

February 9, 2022

Jonathan M. Silverstein
jsilverstein@k-plaw.com

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Hon. Jennifer S. Roberts and
Members of the Select Board
Flynn Building
278 Old Sudbury Road
Sudbury, MA 01776

Re: Creation and Appointment of Sustainability Director

Dear Members of the Select Board:

The Town has requested a legal opinion concerning a proposed Town Meeting article that would create a new, director-level position in the Town and provide funding for said position. I understand the Town anticipates the inclusion of an article on the upcoming Town Meeting Warrant that would declare a climate emergency and, amongst other things, create the position of Sustainability Director (the “Climate Emergency Article”). The Climate Emergency Article would direct the Select Board and Town Manager to create and fill a permanent, director-level position known as the Sustainability Director. Said article would also authorize the Town to transfer from free cash \$130,000, or any other sum, to fund the salary, benefits, and other costs associated with this newly created position.

Under the Town Charter, Town Meeting serves as the Town’s legislative body, with all legislative powers vested in Town Meeting. See Town Charter, Part II, §4. The Town’s executive branch is the Select Board, which implements and enforces the laws of the Town, establishes Town policy, and appoints the Town Manager, Town Counsel, Town Accountant, and the members of all Town boards, committees, and commissions unless otherwise stated in the Charter. Id., Part III, §5(b). The Town Manager serves as the Chief Administrative Officer of the Town, and is responsible for the proper operation of the Town’s affairs, the supervision of Town officers and departments, and the appointment of all department heads, subordinates, and employees of the Town for which appointment is not otherwise provided in the Charter (excepting employees of the School and Health Departments). Id., Part III, §§7-8.

In my opinion, Town Meeting, as the Town’s legislative authority, has the authority to create and fund the new position of Sustainability Director, however, Town Meeting does not have the power to compel or command how the Town Manager exercises his or her appointment power over such a position. A legislative body cannot compel the executive branch to exercise its discretion in any particular manner when the executive is acting within its exclusive power. See Anderson v. Board of Selectmen of Wrentham, 406 Mass. 508, 512 (1990) (board of selectmen and town manager’s authority over union negotiations cannot be controlled by town meeting); see also Lead Lined Iron Pipe v. Inhabitants of Wakefield, 223 Mass. 485, 487 (1916) (town vote directing the

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board of selectmen to hire an engineer is no more than advisory). When the Town Manager possesses the exclusive, discretionary power to appoint, Town Meeting, acting as the legislature, cannot compel the Town Manager to make such an appointment. See, e.g. Finamore v. Dowgiewicz, 24 Mass. L. Rptr. 347 (Mass. Super. 2008) (“When the Board acting as the executive possesses the exclusive, discretionary power to appoint special legal counsel, the Town Meeting acting as the legislature cannot compel the Board to make payment for legal expenses incurred without the prior authorization of the Board.”). Traditional separation of powers principles prevent Town Meeting from compelling the Town Manager to exercise his or her appointment power in any particular manner, or at all.

In my opinion, were the Climate Emergency Article to be approved, the Charter provisions cited above establish the Town Manager as the exclusive appointing authority for the Sustainability Director position, and therefore the provisions of that article directing the Town Manager to make an appointment would be advisory at best. Town Meeting cannot command the Town Manager to make an appointment that is within the Town Manager’s exclusive discretion. Board of Selectmen of Wrentham, 406 Mass. at 512; Inhabitants of Wakefield, 223 Mass. at 487. While the Climate Emergency Article may direct the Town Manager to appoint a person as Sustainability Director and to pay the director a salary with the funds transferred from free cash, in my opinion, the Town Manager cannot be required to do so because Town Meeting, as the Town’s legislative body, cannot control how the Town Manager performs that inherently executive and discretionary function. The Town Manager is responsible to the Select Board for the dutiful and faithful execution and administration of the Town’s affair and laws, and the Select Board may assess his or her performance accordingly. However, a Town Meeting vote directing the Town Manager to exercise his or her discretion here in any particular manner is not, in my opinion, binding or enforceable, and is merely advisory.

In sum, it is my opinion that Town Meeting may establish and fund a new position such as that of Sustainability Director, but it may not command the appointing authority for that position, here the Town Manager, to fill that position or pay any particular salary.

If you have any additional questions, please do not hesitate to contact me.

Very truly yours,



Jonathan M. Silverstein

Golden, Patricia

From: Hayes, Henry
Sent: Friday, March 4, 2022 1:49 PM
To: Golden, Patricia
Subject: FW: SB/TM Note - CONFIDENTIAL - Opinions - appointment responsibility and sub-committee info
Attachments: SUDB opl re_sustainability director.pdf

Respectfully, Henry

Henry L. Hayes, Jr. (he, him)
Town Manager
Town of Sudbury
Phone: (978) 639-3381

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The Secretary of State's office has determined that most e-mails to and from municipal offices and officials are public records. Consequently, confidentiality should not be expected.

From: Town Manager
Sent: Wednesday, February 9, 2022 6:25 PM
Subject: SB/TM Note - CONFIDENTIAL - Opinions - appointment responsibility and sub-committee info

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Leaders: Please see the attached and information below, addressing the creation and appointment of a position and OML related to sub-committees. The attachment on letterhead is about the position.

I just received this and reading it now...

