7 *Official Opinions of the Compliance Board* 274 (2011)

Property Acquisition, §10-508(a)(3) – Acquisition of property for school by committee of board employees to acquire it – Acquisition of property from public entity
Minutes – Generally – Failure to keep – Violation by committee
Notice Requirements – Method – Practices in violation – No notice given by committee
Closed Session Procedures – General – Practices in violation – Failure to follow procedures by committee
Compliance Board – Authority and Procedures – Jurisdictional Limits – Outside jurisdiction – Complaint that a certain constituency was not represented as committee or given notice of contemplated action

September 15, 2011

Mr. Samuel L. Statland
Complainant

Montgomery County Board of Education
Respondent

We have considered the complaint of Mr. Samuel L. Statland, ("Complainant"), that the Montgomery County Board of Education ("County Board") violated the Open Meetings Act (the "Act") with respect to a closed session held on April 28 and the formation of a site selection committee which met without following Act procedures.

For the reasons stated below, we conclude that the County Board violated the Act in some regards and that its site selection committee violated the Act in numerous regards.

I

Facts

The complaint arises out of meetings the County Board held in March and April, 2011, to select a site for a second Bethesda-Chevy Chase middle school. Montgomery County Public Schools ("MCPS") regulations address site selection procedures, which include the formation of a site selection

advisory committee by MCPS staff. After the County Board initiated the process for the proposed middle school, MCPS staff formed a committee comprised of more than 25 members from various Parent-Teacher Associations and government agencies. Neighborhood associations are not listed as one of the constituencies to be represented on site selection committees.

According to the County Board, the site selection committee met in December, 2010, and January, 2011, without giving public notice, voting to close its sessions, or producing minutes. On March 8, 2011, the committee recommended two sites to the Superintendent. The committee's first choice ("Site #1") was located on park land; the alternative site ("Site #2") was located on park land that the County Board had previously transferred to Montgomery County with the proviso that the County Board could recall it for school purposes. On March 24, four days before its regularly-scheduled meeting, the County Board posted the Superintendent's summary of the report on its website and, as a "consent agenda item," a draft resolution for adoption of Site #1. Members of the community potentially affected by that choice began to contact the County Board office. The matter was removed from the consent agenda and scheduled for discussion at the April 28, 2011 meeting.

On April 13, the Director of the MCPS Division of Long Range Planning gave notification by e-mail to members of the neighborhood association for the area near Site #2 that Site #2 was under consideration, "was not the preferred location," "is not the recommended location," but nonetheless remained an option. He stated:

> School site selection processes require that members of the [site selection committee] keep site options confidential. This is the practice since in some cases privately owned properties may be included in the options, and if such properties were recommended for a new school then the negotiating position of the school system could be compromised by disclosure of our interest [in the] acquisition of private property. That is why the sites that were reviewed have remained confidential up until this time.

He further provided instructions for accessing the report on the MCPS website.

In a letter dated April 27, 2011, the Chair of the Montgomery County Department of Parks of the Maryland National Capital Park and Planning Commission ("Parks Department") advised the County Board of the Parks Department's opposition to the use of any parkland for a school. The letter also stated that the Parks Department had not been given the opportunity to present facts and restrictions concerning the six parks the site selection committee had originally considered. The letter acknowledged that the County Board had reserved the right to recall some parks for school uses, and stated that the Parks Department should have been given the opportunity to identify the parks not subject to recall. The Parks Department Chair stated:

> This is a different challenge from the one used for property in private ownership. When dealing with public property, we suggest more transparency is required than when dealing with private landowners, where open deliberation might influence the price. Where public property is at issue, secrecy does not serve the community well.

She then explained that Site #1 was purchased with restricted funds and that "[t]o include this park as a strong candidate for a school .... when there is little likelihood of acquiring it seems at best unproductive...." She acknowledged that Site #2 was subject to recall, though perhaps with some limitations.

On April 28, the County Board posted the agenda for its regular evening meeting. The agenda listed a "Resolution for Closed Session" at 5 p.m., immediately after the open-session acknowledgment of a quorum, and "Bethesda- Chevy Chase MS#2 - Site Selection" as an action item at 7:30 p.m. The County Board's closed session resolution stated six reasons for the closed session, including the "discuss[ion of] matters relating to the acquisition of real property for a public purpose and matters directly related thereto, as permitted under [SG] Section 10-508(a)(3) and Section 4-1079d) of the *Education Article*...." The resolution provided no further information.

