candidly with each other, explore varied settlement options, and sometimes admit mistakes, all in the spirit of compromise or resolution.

As a consequence, the policy in favor of settlement has been extended beyond non-disclosure to active support of alternative means of dispute resolution (ADR) between adverse parties. In 2005, the Supreme Judicial Court mandated that all attorneys filing civil claims must certify that they informed their clients of the option to use ADR methods to settle the claim.³² Two of the earliest legislative acts promoting ADR involved establishing the Massachusetts Office of Dispute Resolution and provided for the protection of confidentiality in mediation, including mediator privilege against discovery.³³

These policies—in favor of transparency in open meetings but also confidentiality for settlement discussions—are in tension and need to be resolved.

The OML contains statutory recognition of a need for confidentiality in its

30. *Bd. of Selectmen of Marion v. Labor Relations Comm'n*, 388 N.E.2d 302, 303 (Mass. App. Ct. 1979).

31. See DAVID A. HOFFMAN & DAVID E. MATZ, MASSACHUSETTS ALTERNATIVE DISPUTE RESOLUTION § 4.01-.30 (1994) (detailing advantages and disadvantages of alternative dispute resolution).

32. See TRIAL COURT STANDING COMM. ON DISPUTE RESOLUTION, SUPREME JUDICIAL COURT RULE 1:18: THE UNIFORM RULES ON DISPUTE RESOLUTION 24 (2005), available at <http://www.mass.gov/courts/admin/legal/newadrbook.pdf>. Rule 5 of the Uniform Rules on Dispute Resolution states that attorneys must (1) provide clients with information about court-connected ADR sources, (2) discuss the advantages and disadvantages of ADR methods with their clients, and (3) certify their compliance with the requirement on the civil action coversheet. *Id.*; see also Superior Court Dep't, Trial Court of Mass., Civil Action Cover Sheet, available at <http://www.mass.gov/courts/courtsandjudges/courts/superiorcourt/civil-action-cover-sheet.pdf> (requiring certification of compliance with Rule 5).

33. MASS. GEN. LAWS ch. 7, § 4G (2010) (providing for creation of Office of Dispute Resolution); MASS. GEN. LAWS ch. 233, § 23C (2010) (providing for confidentiality of mediator work product and communications made in course of mediation); see also *Targus Grp. Int'l, Inc. v. Sherman*, No. 044907BLS1, 2006 WL 2205508, at *3 (Mass. Super. Ct. July 24, 2006) (stating protection of confidentiality applies to mediation and other forms of amicable dispute resolution), *rev'd in part on other grounds*, 922 N.E.2d 841 (Mass. App. Ct. 2010).

ten exceptions for executive session meetings not open to the public.³⁴ The exception most relevant to appeals of land use decisions is that a public body may meet “[t]o discuss strategy with respect to . . . 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.”³⁵ The public body may then meet in closed session with its municipal attorney so long as its discussion relates to “strategy with respect to litigation.”³⁶

The Massachusetts Superior Court has interpreted the litigation exception to cover situations in which litigation is imminent or anticipated but not yet filed in court.³⁷ Similarly, the Massachusetts Appeals Court and Supreme Judicial Court have recognized that when municipalities can reasonably foresee potential legal challenges, the litigation exception should be available to the public body.³⁸ The litigation exception thus allows public bodies to discuss settlement options without revealing to their adversaries valuable information that could frustrate the negotiation of a mutually amicable resolution.³⁹

Should the exception include conversations with opposing counsel or an appellant, and not just the appellee board itself?⁴⁰ Because of the important

34. MASS. GEN. LAWS ch. 30A, § 21(a) (2010) (stating public body may meet in executive session only for specified purposes). The statutory exceptions are as follows: to discuss reputation, character, or discipline of an employee; to strategize about negotiations with nonunion staff; to strategize over litigation or collective bargaining; to discuss security measures; to investigate criminal misconduct; to consider the acquisition of real property if the chair declares an open meeting would adversely affect the public body’s negotiating position; to comply with other law or federal grant-in-aid requirements; to consider potential job applicants; to meet with a mediator; and to discuss trade or proprietary secrets in certain circumstances. *Id.*

35. *Id.* § 21(a)(3).

36. *Id.*

37. See Porcaro v. Town of Hopkinton, No. 965438, 2000 WL 1473038, at *3 (Mass. Super. Ct. July 18, 2000) (holding litigation executive session exception applies to situation of anticipated litigation but not after case at issue has been settled); see also OFFICE OF ATTORNEY GEN. MARTHA COAKLEY, *supra* note 2, at 7 (advising “clearly and imminently threatened or otherwise demonstrably likely” litigation falls under purview of pending litigation exemption to Massachusetts OML).

38. See Doherty v. Sch. Comm. of Bos., 436 N.E.2d 1223, 1226-27 (Mass. 1982) (holding school committee could “properly anticipate a [legal] challenge” in light of pending suit filed against city of Boston by Boston Teachers Union); see also Perryman v. Sch. Comm. of Bos., 458 N.E.2d 748, 751-52 (Mass. App. Ct. 1983) (determining mere threat of court action may be sufficient to meet litigation exception).

39. See ALEXANDER J. CELLA, ADMINISTRATIVE LAW AND PRACTICE § 1428 (2009) (discussing Massachusetts legislature’s determination that government’s litigation strategy ought not be “handicapped” by openness requirements). It is unclear if the litigation exception would also apply to an appeal to an administrative agency, though the purpose to be served is the same. Note also that while not directly applicable to the OML, the Massachusetts Constitution provides local officials a legislative privilege against discovery, indicating another context where nondisclosure itself is in the public interest. See Knights of Columbus v. Town of Lexington, 138 F. Supp. 2d 136, 140 (D. Mass. 2001) (denying plaintiff’s request to depose selectmen).

