COMPLIANCE BOARD OPINION NO. 03-1

January 2, 2003

The Honorable Paul E. Kuhlman, II
President Pro-Tem
The Commissioners of Poolesville

The Open Meetings Compliance Board has considered your letter of November 27, 2002 (received on December 7), in which the Commissioners of Poolesville "take exception" to one aspect of the Compliance Board's recent opinion, Compliance Board Opinion No. 02-13 (October 28, 2002). The Compliance Board deems your letter to be a request for reconsideration of this aspect of the Board's opinion. This request is denied.

In Opinion No. 02-13, the Board concluded in part that the Commissioners had violated the Act by closing the portion of the meeting of February 26, 2002, related to possible wetlands in a Town park. We held that the closed session on this matter was not justified by the exception in the Open Meetings Act for discussion of "pending or potential litigation." §10-508(a)(8) of the State Government Article. In essence, we viewed the information about the wetlands issue as failing to evidence a palpable and concrete potential for litigation.

When the complaint resulting in Opinion No. 02-13 was filed, the Compliance Board forwarded it to the Commissioners with a cover letter that "encourage[d] the Commissioners to provide any material that might be relevant to the Compliance Board's review of the complaint." The Town's response indicated that this portion of the meeting, involving a presentation by an engineering consultant, was closed in light of a "complaint [that] had previously been made by a Town resident to the Commissioners that [wetlands] existed, and the resident advised that if appropriate action was not taken, he would report the Town to the Corps of Engineers." This potential complaint was characterized as having "a great chance of developing into litigation." No additional material was provided.

Your letter of November 27 provided a copy of a letter from Mr. Robert J. Pierce to the Commissioners, dated February 19, 2002, which set forth in considerable detail Mr. Pierce's contention that the Town's previous delineation of wetlands was inadequate. Mr. Pierce's letter, you suggested, "makes clear that [the] threat of litigation was quite real."

The Open Meetings Act contains no explicit authorization or procedure for reconsideration. While it may be argued that the Compliance Board has inherent authority to reconsider its opinions, the lack of explicit authority implies that the Board should do so, if at all, only sparingly. One compelling basis for reconsideration would be a public body's discovery of important new information that calls into serious question the Board's prior determination. Conversely, the Board will not entertain a request for reconsideration simply because a public body submits information that it could have provided in its response to the complaint and that merely expands upon a point already considered.

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As your letter acknowledged, "perhaps the Town's response should have addressed this matter more comprehensively." In other words, the Town could have submitted Mr. Pierce's letter as part of its response, but did not do so. Moreover, the belatedly provided information does not call into serious question the Board's conclusion about the "potential litigation" exception. Mr. Pierce's letter, to be sure, evidenced the fact that he was knowledgeable about the wetlands issue and forceful in presenting his point of view. The letter itself, however, manifested no concrete threat of litigation. The last paragraph of the letter began: "At this point, I have not contacted either [the] Maryland Department of Environment or the Army Corps of Engineers." It went on to state an intention to contact those agencies if the Town "act[s] on the erroneous delineation that you received from [the consultant]...." Given the long and uncertain chain of events that would have to occur, even if Mr. Pierce did complain to these two agencies, before the actual filing of a lawsuit, the mere threat of his complaint did not meet the test for invoking the "litigation" exception.

For these reasons, the Open Meetings Compliance Board declines to reconsider or modify Opinion No. 02-13.

OPEN MEETINGS COMPLIANCE BOARD

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