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DEPARTMENT OF JUSTICE

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May 1, 2009

Ms. Cheryl White
510 Kettle Moraine Drive South
Slinger, WI 53086

Dear Ms. White:

I am responding to the electronic mail messages and supporting materials you sent to the Department of Justice on March 27, 2009, relating to the open meetings practices of the Village of Slinger Board of Appeals ("Board"). This letter will also address the questions you raised in a follow-up electronic mail message on March 30, 2009.

The legal authority of the Attorney General and the Wisconsin Department of Justice is specifically defined, and limited, by laws passed by the Wisconsin Legislature. Under these laws, our principal functions are to act as legal counsel to the Governor, the two branches of the Legislature, and state agencies, and to provide opinions and advice to state officers and agencies and the legal representatives of counties on matters pertaining to the duties of their respective offices. Fortunately, the Legislature has given the Attorney General authority to provide interpretations of the open meetings and public records laws to members of the public. Secs. 19.39 and 19.98, Wis. Stats. Where your inquiry implicates the open meetings law, this letter responds substantively to your concerns based on the materials you have provided. However, some of your concerns implicate areas of the law as to which the Legislature has not given the Attorney General and the Department of Justice authority to provide you with legal advice. Where your inquiry implicates those areas of the law, this letter will be unable to provide you with the advice you seek. I regret that we cannot be of greater assistance to you, but hope that you understand that we must act within the constraints of our legal authority.

Assumed facts. The Board timely posted public notice of a March 25, 2009, meeting. The meeting notice provided, in relevant part:

I. Call to Order: Noting of roll call by Clerk.

II. Public Hearing: Petition of Shawn Graff and Cheryl White for an alleged error of a determination by the Zoning administrator of Rd-1 Village zoning not allowing

two (2) single family residences on applicants' one lot or alternatively for a variance permitting two (2) residential dwelling units on applicants' lot.

III. Adjourn into Closed Session: To consider applicant's request. The Board will not reconvene in open session.

You have provided a copy of the minutes of the March 25, 2009, meeting, and you state that the minutes accurately reflect what happened at the meeting. After the meeting was called to order, the Board chairman read a March 18, 2009, letter from Shawn Graff ("Graff") into the record. The letter requested an adjournment of the meeting for approximately sixty days, citing three reasons. First, a witness that Graff was relying on to provide historical information relating to the appeal was out of state and would not return until after the hearing. Second, a family member had been diagnosed with cancer and Cheryl White wanted to attend to family matters during the week of the scheduled hearing. Third, Graff objected to the portion of the meeting notice that indicated that the Board intended to convene into closed session. The letter argued that state statutes governing boards of zoning appeals lacked authority to convene in closed session, and argued that the meeting notice was legally insufficient because it failed to identify the specific statutory exemption that would justify the closed session and failed to identify the subject matter to be considered in closed session.

After reading the letter, the Board chairperson asked the village's attorney to respond to the request for adjournment. The attorney stated that the Board staff had done considerable research on the subject of closed session procedures and that he was of the opinion that the Board was within its authority to convene in closed session if a majority voted to do so. The attorney stated that the Board's status as a quasi-judicial body authorized closed session deliberations to deliberate on the testimony brought before it.

After the attorney's presentation, the Board adopted a motion to adjourn the March 25, 2009, meeting for a period not to exceed sixty days, during which time a new hearing request would have to be filed, accompanied by a $175 hearing fee. The meeting then adjourned.

Your email message attached copies of Board meeting notices for its May 14 and November 12, 2008, meetings and its February 11, 2009, meeting. Each of the meeting notices describes the public hearing which was the subject of the meeting, and indicates that the Board will deliberate and act on the hearing subject. None of the meeting notices indicates that the Board plans to convene in closed session to conduct its deliberations.

1. **Legal sufficiency of notice of March 25, 2009, closed session.** You ask whether the portion of the meeting notice for the March 25, 2009, meeting that identifies the contemplated closed session complies with the requirements of the open meetings law.

Section 19.84(2) of the Wisconsin Statutes provides, in relevant part, that "[e]very public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof."

The notice provision in section 19.84(2) requires that if the chief presiding officer or the officer's designee knows at the time he or she gives notice of a meeting that a closed session is contemplated, the notice must contain the subject matter to be considered in closed session. Such notice "must contain enough information for the public to discern whether the subject matter is authorized for closed session under § 19.85(1)." *State ex rel. Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71, ¶ 37 n.7, 301 Wis. 2d 178, 732 N.W.2d 804. The meeting notice at issue in the *Buswell* case identified a statutory subsection as the basis for the closed session, but mistakenly identified the wrong subsection. The supreme court determined that the meeting notice was therefore "vague and misleading," and therefore not "'reasonably likely to apprise members of the public' of the subject matter of the meeting." *Id.*, ¶ 37. The Attorney General has also provided interpretive guidance regarding closed session meeting notices, advising that notice of closed sessions must contain the specific nature of the business, as well as the exemption(s) under which the chief presiding officer believes a closed session is authorized. 66 Op. Att'y Gen. 93, 98 (1977) (copy enclosed). Merely identifying and quoting from a statutory exemption does not reasonably identify any particular subject that might be taken up thereunder and thus is not adequate notice of a closed session. Weinschenk correspondence, December 29, 2006; Anderson correspondence, February 13, 2007 (copies enclosed). By the same logic, it is not adequate notice of a closed session to identify only the subject of a closed session without also identifying the specific statutory section that is claimed to justify the closed session.