40. Compare Whispering Woods at Bamm Hollow, Inc. v. Twp. of Middletown Planning Bd., 531 A.2d 770, 777 (N.J. Super. Ct. Law Div. 1987) (holding closed settlement negotiations permitted under pending litigation exception), and Peter J. LaBelle, *The Massachusetts Open Meeting Law: An Historical Overview and Contemporary Analysis*, 25 NEW ENG. L. REV. 257, 272 (1990) (“It is hard to envision a serious discussion of litigation in the presence of an opponent that could not have a detrimental effect on that litigation.” (emphasis added)), with Gandolfi v. Town of Hammonton, 843 A.2d 1175, 1183 (N.J. Super. Ct. App. Div. 2004)

policy in favor of settlement, this exception should not be so narrowly construed, an issue discussed in more detail below.

A second executive session exception available to municipal zoning appeals provides for mediation and states that “[a] public body may meet in executive session . . . [t]o meet or confer with a mediator, as defined in section 23C of chapter 233, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or entity.”⁴¹ This exception remains subject to prior public disclosure of the parties, issues, and purposes of the mediation, and requires further deliberation and approval in open session after mediation is concluded.⁴²

The mediator exception has two aspects possibly broadening its reach in the case of local boards. First, the statute referenced by the executive session mediation exception—chapter 233, section 23C—defines a mediator as not only one having the requisite training, but also one “appointed to mediate by a . . . governmental body.”⁴³ The effect may be that a municipal public body wishing to take advantage of this OML executive session exception might have the benefit of a wider pool of mediators than would be available to private organizations because of its ability as a governmental body to appoint any mediator that is “not a party to [the] dispute.”⁴⁴ Because mediators must be acceptable to both sides—and in this case, both the appellant and the appellee—the risk of partiality, simply due to municipal designation, is limited.

(questioning *Whispering Woods* holding that public bodies may meet in closed sessions with opposing counsel), and *Payton v. N.J. Turnpike Auth.*, 691 A.2d 321, 338 (N.J. 1997) (holding pending litigation exception protections duplicative of those of attorney-client privilege and work-product doctrine), and WILLIAM R. KEATING, UNDERSTANDING THE OPEN MEETING LAW: A HANDBOOK FROM NORFOLK COUNTY 15 (2002) (arguing litigation opponent’s presence at open meeting does not impair government body’s litigating position). Because the Massachusetts pending litigation exception is independent of the attorney-client privilege, *Whispering Woods* may still provide useful guidance. See generally 531 A.2d 770.

41. MASS. GEN. LAWS ch. 30A, § 21(a)(9) (2010).

42. The statute requires as a condition of use of the mediation exception that:

any decision to participate in mediation shall be made in an open session and the parties, issues involved and purpose of the mediation shall be disclosed; and . . . no action shall be taken by any public body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open session.

Id.

43. MASS. GEN. LAWS ch. 233, § 23C (2010). The statute provides in part:

For the purposes of this section a “mediator” shall mean a person not a party to a dispute who enters into a written agreement with the parties to assist them in resolving their disputes and has completed at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body.

Id.

44. *Id.* Note that even in the case of governmental appointment, the statute requires the mediator to have had at least thirty hours of training. *Id.*

Also, the OML executive session exception for mediation is broadly framed to include “any public business within its jurisdiction involving another party, group or entity,”⁴⁵ which might be broader than just matters under actual or likely appeal, as in the case of the litigation executive session exception itself. The one caveat is that the mediation executive session exception allows such a session so the public body can “meet or confer with a mediator.”⁴⁶ Narrowly read, this would not allow a local board to participate in mediation in executive session, but only to talk with a mediator. Such a construction makes little sense, especially in light of the policy in favor of settlement and the general privilege against discovery available to mediators, as well as the other language in the statute requiring open sessions both before and after the mediation, as discussed above.⁴⁷ Here again, however, the Attorney General can render a public service by interpreting the statute to clarify that mediation, and not just conversation with a mediator, can occur in executive session.

Whatever the applicable open meeting exception, to enter into an executive session the local board must first hold an open public meeting.⁴⁸ The presiding officer must state the reason for entering the session (with specific requirements for the litigation and mediation exceptions) and state if and when the body will reconvene at the conclusion of the executive session.⁴⁹ Moreover, the body must also take a roll-call vote to enter into an executive session.⁵⁰ In executive session, the body is responsible for taking minutes, recording votes, and releasing the minutes when appropriate.⁵¹

There are two other potential exceptions relevant to the process of settling land use appeals. First, there is the potentially implicit exception to the OML for a public body to be advised by its counsel. For some time, many commentators have assumed that attorney-client privilege does not provide an exception to the open meeting requirements.⁵² In *General Electric Co. v. Department of Environmental Protection*,⁵³ the Supreme Judicial Court ruled that the Commonwealth’s public records law largely overrode the government’s right to protect attorney work product.⁵⁴ Many lawyers and government officials, including the Secretary of State, inaccurately believed

45. Ch. 30A, § 21(a)(9).

46. *Id.*

47. MASS. GEN. LAWS ch. 30A, § 21(a)(9) (2010).

48. *Id.* § 21(b)(1).

49. *See id.* § 21(b)(3)-(4).

50. *See id.* § 21(b)(2).

51. *See* ch. 30A, § 21(b)(5).

52. *See* KEATING, *supra* note 40, at 5 (citing *Dist. Attorney v. Bd. of Selectmen of Middleborough*, 481 N.E.2d 1128, 1131 (Mass. 1985) (holding OML legislatively waived attorney-client privilege for governmental bodies except for explicit executive session exceptions)); *see also* Porcaro v. Town of Hopkinton, No. 965438, 2000 WL 1473038, at *4 (Mass. Super. Ct. July 18, 2000) (holding public bodies not entitled to avoid requirements of OML by asserting attorney-client privilege).

53. 711 N.E.2d 589 (Mass. 1999).