In the subsequent public session, the County Board was presented with a resolution adopting Site #1, or, if that site was not available, Site #2. Discussion ensued about the composition of the site selection committee and the participation of the Parks Department. The Board then adopted a resolution noting the site selection committee's recommendation of Site #2 if Site #1 could not be acquired.

The minutes of the County Board's May 10, 2011, meeting contain a summary of the April 28 closed session. The summary identifies the people who attended the closed session and states, in relevant part,

> Discussed matters of an administrative function relating to the acquisition of real property for a public purpose and matters related thereto which are outside the purview of the *Open Meetings Act* (Section 10-508(a)(3) of the *State Government Article* and Section 4-107(d) of the *Education Article*).

On July 25, 2011, after Complainant filed his complaint, the County Board amended that summary to instead provide that on April 28, it:

> Discussed provisions in existing deeds between the [County Board] and the County Government and provisions of leases and agreements between the County Government and others as they relate to the acquisition of real property for a public purposeand matters related thereto, as permitted under (Section 10-508(a)(3) of the *State Government Article* and Section 4-107(d) of the *Education Article....*

The County Board has provided us with the closed-session minutes, which, in accordance with State Government Article ("SG") 10-502.5, we will keep confidential except for generic references. The closed-session minutes repeat the statutory exception, add that the discussion related to the middle-school site selection matter, and provide no other detail. The revised closing summary is thus more informative than the minutes of the closed session itself.

Complainant alleges that the County Board violated the Act by discussing the site selection in a closed session, by creating the site selection committee, which did not hold public meetings, and by foreclosing his neighborhood association from participating in the process by which the County Board selected a park in the neighborhood as the site for a new school. [1]

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[1] Complainant further alleges that the County Board did not adopt its closed-session resolution in an open meeting. The minutes show that the Board in fact declared a quorum in open session before adopting its closed-session resolution and therefore did not violate the Act in that regard. With respect to Complainant's contention that the summary of the April 28 closed session should have been

(continued...)

II

Discussion

A. The site selection committee

The County Board states that, "[b]ased on .... 7 *Compliance Board Opinions* 21 (May 27, 2010), MCPS has implemented a practice that applies [Open Meetings Act] requirements" to its site selection committee meetings, but that those procedures "were not in place" for this site selection committee's meetings in December 2010 and January 2011. In that opinion, we concluded that a boundary study commission appointed by a county assistant superintendent pursuant to the county's board of education policy was a "public body" subject to the Act. The County Board has correctly concluded that its site selection committee was similarly a "public body."

The County Board further states that, in any event, the site selection committee meetings could have been closed under SG §10-508(a)(3) "since they involved matters directly related to the acquisition of real property." Two issues arise here: first, whether the site selection committee, which itself did not have the power to acquire the property under discussion, could claim the exception, *see* 1 *OMCB Opinions* 233, 234 (1997) (concluding that a town could not claim the exception to discuss school board property it lacked the power to acquire), and, second, whether the discussion actually fell within the scope of the exception.

As to the first issue, we believe that a committee formed by a public body to advise that public body on the acquisition of real property may claim the exception. Our ability to address the second issue is thwarted by the site selection committee's apparent failure to keep minutes. It is difficult for us to imagine, however, that a committee comprised of more than 25 individuals representing numerous constituencies did not at some point address matters such as the role of County staff in researching sites, the goals of the committee, the procedures to be followed, and, as shown by the April 28 minutes and Parks Department letter, the general question of school board use

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[1] (...continued)
included in the minutes of that meeting, we have recognized that a public body may wish to refer to the minutes of the closed session when preparing the summary, and so we have not required a public body to adopt its summary during a subsequent open session that day. 4 *OMCB Opinions* 1, 4 (2004).

of county parks for new schools. Under SG §10-508(c), we construe the exceptions "strictly ... in favor of open meetings of public bodies." We have not interpreted the other exceptions to apply to generally-applicable policy discussions. *See, e.g.*, 7 *OMCB Opinions* 148, 164 (2011) (applying the "business location" exception in SG §10-508(a)(4)). Here, we are unable to declare that every subject discussed by the site selection committee fell within the scope of SG §10-508(a)(3).

We conclude that the site selection committee violated the Act by holding meetings without giving notice to the public, by failing to keep minutes, and by failing to follow any of the procedures required of a public body meeting out of the public eye. We commend the County Board for its forthright statement that it has since recognized from our opinion at 7 *Compliance Board Opinions* 21that the committees formed pursuant to its policies and regulations are public bodies and for its undertaking to ensure that those committees comply with the Act.