Regarding OML and Sub-Committees: A single liaison to another board would not be considered a subcommittee subject to the Open Meeting Law. By definition only multi-member bodies are subject to the Open Meeting Law. If, however, two members of the Board were formally designated to act as co-liaisons to another board, those two members would be considered a subcommittee in my opinion. This is distinguished from a situation where two members of the Board independently decide to meet with one another to discuss an issue without having been designated or tasked with doing so by the rest of the Board. In that situation, since they do not constitute a quorum of the full Board and have not been formally designated by the full Board to discuss this issue, these two members would not be considered a subcommittee for purposes of the Open Meeting Law. // KP Law/Silverstein and Riley

Respectfully, Henry
Henry L. Hayes, Jr.
Town Manager
Town of Sudbury
Phone: (978) 639-3381

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From: [Duchesneau, Adam](#)
To: sgarvin@samiotes.com; [Russo, Charlie](#)
Cc: [Hayes, Henry](#)
Subject: RE: Question re Working Groups for Master Plan Implementation
Date: Thursday, October 21, 2021 3:55:48 PM

Hello Steve and Charlie,

I wanted to bring you both up to speed on the latest information regarding compliance with the Open Meeting Law and the proposed “working groups” to assist with implementing the various Action Items in the Master Plan. I had a conversation with Jonathan Silverstein from KP Law earlier today and he indicated that it will be tough to create working groups which are NOT subject to the Open Meeting Law. Here is the situation.

If any Town board, committee, or commission designates more than one (1) person (such as a board member, but also including any members of the public), this group of multiple individuals would be subject to the Open Meeting Law requirements when they meet.

The same is true of two, three, four, etc. Town boards, committees, or commissions who each designate just one (1) person to work as a collective group with the other people designated by the other boards, committees, or commissions. This group of multiple individuals would be subject to the Open Meeting Law when they met.

The only way around the types of scenarios above is the two (2) following options:

- If only one (1) board/committee/commission member is designated to work on an Action Item and that particular person works with Town staff members on the Action Item.
- Each Town board, committee, and commission could handle/discuss the Action Items they are responsible for as part of their regular public meetings (which are also subject to the Open Meeting Law).

I do not think the above requires us to entirely change the approach of how the Master Plan’s Action Items will be addressed, but they will need to be handled as part of regular Town board/committee/commission meetings or by a single member of a Town board/committee/commission working with Town staff.

I’m happy to discuss this further at a future date but I wanted to give you this quick update before tonight’s Town Forum.

Please let me know if you have any questions. Thank you.

Adam

Adam L. Duchesneau, AICP
Director of Planning & Community Development
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From: Jonathan Silverstein <JSilverstein@k-plaw.com>
Sent: Tuesday, October 19, 2021 12:01 PM
To: Duchesneau, Adam <DuchesneauA@sudbury.ma.us>
Cc: Hayes, Henry <HayesH@sudbury.ma.us>
Subject: RE: Question re Working Groups for Master Plan Implementation

Adam,

Since the Planning Board is a multi-member body subject to the Open Meeting Law, any working group or subcommittee with more than one member that the Planning Board forms to advise it regarding implementation of the Master Plan would also be subject to the Open Meeting Law. A single board member or individual designated to serve in such a capacity would not have to comply with the Open Meeting Law, which applies only to multi-member bodies. Moreover, an ad hoc working group assembled by you or Henry to advise you with respect to Master Plan implementation would not be subject to the Open Meeting Law, since neither you nor Henry is a multi-member body subject to the law.

Please do not hesitate to call or email with any further questions.

Best,

Jonathan

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From: Duchesneau, Adam <DuchesneauA@sudbury.ma.us>
Sent: Tuesday, October 19, 2021 11:19 AM
To: Jonathan Silverstein <JSilverstein@k-plaw.com>
Cc: Hayes, Henry <HayesH@sudbury.ma.us>
Subject: RE: Question re Working Groups for Master Plan Implementation

Hello Jonathan,

I just wanted to follow up on my email below regarding an opinion of using working groups to advance the Master Plan Action Items and their ability to not be required to fully comply with the Open Meeting Law.

Please let us know when you have a chance and, if possible, before the Town Forum on this matter which will take place on Thursday, October 21st at 7:00 PM. Thank you.

Adam

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From: Duchesneau, Adam
Sent: Wednesday, October 13, 2021 9:41 AM
To: Jonathan Silverstein <JSilverstein@k-plaw.com>
Cc: Henry Hayes <HayesH@sudbury.ma.us>
Subject: Question re Working Groups for Master Plan Implementation

Hello Jonathan,
We are seeking your guidance (or someone else's at KP Law) regarding the Town's proposed set up to implement/advance the various Action Items in the Master Plan. Here is what is currently being proposed.

The Planning Board will be the Implementation Committee but in an effort to delegate the advancement of various Action Items, the Planning Board and/or the responsible entities for each Action Item, would like to set up smaller Working Groups to advance on each Action Item. The plan is for there to be 1-3 of these groups active at any one time, which would consist of 2-5 people each (maybe just one person), for a period of 3-6 month segments. These groups would consist of a mix of people such as 1 or 2 appointed people from a committee(s) and volunteers from the public, perhaps a Town staff member, etc.

Would the Working Groups in the above scenario be permissible under the Open Meeting Law? We are hoping these Working Groups could function without any noticed meetings, agendas, meeting minutes, etc., and there would be no formal appointment of members/disbanding of formal committees.

This is the general idea right now but if the groups need to be smaller, not involve designated or appointed committee members, or have some Town staff component, we can work with that as well. We think this approach would allow the Working Groups to work efficiently on advancing these specific Action Items.

Please let us know your thoughts when you have a chance. Happy to discuss this further over the phone if you would prefer. Thank you.

Adam

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