54. *Id.* at 592.

this holding also meant the end of governmental attorney-client privilege.⁵⁵ However, in the landmark ruling of *Suffolk Construction Co. v. Division of Capital Asset Management*,⁵⁶ the Supreme Judicial Court distinguished the two privileges by showing that the public records law demonstrated no clear legislative intent to abrogate attorney-client privilege.⁵⁷ In its decision, the Supreme Judicial Court supported maintaining the attorney-client privilege in the context of public records with this rationale:

It is in the public's interest that [government bodies and public officials] be able to [meet with their own counsel] in circumstances that encourage complete candor, without inhibitions arising from the fear that what they communicate will be disclosed to the world. If counsel, despite all diligence, are unable to gather all of the relevant facts, they will less likely serve the public interest in good government by preventing needless litigation In short, counsel will be less likely to perform adequately⁵⁸

The question of whether the attorney-client privilege may be used to advise a public body orally is left unanswered by the court's ruling, but the court's holding indicates that the lack of a specific statutory exception may not be decisive for OML purposes as previously assumed. Because the court found an exception to the public records law where the statute was also silent, the language of *Suffolk Construction* argues otherwise for purposes of the new OML.⁵⁹ It would seem odd that a written opinion by counsel is exempt from public records disclosure under Massachusetts law, but the same is not true of advice given orally, especially where the role of such advice is to clarify the authority of the public body, aid settlement of disputes, and perhaps avoid a

55. WILLIAM FRANCIS GALVIN, A GUIDE TO THE MASSACHUSETTS PUBLIC RECORDS LAW 26-27 (2006).

56. 870 N.E.2d 33 (Mass. 2007).

57. *See id.* at 42 (holding public records law does not abrogate attorney-client privilege for government officials regarding writings). The duty of confidentiality and the attorney-client privilege are codified in MASS. RULES OF PROF'L CONDUCT R. 1.6 (2009).

58. *Suffolk Constr.*, 870 N.E.2d at 39.

59. Christopher J. Petrini, the town counsel for Framingham, has written that "in my opinion, *Suffolk Construction* now constitutes a separate and independent ground to enter executive session for the purpose of giving legal advice to municipal clients." Christopher J. Petrini, *The Attorney-Client Privilege Between Municipalities and Their Counsel in Light of Suffolk Construction Co., Inc. v. Division of Capital Asset Management*, 449 Mass. 444 (2007), PETRINI & ASSOCIATES, P.C., 5 (February 2008), [http://www.petrinilaw.com/wp-content/uploads/2008.02.04%202008%20MCLE%20Article%20re%20AC%20Privilege%20\(2700-23\).pdf](http://www.petrinilaw.com/wp-content/uploads/2008.02.04%202008%20MCLE%20Article%20re%20AC%20Privilege%20(2700-23).pdf); *see also* MASS. GEN. LAWS ch. 30A, § 22(f) (2010). The new OML also references the attorney-client privilege in record keeping. *Id.* Although the Attorney General has not expressed a formal opinion as to whether the attorney-client relationship is available for public bodies, her office has noted that "[a] public body's discussions with its counsel do not automatically fall under this [strategy in litigation exception] or any other Purpose for holding an executive session," suggesting that in some circumstances the attorney-client privilege is independently available to public bodies for oral as well as written advice from their counsel. *See* OFFICE OF ATTORNEY GEN. MARTHA COAKLEY, *supra* note 2, at 7.

land use appeal altogether.⁶⁰ At the same time, because the privilege is grounded in confidentiality in attorney-client communications, it may not be broad enough to include conversations with adverse parties. The lack of such an option might mean the local board's counsel would need to communicate with counsel for the adverse party separately from the board.⁶¹ Nonetheless, while the litigation exception is available for executive session discussions, there may be legitimate occasions where, in order to settle or avoid an appeal, a local board may need to be advised privately by its counsel outside of the framework of a statutory executive session exception.

As to how the attorney-client privilege might be invoked in an otherwise open meeting, rather than go through the same procedures as may be required for statutory exceptions for executive sessions, in New York, local boards are advised to "inform the public that it is seeking the legal advice of its attorney, which is a matter made confidential by law, rather than referring to an executive session."⁶²

A second potential exception to the OML is one new to the law applicable to local boards. The new OML contains an exception in the local context for meetings of "a quasi-judicial board or commission held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it."⁶³ A body, like the Board, acting on a special permit, could be considered to fall

60. Indeed, in *Suffolk Construction*, the court noted OML cases in other jurisdictions offering the proposition that the attorney-client privilege was not foreclosed by local OMLs. 870 N.E.2d at 45 n.20; see, e.g., *Dunn v. Ala. State Univ. Bd. of Trustees*, 628 So. 2d 519, 529-30 (Ala. 1993) (finding implied exception to Alabama's "Sunshine Law" for meetings between public body and its counsel, but limiting exception to meetings over pending legal matters to which board was party), *overruled on other grounds by* *Watkins v. Bd. of Trustees of Ala. State Univ.*, 703 So. 2d 335 (Ala. 1997); *Roberts v. City of Palmdale*, 853 P.2d 496, 501 (Cal. 1993) (holding California's OML does not require disclosure of written legal opinion from public body's counsel distributed to members); *Okla. Ass'n of Mun. Attorneys v. State*, 577 P.2d 1310, 1315 (Okla. 1978) (holding Oklahoma's legislature did not intend to nullify attorney-client privilege for public bodies); see also *Minneapolis Star & Tribune Co. v. Hous. & Redevelopment Auth. of Minneapolis*, 251 N.W.2d 620, 625-26 (Minn. 1976) (holding public's interest in transparent government outweighed by public body's interest in keeping discussions with counsel regarding pending legal matters confidential). What is intriguing about the *Dunn*, *Roberts*, and *Oklahoma Association of Municipal Attorneys* cases cited by the SJC is that they all argued that the judiciary has "inherent, continuing, and plenary control" over issues of attorney-client privilege and the legislature may not abridge this control. *Dunn*, 623 So. 2d at 528. The SJC had previously determined that the attorney-client privilege available to public clients was the legislature's to waive by enacting the OML, so as not to violate the provision of the Declaration of Rights reserving the power to regulate the practice of law to the court. See *Dist. Attorney v. Bd. of Selectmen of Middleborough*, 481 N.E.2d 1128, 1131 (Mass. 1985). In *Suffolk Construction*, the court did not reexamine the separation of powers argument, but simply said, "[i]f the Legislature intended to divest government officials and entities subject to the public records law of a privilege as basic and important as the attorney-client privilege, it would have made that intention unmistakably clear." 870 N.E.2d at 46. That is a different judicial frame of reference about this issue from the same court in *Board of Selectmen of Middleborough*, where it articulated the view that non-statutory exceptions to the OML should not be implied. 481 N.E.2d at 1130-31.

