

WHITEMAN
OSTERMAN
& HANNA LLP

Attorneys at Law
www.woh.com

One Commerce Plaza
Albany, New York 12260

Charles J. Gottlieb
Partner
518.487.7612 phone
cgottlieb@woh.com

September 15, 2021

VIA EMAIL

Chairman Paul Schwartz and
Members of the Comprehensive Plan Committee
Town of Washington Town Hall
10 Reservoir Drive
Millbrook, New York 12545

***RE: Town of Washington Comprehensive Plan Review
August 26, 2021 Public Input Session – Open Meetings Law Violations***

Dear Chairman Schwartz and Members of the Comprehensive Plan Committee:

As you know, this firm has been retained by Veronica Bulgari, Stephan Haimo, and Alain Wertheimer (collectively the “Adjacent Owners”) to participate in the Town’s current review of its existing Comprehensive Plan (the “Plan”). We appeared before the Comprehensive Plan Committee (the “Committee”) at its August 26, 2021 public input session (the “August 26 Meeting”) to express the Adjacent Owners’ questions and concerns related to the proposed update to the Plan. Unfortunately, the August 26 Meeting resulted in violations of New York’s Open Meeting Law, which limited the Adjacent Owners participation at the public meeting.

The August 26 Meeting Violated New York’s Open Meeting Law

At the time of the August 26 Meeting, all Executive Orders from the New York State Governor’s Office related to suspension of New York Public Officers Article 7 (“Open Meetings Law”) had ceased. As such, the August 26 Meeting was subject to the requirements of the Open Meetings Law. It was not until September 2, 2021 that the New York State Legislature passed Ch. 417 of the Laws of 2021, which permitted municipalities in New York to again conduct zoom public meetings.

That said, prior to the adoption of Ch. 417 of the Laws of 2021, the Comprehensive Plan Committee was permitted to hold video conferencing meetings *only if* it “provide[d] an opportunity to attend, listen and observe *at any site at which a member participates.*” N.Y. Public Officer’s Law § 103(c) (emphasis added). Furthermore, “[i]f videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be

used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations.” N.Y. Public Officer’s Law § OML § 104(4).

The August 26 Session was held at the Town of Washington Town Hall with members of the public able to attend in-person or via videoconferencing. During the meeting, at least three (3) members of the Committee, including the Committee’s Chairman, did not attend in-person at the Town Hall, but rather attended via videoconferencing from an undisclosed location. This resulted in a clear violation of New York’s Open Meetings Law because those attending the meeting in person did not have the ability to witness all committee members in person.

That said, videoconferencing by Committee members is permitted, but *only* if the location of those Committee members participating by videoconference is publicly noticed. *See* N.Y. Public Officer’s Law § 103(c). Therefore, because the location of those Committee members participating by videoconference was not publicly noticed for the August 26 Meeting, members of the public were not given the right to attend and view the August 26 Meeting at the location of said videoconferencing Committee members.

The Committee on Open Government has noted that this in-person requirement is to ensure that a public official faces his or her constituents”. *See* N.Y. State Comm.Open Govt., Advisory Opinion, 5535. More importantly, its purpose is to ensure the “public’s right and opportunity to see its representatives in action during meetings.” *Id.*; *see also Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668, 686 (1996) (“[t]he purpose of the Open Meetings Law is to prevent municipal governments from debating and deciding in private what they are required to debate and decide in public”).

By failing to allow members of the public to attend the August 26 Meeting at the location of any videoconferencing Committee member, the Committee impeded public access and transparency. We noticed irregularities at the August 26 Meeting that lead us to believe that certain videoconferencing Committee members may have engaged in conversations with Committee members, the moderator of the public hearing or those in attendance at the August 26 Meeting that were not made part of the official record.

To the extent that any Committee member participating via videoconferencing had any communication (*e.g.* phone call, text, or other correspondence) with any other Committee member, the moderator of the August 26 Meeting, any Town Board Member or any other person, those communications must be disclosed on the public record at the upcoming September 15th Committee meeting.

The Committee Limited Public Participation at the August 26 Meeting

Escalating the above violations, and despite my documented representation of the Adjacent Owners (who are residents and property owners within the Town), the Chairman of the Committee, the moderator of the August 26 Meeting, and a Town Board member present at the meeting initially sought to deny my participation in the meeting because I was not a “Town resident”. Thankfully, the Committee did allow my participation on behalf of the Adjacent Owners, but not without debate.

It is a tenet of New York's Open Meeting Law that a public body may not preclude a member of the public (or their authorized representative) from speaking or otherwise participating in a meeting. To that end, New York Town Law provides that, when engaging in the comprehensive plan amendment process, the Committee "shall hold one or more public hearings and *such other meetings as it deems necessary to assure full opportunity for citizen participation* in the preparation of such proposed plan or amendment." N.Y. Town Law § 272-a(6)(b).

Although the August 26 Meeting was not a formal public hearing as required by Town Law, it was a meeting called by the Committee to engage public participation and gather comments on the proposed Plan update. Therefore, it was improper for the Committee to attempt to block any members of the public from participating in the meeting, regardless of their Town of Washington residency or property ownership status. See N.Y. State Comm. Open Govt., Advisory Opinion, 2929 (finding that the Open Meetings Law provides that meetings of public bodies are open to the "general public" and that any member of the public should have the same right to attend and participate in the meeting, regardless of their residency status).

Conclusion

For the reasons set forth above, the Committee's conduct at the August 26 Session violated the provisions of New York's Open Meeting Law. We hope that, as the Plan's update progresses, additional public hearings will be conducted in compliance with New York Town Law and Open Meetings Law. While public participation at this time is important, there is currently no draft of a Plan update, which should be the focus of public hearings required by New York Town Law in the future.

We hope that the Town abides by New York's Open Meetings Law and conducts itself in an open and deliberative process. That said, the Adjacent Owners reserve all legal remedies available to ensure that their due process rights, as set forth in New York's Open Meetings Law, are protected.

Very truly yours,

/s/ *Charles J. Gottlieb*

Charles J. Gottlieb

cc: Jeffrey Battistoni, Esq., Van De Water & Van De Water (via email)
John Lyons, Esq., Grant & Lyons, LLP (via email)
J. Theodore Fink, AICP from GREENPLAN (via email)
Veronica Bulgari (via email)
Stephan Haimo (via email)
Alain Wertheimer (via email)