B. The County Board's closed-session resolution and discussion of the site selection

Our ability to address the question of whether the County Board's closed session discussion fell within the claimed exception has improved since we received the complaint, because the County Board has since adopted a new summary of its April 28 closed session. The County Board's closing resolution for that session and original closing summary violated the Act; as we have often stated, a public body's rote repetition of the statutory exception, without more, violates the provisions of Act applicable to those documents. *See, e.g.* 6 *OMCB Opinions* 77, 82 (2009) (finding the County Board's closing resolution "legally deficient" because it simply reiterated the words of the exception). And, we have recently explained that closed-session minutes must also contain meaningful information; these did not. *See* 7 *OMCB Opinions* 245, 248 (2011). The County Board's new closed session summary, however, provides the information that the County Board discussed the provisions of leases and deeds pertaining to the site selection.

Complainant, directing us to the Parks Department Chair's letter to the County Board, contends that the real property exception does not apply to the discussion of public properties, because the public discussion of those properties would not influence the price. The Chair's statement in that regard, as quoted above, articulates well the reasons why the acquisition of public real property might not require the confidentiality appropriate to the acquisition of private real property. And, we must construe the SG §10-508 exceptions

strictly in favor of open meetings. *See* SG §10-508(c). Even so, in accordance with the directions of the Court of Appeals of Maryland on the reading of statutes, we must apply the words of the statute in accordance with their meaning when that meaning is plain, and we are not free to add or delete words. *See Taylor v. NationsBank*, 365 Md. 166, 181, 776 A.2d 645, 654 (2001) (stating "We neither add nor delete words to a clear and unambiguous statute to give it a meaning not reflected by the words the Legislature used or engage in forced or subtle interpretation in an attempt to extend or limit the statute's meaning."). The real property exception does not modify the term "property" with the word "private," and it does not exclude publicly-owned real property. Further, when the Legislature intended to make an exception dependent on a public body's determination of a need for secrecy, it so stated: the SG §10-508(a)(10) exception for public security matters is conditioned on a determination that public discussion of the matter would create a risk to the public. No such condition appears in SG §10-508(a)(3), perhaps because public entities seeking to dispose of real property might also compete in the real estate market. Therefore, we do not read the exception to apply only to private real property, and we conclude that the County Board's discussions about the lease and deeds pertaining to the site or sites under consideration fell within the exception.

The County Board claimed §4-107(d) of the Education Article ("EA") in conjunction with SG §10-508(a)(3) as a basis for closing the April 28 meeting. The County Board properly has not pressed the point in its submissions to us. SG §10-508(a)(14) permits a public to close a meeting to "comply with a specific ... statutory ... requirement that prevents public disclosures about a particular proceeding or matter...." EA §4-107(d) provides that a "county board may meet and deliberate in executive session if the matter under consideration is... land and site acquisitions...." That statute does not prevent public disclosure about such matters, and it thus does not support a claim for an exception under SG §10-508(a)(14).

C. The allegations concerning the lack of an opportunity for the affected neighborhood to participate in the process

Complainant alleges that the procedures followed by the County Board prevented his neighborhood from participating in a process that ended with the selection of the neighborhood park as a site for a middle school. The April 28 minutes reflect County Board members' observations on the same subject. In this opinion, we have addressed only the allegations going to Open Meetings Act issues, because our authority extends only to those issues. SG §10-502.5(a). We therefore have not addressed whether the County Board's

regulations on the composition of site selection committees should add constituencies, or when a neighborhood association should be advised of the possibility that a local park might instead become a new school, or whether the listing of an unavailable site as the committee's first choice lulled the neighborhood potentially affected by the choice of Site #2 into inaction.

It is within our authority, however, to observe that a public body's decision to close a meeting under SG §10-508(a)(3) is discretionary, not required, *see* 4 *OMCB Opinions* 58, 62 (2004), and to encourage public bodies to publicly discuss matters falling within an exception when the need to invoke the particular exception has dissipated.

III

Conclusion

As set forth above, we conclude that the County Board violated the Act by failing to include meaningful information in its closing resolution for the closed April 28, 2011, session and by failing to keep meaningful minutes of that closed session. The County Board states that the site selection committee did not follow the Act's procedures for a meeting held by a public body, and we find that the committee violated the Act with respect to each such procedure.

OPEN MEETINGS COMPLIANCE BOARD

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