61. See *Gandolfi v. Town of Hammoncton*, 843 A.2d 1175, 1183 (N.J. Super. Ct. App. Div. 2004).

62. N.Y. State Dept. of State Comm. on Open Gov't Op. OML-AO-3478 (June 26, 2002), available at <http://www.dos.state.ny.us/coog/otext/3478.htm>.

63. MASS. GEN. LAWS ch. 30A, § 18(d) (2010).

within this new exception, because it is acting in a quasi-judicial capacity.⁶⁴ On the other hand, the exception only applies if the quasi-judicial body is also making a decision in an adjudicatory proceeding.

Local boards making land use decisions generally hear testimony, but not under oath or subject to cross-examination, and they actively engage applicants and the public about the issues involved—all characteristics of a more informal, quasi-legislative process. But at the same time, earlier cases holding SPGA decisions to be quasi-judicial focused on the adjudicatory aspects of the effect on individual rights and the substantial procedure involved.⁶⁵ Therefore, despite some more informal procedures, a local SPGA might still fit within this exception. If so, however, it would mark a major change from the prior treatment of local land use decision-making bodies under the OML. It is not clear, however, that the legislature intended that result to be part of the general re-codification when prior language from chapter 30A, relating only to state agencies, was added to the new OML in chapter 30A, section 18(d).⁶⁶ The issue appears to be resolved, however, by informal guidance from the Attorney General. In a portion of responses to “Frequently Asked Questions,” the Attorney General has viewed these provisions as applying only to state agencies.⁶⁷

In light of that advice, it would not be prudent for local land use decision-making bodies to rely on this exception for avoiding the OML in making their decisions. Moreover, even if they were able to do so, these bodies still have obligations under the law to hold a public hearing, implying an independent obligation of transparency for at least that part of their land use decision-making process.⁶⁸ At the same time, even if this statutory exception is not formally available to local zoning boards making quasi-judicial decisions, it still represents a legislative policy in favor of confidentiality when a quasi-judicial decision is involved, again marking a legislative recognition that transparency sometimes needs to yield to a competing public purpose in favor of confidentiality. In summary, the importance of these confidentiality provisions for settling local land use appeals is that while the general policy is

64. See *Tenneco Oil Co. v. City Council of Springfield*, 549 N.E.2d 1135, 1137 (Mass. 1990); *Mullin v. Planning Bd. of Brewster*, 456 N.E.2d 780, 782-83 (Mass. App. Ct. 1983).

65. See *Tenneco Oil*, 549 N.E.2d at 1137; *Mullin*, 456 N.E.2d at 782-83.

66. Ch. 30A, § 11A; MASS. GEN. LAWS ch. 39, § 23A(d) (repealed July 1, 2010).

67. See *OML FAQ: Quasi-Judicial Public Bodies*, OFFICE OF ATTORNEY GEN. MARTHA COAKLEY, http://www.mass.gov/?pageID=cagoterminal&L=4&L0=Home&L1=Government&L2=The+Open+Meeting+Law&L3=Open+Meeting+Law+FAQs&sid=Cago&b=terminalcontent&f=government_OML_FAQ_quasi_judicial&csid=Cago (last visited Jan. 13, 2011). Note that the Attorney General has not issued a formal advisory opinion on this issue, but in a set of “Frequently Asked Questions” said that because the statutory language refers to an “adjudicatory proceeding,” such matters refer only to proceedings before state agencies under chapter 30A of the *Massachusetts General Laws*, but that even then, the exemption from the definition of a meeting refers only to meetings held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it, not the adjudicatory proceeding itself, which must be public. *Id.*

68. MASS. GEN. LAWS ch. 40A, § 9 (2010).

in favor of transparency both in the initial decision and at the end of the settlement process, the ability to secure a settlement will often require that the groundwork be laid in private conversations between the initial decision and final settlement.

But what happens when a public body, acting in good faith, is found to be in violation of the OML? Courts have looked at the ability to “cure” a violation of the OML as a possible remedy.⁶⁹ Thus, even if for some reason the settlement discussions held by a local board were deemed to be in violation of the OML, subsequent open meetings may remedy the violation. This is especially important if the board is attempting to reach a successful settlement, as Abraham Lincoln advised. To earn the right to cure, however, such subsequent public open meetings should provide a meaningful opportunity for the public to comment on the proposed settlement, as would ordinarily occur when any special permit is first sought, and follow the OML procedures before coming to a final decision on a settlement.⁷⁰

Note also that aside from the foregoing opportunities, advisory opinions by the Attorney General could be of aid to public bodies seeking to settle land use cases within the framework of the OML, as discussed above and in more detail below. Also, to be protected against penalties, it is important for a local public body to be advised by its counsel on OML issues.⁷¹

III. TWO EXAMPLES OF SETTLEMENT OF LAND USE APPEALS FROM NEWTON, MASSACHUSETTS

The City of Newton encountered two zoning appeals that presented an opportunity for settlement, and those successful settlements may be instructive in other contexts. The first example was an appeal after a special permit