Based solely on the information you have provided, and in the absence of any contravening information to the contrary, it is my informal opinion that a court could conclude that the meeting notice does not satisfy the content requirements for meeting notices prescribed by section 19.84(2). The meeting notice for the March 25, 2009, meeting identifies the subject for the contemplated closed session, but does not identify the specific statutory exemption that is claimed to justify closure. You should be aware that if an enforcement action were commenced, the parties would have an opportunity to develop a more complete factual record related to this question. A more complete factual record may or may not support the informal opinion expressed here. You should also be advised that the opinions contained in this letter do not

constitute a formal opinion of the Attorney General or the Department of Justice under section 165.015(1).

2. Appropriateness of closed session board of appeals deliberations after public hearing. The minutes reflect that the village attorney expressed the view that the Board could convene in closed session to deliberate on the testimony received at the public hearing portion. There is a case decision, now more than forty-five years old, which holds that boards of appeal may deliberate in closed session after hearing. *State ex rel. Cities S. O. Co. v. Bd. of Appeals*, 21 Wis. 2d 516, 537, 124 N.W.2d 809 (1963). That decision may be the source of the attorney's view. However, changes in the open meetings statutes and a subsequent supreme court decision now make it clear that bodies that consider zoning appeals may not convene in closed session to deliberate after public hearings involving those who seek relief from such bodies. The Department of Justice's 2007 Wisconsin Open Meetings Law Compliance Guide at 16 (*see http://www.doj.state.wi.us/AWP/2007OMCG-PRO/2007_OML_Compliance_Guide.pdf*), clearly provides such guidance.

The reasoning behind the Department of Justice's guidance is articulated in an April 12, 2005, letter to Mr. and Mrs. Robert Tregoning (copy enclosed). Prior to 1977, boards of appeal could deliberate in closed session after "judicial or quasi-judicial trial or hearing." Sec. 19.85(1)(a), Wis. Stats. (1977), created by ch. 426, Laws of 1975. Later in 1977, however, the Legislature amended section 19.85(1) to allow closed sessions for the purpose of "[d]eliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing . . . ." Ch. 260, sec. 1, Laws of 1977. The supreme court in *State ex rel. Hodge v. Turtle Lake*, 180 Wis. 2d 62, 71-74, 508 N.W.2d 603 (1993), concluded that the addition of the word "case" to section 19.85(1)(a) reflected the Legislature's intent to limit the exemption. The court reasoned that, although "case" is not a word of definite legal content, the term "contemplates a controversy between or among parties who are adverse to one another and a type of proceeding designed to redress wrongs or enforce rights. It does not connote the idea of mere application and granting of a permit." *Hodge*, 180 Wis. 2d at 73-74. The court further noted that "although the Board heard testimony from interested neighbors, the neighbors were not and could not have been made parties, they were not under oath and the rules of evidence did not apply to their testimony," and noted that "[t]he Board meeting resembled a judicial proceeding only in that the Board was making a decision which would impact a particular individual." *Id.* at 74. The court concluded that these features were insufficient to conclude that the application was a "case" within the exemption of section 19.85(1)(a). The relief sought by applicants to boards of appeal—permission to conduct some activity on the premises of property they own, *see* section 62.23(7)(e)7.-8.—is analogous to the relief sought by the permit applicant in *Hodge*—permission to store junked automobiles on his property. The matters that come before boards of appeal are not "cases," and therefore section 19.85(1)(a) cannot be used by boards of appeal to deliberate in closed session after hearing appeals.

Conclusion. The guidance contained in this letter is intended primarily to assist you in helping the Village of Slinger Board of Appeals to avoid future violations of the open meetings laws. It does not appear that you sustained any actual harm as a result of the deficient meeting notice, because the Board granted an adjournment, and did not deliberate the merits of your appeal in open or closed session. At your request, I am providing a copy of this letter to your legal counsel, Daniel R. Dineen. Thank you for your interest in assuring full compliance with Wisconsin's open meetings law.

Sincerely,

Bruce A. Olsen
Assistant Attorney General

BAO:ajw

Enclosures

c: Daniel R. Dineen

Phillip J. Eckert
Village Attorney
Village of Slinger

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