69. See *Benevolent & Protective Order of Elks, Lodge No. 65 v. Planning Bd. of Lawrence*, 531 N.E.2d 1233, 1259 (Mass. 1988) (concluding two properly noticed public meetings, which followed violations that may have occurred when president conversed with other city council members, served as appropriate action to correct violations); see also *Pearson v. Bd. of Selectmen of Longmeadow*, 726 N.E.2d 980, 985 (Mass. App. Ct. 2000) (holding subsequent, properly noticed public meeting would have cured OML violations of previously held nonpublic meeting had it been deemed violation of OML); *Gandolfi v. Town of Hammonton*, 843 A.2d 1175, 1183 (N.J. Super. Ct. App. Div. 2004) (holding subsequently held public meeting “cured” any defect under New Jersey’s OML). But see *McCrea v. Flaherty*, 885 N.E.2d 836, 841 (Mass. 2008) (distinguishing *Elks*). The *McCrea* Court concluded that a Boston City Council vote in open meeting extending an urban renewal plan after prior nonpublic meetings was not sufficiently “independent deliberative action” to cure alleged violations of the OML at the prior council meetings. *McCrea*, 885 N.E.2d at 842-43; see also *Tolar v. Sch. Bd. of Liberty Cnty.*, 398 So. 2d 427, 429 (Fla. 1981) (holding no cure where subsequent meeting only serves purpose of acting as ceremonial acceptance).

70. See *Gandolfi*, 843 A.2d at 1183 (stating that after violation, public body may take corrective action in compliance with OML rules).

71. MASS. GEN. LAWS ch. 30A, § 23(g) (2010). The statute states, in relevant part: “It shall be a defense to the imposition of a penalty that the public body . . . acted in good faith compliance with the advice of the public body’s legal counsel.” *Id.*

requesting a waiver of parking requirements was denied.⁷² This appeal was filed by Chabad-Lubavitch (Chabad). Chabad was a small Orthodox Jewish congregation operating in a former single-family house within a typical suburban residential neighborhood.⁷³ The second example involved the denial of a permit to expand a radio tower complex bordering a residential zone.⁷⁴ The *Chabad* case was resolved prior to, and helped set a precedent for, the radio tower case.

A. The Chabad-Lubavitch Settlement

Under the Newton zoning ordinances, places of assembly are required to provide adequate parking for the expected number of worshipers.⁷⁵ This requirement became an issue for the Orthodox Jewish congregants who wanted to practice their faith in a converted residence to which they walked for services held on High Holy Days. The general provisions of Newton's zoning ordinances require one parking space for every three people expected to attend services and one spot for every forty-five square feet of associated function floor area.⁷⁶ The formula yielded a requirement of forty-five off-street parking spaces, while Chabad only had two off-street parking spaces.⁷⁷ Chabad worked with the city to investigate adding additional parking on the property. Results showed, however, that drainage problems would prevent adding more spaces on the lot.

Chabad's inability to provide adequate off-street parking meant the congregation needed to seek zoning relief from the local requirements. The proper process for Chabad to pursue was applying for a special permit for a parking waiver. As indicated above, the Board could grant special permits if it could find an exception from the zoning code that would be in the public's interest as well as meet other criteria.⁷⁸

72. *Board of Aldermen Actions, Monday, December 15, 2003*, CITY OF NEWTON, MA, <http://www.ci.newton.ma.us/aldermen/actions/2003/12152003.htm>.

73. Chabad-Lubavitch, Inc., Newton, Mass., Bd. of Aldermen Order No. 319-03, at 1 (May 25, 2004), available at http://www.ci.newton.ma.us/cdbg/special%20Permits/2007/106-07%20_349%20Dedham%20St.pdf, and <http://www.law.suffolk.edu/highlights/stuorgs/lawreview/documents/May252004.pdf> (order also available by request from Suffolk University Law Review, 120 Tremont St., Boston, MA 02108, and from Newton City Clerk, 1000 Commonwealth Ave., Newton Centre, MA 02459).

74. See *Champion Broad. Sys., Inc. v. Gerst*, No. 300654, 2005 WL 1971167, at *1-2 (Mass. Land Ct. Aug. 17, 2005) (setting forth facts giving rise to appeal from Board's denial of broadcasting company's applications to amend existing special permits and for site plan approval for modification and reconstruction of non-conforming radio transmission building and antenna complex).

75. See NEWTON, MASS., REV. ORDINANCES § 30-19(d)(13) (2010) (setting forth minimum required number of parking stalls for places of assembly).

76. *Id.*

77. Chabad-Lubavitch, Inc., Newton, Mass., Bd. of Aldermen Order No. 319-03, at 1 (denying Chabad's request for special permit to waive requirement of forty-five on-site parking spaces and noting Chabad's two existing on-site parking spaces).

78. See NEWTON, MASS., REV. ORDINANCES § 30-19(m) (2010) (empowering Board to grant special

Chabad filed its application for a special permit in July of 2003. The Committee convened to determine the merits of the application. The Committee found the surrounding neighbors were concerned over the potential increase in traffic and parking on both their properties and a neighboring elementary school, specifically about the crowding of the street and the safety of their children walking to the nearby Countryside School.⁷⁹ A majority of the Board voted to deny the special permit in December of 2003 because of the traffic and parking concerns raised. Chabad brought suit in the Land Court claiming the City of Newton violated various protections for religious institutions under federal and state law.⁸⁰

Ultimately, the Board, with the help of City Solicitor Dan Funk and Associate City Solicitor Ouida Young, and aided by the advice and assistance of several aldermen who represented the affected area or were experienced in dispute resolution, successfully settled the potential appeal arising out of a Board's prior denial of a parking waiver for Chabad. More specifically, the Board's counsel recommended a resolution to the dispute wherein the Board would waive the on-site parking requirements in exchange for Chabad's securing additional parking through an agreement with the neighboring public elementary school. The elementary school granted Chabad a non-exclusive license to use up to fifteen parking spaces. Under the proposed settlement, Chabad—recognizing its congregants' more limited use of automobiles—agreed to abide by other conditions that limited the additional traffic and demand for parking generated by its activities. These “other conditions” included creating a council of officials, neighbors, and Chabad representatives who could meet from time to time to raise and resolve future disputes.⁸¹

permits where “literal compliance is impracticable due to the nature of the use, or the location, size, width, depth, shape, or grade of the lot, or [where] such exceptions would be in the public interest, or in the interest of safety or protection of environmental features”); *Id.* § 30-19(c)(3) (empowering Board to grant special permits to “reduce or waive” parking requirements under Newton’s zoning law “in conjunction with the enlargement, extension or change in use of a building or structure”); *Id.* § 30-24 (setting forth procedure for obtaining special permits from Board).

79. See Chabad-Lubavitch, Inc., Newton, Mass., Bd. of Aldermen Order No. 319-03, at 3 (May 25, 2004), available at http://www.ci.newton.ma.us/cdbg/special%20Permits/2007/106-07%20_349%20Dedham%20St.pdf, and <http://www.law.suffolk.edu/highlights/stuorgs/lawreview/documents/May252004.pdf> (order also available by request from Suffolk University Law Review, 120 Tremont St., Boston, MA 02108, and from Newton City Clerk, 1000 Commonwealth Ave., Newton Centre, MA 02459) (finding special permit would increase traffic and demand for parking near Chabad building and neighboring school).

80. See Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (2006); see also MASS. GEN. LAWS ch. 40A, § 3 (2010) (providing protection for religious and educational uses under local zoning). This provision of chapter 40A is often referred to as the “Dover Amendment” because its original form arose in response to a decision to deny a religious educational institution in the town of Dover. See *Forster v. Bd. of Appeals of Belmont*, 803 N.E.2d 1289 (Mass. App. Ct. 2004) (unpublished table decision) (using term “Dover Amendment”); Verified Complaint, *Chabad-Lubavitch, Inc. v. City of Newton*, No. 295600 (Mass. Land. Ct. Jan. 5, 2004). See generally *Attorney Gen. v. Inhabitants of Town of Dover*, 100 N.E.2d 1 (Mass. 1951).

81. See Chabad-Lubavitch, Inc., Newton, Mass., Bd. of Aldermen Order No. 319-03, at 3 (setting forth conditions of Board of Aldermen’s approval of Chabad’s request for special permit and site plan approval).

B. *The Champion Broadcasting Radio Tower Settlement*

The second example involved a radio station, and a complex of antennas operated by Champion Broadcasting, and others, in the Oak Hill Park neighborhood, which is in southern Newton. This area had been developed after the Second World War, primarily as housing for returning veterans.⁸² The radio station, authorized by a 1947 special permit, consisted of a transmission building and two lighted 353-foot antennas.⁸³

Champion Broadcasting sought to amend the 1947 special permit. The company sought to replace the two existing antennas with five unlighted, 199-foot antennas, and renovate the transmission building to make it resemble a single-family dwelling.⁸⁴ At the public hearing, most of the comments focused on the effects the radio broadcasts would have on the people and electronic and other equipment in the neighborhood nearby.⁸⁵ The Board initially denied the permit, citing concerns over radio frequency interference (RFI), as well as environmental and other issues.⁸⁶

The denial prompted the broadcaster to file suit against the Board.⁸⁷ The Land Court ruled that most of the Board's findings were preempted by federal and state law.⁸⁸ The Land Court granted summary judgment for the broadcaster, ordering the decision remanded to the Board.⁸⁹ Again, the Newton Law Department helped settle the dispute with the assistance and advice of several knowledgeable aldermen in a process similar to that employed in the

82. See *Champion Broad. Sys., Inc. v. Gerst*, No. 300654, 2005 WL 1971167, at *1 (Mass. Land Ct. Aug. 17, 2005) (describing Oak Hill Park neighborhood); Clear Channel Radio, Newton, Mass., Bd. of Aldermen Order No. 542-03, at 3 (July 12, 2004), available at <http://www.law.suffolk.edu/highlights/stuorgs/lawreview/documents/July122004.pdf> (order also available by request from Suffolk University Law Review, 120 Tremont St., Boston, MA 02108, and from Newton City Clerk, 1000 Commonwealth Ave., Newton Centre, MA 02459).

83. See *Clear Channel Radio, Newton, Mass., Bd. of Aldermen Order No. 542-03*, at 3 (finding special permit required for nonconformity of antennas and transmission building due to height and setback requirements).

84. See *id.* at 2 (determining structures would still be nonconforming as modified and thus required special permit).

85. See *id.* at 5 (discussing radio frequency emissions' interference with household devices). The Board determined that the emissions interfered with not only household electronic devices, but also medical devices, such as fetal heart monitors, security systems, and life safety equipment. *Id.*

86. See *id.* at 3-7 (observing site provided habitat for Blue Spotted Salamander, an endangered species).

87. See *Champion Broad.*, 2005 WL 1971167, at *2; *Clear Channel Radio, Newton, Mass., Bd. of Aldermen Order No. 542-03* (denying broadcaster's application). The Board denied the application because planned reconstruction and renovations would be "substantially more detrimental to the neighborhood than the existing nonconforming structures" and would not "serve the public convenience and welfare." *Clear Channel Radio, Newton, Mass., Bd. of Aldermen Order No. 542-03*, at 1.

88. See *Champion Broad. Sys., Inc. v. Gerst*, No. 300654, 2005 WL 1971167, at *6 (Mass. Land Ct. Aug. 17, 2005) (stating statutes make clear FCC has exclusive authority over technical matters related to radio broadcasting). The court explained that the Board overlooked 47 U.S.C. § 302(a)(1), which provides that the FCC may "make reasonable regulations . . . governing the interference potential of devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications." *Id.* (quoting 47 U.S.C. § 302(a)(1) (2000)).

89. *Id.* at *10.

Chabad case.

In the ultimate settlement, the broadcaster agreed to some enhanced protections for those potentially affected by the project, including monitoring the neighborhood for any adverse affects created by RFI, a remediation fund, and the creation of communication pathways for the neighbors to register any complaints.⁹⁰

While settling these matters did not involve mediation, the post-settlement process involved resembled the post-settlement requirement of the mediation executive session option within the OML, which requires that “no action shall be taken by any public body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open session.”⁹¹

Also, the settlement Board orders were treated as requiring the same vote as the original special permits, as well as a public hearing before the vote. The hope was that third parties who might have been affected by the settlement did not feel the settlement process was a way for an applicant to avoid the same public oversight in the original special permit application. Despite neighborhood concerns in both cases, the settlements appeared to respond successfully not only to the appellants’ interests, but also to the neighborhood concerns, at least to the extent that no affected neighbors appealed the settlement decisions, which could very well have occurred.

Newton was fortunate in how it worked out in both the *Chabad* and *Champion Broadcasting* matters. Could other cities and towns do the same under the new OML? That is likely to prove more challenging if the settlement process is not treated as something that requires confidentiality to succeed. Settlement conversations require those involved to look behind the public positions, to get past hard feelings and sometimes harsh rhetoric, to explore the underlying interests, to think creatively about options for solution, and to build mutual trust, face to face, sufficient to resolve a difficult dispute. That process is simply difficult, if not impossible to do, in full public view, as the policies outlined at the beginning of this article make clear, and as Newton’s experience in these two cases illustrates.

Obviously the OML has to have some limits or government would not be able to go on. For example, individual government officials, and members of their staffs, are not “public bodies” subject to the OML, “so they may meet with one another to discuss public business without needing to comply with

90. Clear Channel Radio, Newton, Mass., Bd. of Aldermen Order No. 542-03, at 3-5 (Nov. 21, 2005), available at <http://www.ci.newton.ma.us/Aldermen/LandUse/2005/Clear%20Channel%20settlement%2011-1-05.pdf>, and <http://www.law.suffolk.edu/highlights/stuorgs/lawreview/documents/Nov.212005.pdf> (order also available by request from Suffolk University Law Review, 120 Tremont St., Boston, MA 02108, and from Newton City Clerk, 1000 Commonwealth Ave., Newton Centre, MA 02459) (approving special permit to build towers subject to various community-oriented provisions).

91. See MASS. GEN. LAWS ch. 30A, § 21(a)(9) (2010).

Open Meeting Law Requirements.”⁹² Individual members of the Board, either alone or in small groups, routinely meet with and receive advice from the members of the Newton Law Department on various public matters within the jurisdiction of the Board, and it would be difficult to imagine requiring public notice and open meeting procedures for such conversations, especially in light of the possible implicit exemption in the OML for attorney-client communications discussed above.

On the other hand, the new OML has expanded the application of the statute by now defining “subcommittees” of public bodies to which the OML applies as including “any multiple-member body created to advise or make recommendations to a public body.”⁹³ That definition could be read as including multiple members of a local quasi-judicial zoning board, even if not a quorum of the local board or any of its committees, involved in settlement negotiations of a land use appeal unless they are deemed as being advised by or providing information to municipal counsel as part of these settlement conversations.

Pending clarification or advice by the Attorney General on how settlement of land use appeals is best undertaken in light of the new OML, how should local boards proceed? One alternative is to consider conducting all settlement negotiations in executive session under the strategy in litigation exception, but that may not be sufficient to include the appellee or its counsel, as discussed above.⁹⁴ Also, the initial stages of such conversations are challenging because settlement is a tender idea. It can wither under public scrutiny if that occurs before settlement can take root in the form of a carefully crafted resolution that can respond to concerns of not only the appellant but also those third parties likely to be affected, such as nearby neighbors.

Another alternative is to use the mediation executive session exception to the OML, because mediation has the potential advantage of including adverse parties if the scope of the exception allows conversations with not only a mediator but also the appellants, as discussed above. The problem with the mediation executive session alternative, as opposed to a discussion of strategy in litigation where settlement can be explored more deeply in executive session, is that a public discussion of mediation, as the OML requires, raises the prospect of settlement at its most fragile stage. Indeed, publicly announcing settlement efforts will sometimes prevent the process from getting underway, especially if it poses problems with some affected parties who would rather see an appeal carried through to conclusion without a negotiated resolution.⁹⁵

92. See OFFICE OF ATTORNEY GEN. MARTHA COAKLEY, *supra* note 2, at 2.

93. See ch. 30A, § 18; see also *Nigro v. Conservation Comm’n of Canton*, 458 N.E.2d 1219, 1222 (Mass. App. Ct. 1984) (holding subcommittees of local governments subject to OML when they “engage[] in making findings of fact” or provide recommendations to higher committee, board, or commission).

94. See *supra* note 40 and accompanying text.

95. See generally ROBERT MNOOKIN, *BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE, WHEN TO*

With those uncertain alternatives, pending further advice from the Attorney General, a local land use decision-making body is best advised to rely on its counsel and perhaps one of its members to conduct settlement negotiations.⁹⁶ Their conclusions can then be brought back to the full body in executive session under the strategy in litigation exception to the OML, and if successful, then into a full public process, as occurred in the Newton examples. Even then, the requirements of lengthier notice of meetings, preparation of agendas, retention of records, and other provisions in the updated OML can be a barrier to the already challenging process of trying to reach a resolution in the public's best interest, rather than simply standing back and letting the arrows fly in a litigated appeal.⁹⁷

For that reason, it is important to recognize that the policy in favor of settlement of disputes may argue for construing the OML in a way to permit local boards to participate in more informal settlement discussions, as occurred in the Newton *Chabad* and *Champion Broadcasting* cases. These cases demonstrate how candid but confidential conversations with appellants, mindful of third-party impacts, can settle land use appeals and still protect the public interest, including those citizens who are not part of the confidential conversations but who may be affected by the outcome. The hope is that either the Attorney General or the courts will find ways to allow the new OML to be read to facilitate settlements like these two in Newton. What specifically might be involved?

FIGHT (2010) (discussing example of Nelson Mandela's need to undertake conversations in secret with South African apartheid regime to have any chance of success).

96. A dispute involving the Town of Longmeadow and the City of Springfield regarding access to land was resolved after a nonpublic meeting among representatives of both communities and their counsel in which the town representative was not empowered to act on behalf of the Town Board of Selectmen or to bind it. During that meeting, the framework of a resolution was worked out, and brought back to a community meeting. Subsequently, a more formal agreement drafted by counsel for the two municipalities was voted on at a formal meeting of the Longmeadow Board of Selectmen. The Appeals Court found that this nonpublic meeting was not of a subcommittee of the Longmeadow Board of Selectmen so as to require a public meeting. The court also said that even if it were, the subsequent public meeting and vote on the resolution of the access road issue would have cured any violation of the OML if it had occurred. *Pearson v. Bd. of Selectmen of Longmeadow*, 726 N.E.2d 980 (Mass. App. Ct. 2000); *see also Connelly v. Sch. Comm. of Hanover*, 565 N.E.2d 449 (Mass. 1991) (holding OML does not apply to selection committee appointed by superintendent of schools to advise superintendent); *Dist. Attorney v. Bd. of Trs. of Leonard Morse Hosp.*, 452 N.E.2d 208 (Mass. 1983) (determining board of trustees of public hospital established by will not governmental body subject to OML). *But see Kilcoyne v. Wayland Landfill Review Panel*, No. 04-03824, 2004 WL 2434649 (Mass. Super. Ct. Oct. 18, 2004), *aff'd* 896 N.E.2d 60 (Mass. App. Ct. 2008) (unpublished table decision). The *Kilcoyne* case involved a local review panel formally appointed by the Wayland Board of Selectmen, including the Chair of the Board, special town counsel, and the Chair of the Board of Health, to investigate compliance with a municipal landfill agreement with the commonwealth regarding the disposal of recyclables. *Kilcoyne*, 2004 WL 2434649, at *1. The court held that the review panel was a "committee" subject to the OML because it was appointed by the Board of Selectmen to discharge a portion of a function exclusively committed to the board by statute. *Id.* at *3-5.

97. *See generally* MASS. GEN. LAWS ch. 30A, §§ 18, 20-22 (2010) (describing requirements of OML).

IV. POSSIBLE AIDS TO SETTLEMENT FROM THE ATTORNEY GENERAL

In the guide to the OML, Attorney General Martha Coakley said the following about the purposes of the OML: “[The OML] also seeks to balance the public’s interest in witnessing the deliberations of public officials with the government’s need to manage its operations efficiently.”⁹⁸ As indicated above, these paths to settle land use appeals may be aided if the Attorney General interprets the new OML so as to aid the government’s need to operate efficiently by encouraging settlements like the ones which Newton achieved. How could this occur?

First, it would help if the Attorney General were to advise local boards, either through an interpretive ruling, regulation, or an advisory opinion, that the OML’s litigation exception applies not only to litigation in court, but also to appeals of administrative agencies.

Second, the Attorney General could advise local bodies that the litigation exception to the OML includes conversations with appellants, and not just counsel to the local body, in order to determine strategy. This interpretation would allow for the express use of informal conversations between knowledgeable persons on both sides, even in formal executive sessions.

Third, the Attorney General could clarify that, at least for purposes of settlement, the new OML definitions should not preclude having more than one advisor from a local board work with municipal counsel in seeking a resolution. Having multiple advisors helps avoid missing key interests that may be essential to settlement success.

Fourth, the Attorney General could make explicit the implicit exception for attorney-client communications to local boards so that they can be well advised on how appeals can be avoided as well as settled.

Fifth, the legislature extended the adjudicatory body exception in the old OML to include quasi-judicial bodies. While the Attorney General has interpreted the scope of that exception narrowly, she might still choose to use that provision as legislative policy guidance to allow confidentiality in the process of settling local land use appeals, if not in general.

Sixth, the Attorney General could clarify that the mediation executive session exception to the OML includes mediation itself and not just a conversation with a mediator outside of the mediation.

Finally, if there is a missed OML step, but a robust open process follows it, the Attorney General could help by indicating when such a public process is sufficient to remedy the prior flaw.

All these options are important because the policy encouraging settlement argues for a range of available avenues to achieve resolution for local boards whose decisions have been appealed.

98. See OFFICE OF ATTORNEY GEN. MARTHA COAKLEY, *supra* note 2, at 1.

V. CONCLUSION

In summary, based in part on the Newton experience, and pending further guidance from the Attorney General, when settling land use cases in Massachusetts within the framework of the OML, success is likely to require a multi-step process:

1. Undertake exploratory conversations between counsel for both the public body and the appellant, perhaps assisted, at least in the case of the local board, by a member of the body who can advise municipal counsel from his or her knowledge and experience.
2. Discuss settlement in an executive session, and if desired, engage the assistance of a mediator, assuming that the appellant can also be involved in such mediation executive sessions.
3. Discuss any possible settlement proposal with the local board in an executive session without the appellant present.
4. Bring a proposed settlement to the public for review and comment in open meeting and full public hearing. At that time, interested parties can be heard and comment on the proposed settlement, followed by an additional executive session, if need be, to discuss strategy with respect to concluding the appeal.
5. Undertake public deliberation and a public vote on the final proposed settlement in an open meeting.
6. Return to court if an appeal has been filed to get the settlement approved, if necessary.

Municipal attorneys or members of local boards whose land use decisions are subject to appeal should be able to work together to settle such appeals in ways consistent with the public interest in both good land use and transparent decision-making. With the assistance of the Attorney General, even more options may be made available for this purpose, which would be helpful because litigation is not always a better alternative. As Winston Churchill once said: "To jaw-jaw is always better than to war-war."⁹⁹

99. THE YALE BOOK OF QUOTATIONS 154 (Fred R. Shapiro ed., 2006).