

# CITY OF GARDNER LAW DEPARTMENT

John M. Flick  
City Solicitor

~~Ethan Keelodny~~  
Assistant City Solicitor



144 Central Street, Suite 201  
Gardner, MA 01440

Telephone (978) 632-7948  
Fax (978) 630-3703

Writer's Email:

May 10, 2023

## VIA ELECTRONIC MAIL

Elizabeth Kazinskas, President  
City of Gardner, City Council  
95 Pleasant Street  
Gardner, MA 01440

Re: Legal Opinion Regarding Potential OML Violations  
File No. 19.1952

Dear President Kazinskas:

This letter is in response to your request to the Law Department for a legal opinion. Specifically, you have asked the Law Department to review and comment on three letters included in the April 27, 2023 City Council Packet.

The letters in question each discuss proposed changes to the City of Gardner Zoning Ordinances and are signed by five members of the City Council. In the letters, the Councilors voice their support for the proposed changes in the form of opinions that the proposed changes are in the interest of the City. The letters are attached hereto as Items 10972, 10973, and 10974.

In reviewing the three letters, the Law Department interviewed each Councilor whose signature appears on the letters in question. The result of the investigation is as follows:

1. The Councilors who signed the letter did not meet as a group to discuss the contents of the letters.
2. The letters were not drafted by any of the signatories.
3. The Councilors who signed the letters did not discuss the contents of the letters with any other Councilor. In fact, none of the Councilor's knew what the letters said until they saw each letter in the Mayor's office.
4. The Councilors signed the letters, one at a time in the Mayor's office.
5. One Councilor was surprised to see other Councilor names on the letters.
6. The Councilors who signed the letters did not question, nor were they advised by any department regarding the applicability of the open meeting law to the letters.

The Open Meeting Law (the "OML") requires that all meetings of a public body be noticed to the public, with very limited exceptions. M.G.L. c. 30A, §§ 20(a)-(b), 21. The OML defines a

“meeting” as a “deliberation by a public body with respect to any matter within the body’s jurisdiction.” M.G.L. c. 30A, § 18. A “deliberation” is defined as “an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction; provided, however, that ‘deliberation’ shall not include the distribution of a meeting agenda, scheduling information or distribution of other procedural material or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed.” *Id.* [Emphasis added.]

Note that a deliberation can be a one-way communication and can include restated opinions which had been previously voiced by a public body member or members during a properly noticed public meeting. *See Boelter v. Board of Selectmen of Wayland*, 479 Mass. 233 (2018). One Councilor explained that they signed the letter because their opinion had already been stated during an open meeting and the letters did not provide any additional opinions. This position is contrary to the *Boelter* decision.

Despite the fact that the letters were not drafted by any member of the City Council, the signatures of each Councilor on the letters constitute an affirmative statement of that Councilor’s opinion. These letters were then distributed to the entire City Council in its meeting packet. This distribution constituted a communication of an opinion to a quorum of the City Council outside of a duly noticed public meeting. It is therefore, the Law Department’s opinion that each of the letters submitted by the five Councilors constitutes a violation of the Open Meeting Law.

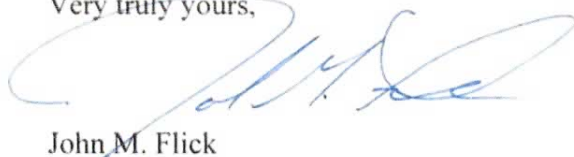
In order to remedy this matter, the Law Department recommends the following steps be taken:

1. Each of the letters be withdrawn from consideration;
2. The City Council vote to self-report the violations to the Commonwealth of Massachusetts Attorney General’s office; and
3. The Council refrain from any future communication of an opinion by one or more members of the Council outside of a duly noticed public meeting by any means.

I recommend that the Law Department work together with the Council President to draft the self-report to the Attorney General’s Office. Whereas one OML complaint has been received by the Council for its consideration and response, I have included a proposed response letter for the Council to consider.

Please let me know if you have any further questions.

Very truly yours,



John M. Flick

Cc: Mayor  
City Clerk



April 19, 2023

Hon. Elizabeth J. Kazinskas, Council President  
 And City Councilors  
 Gardner City Hall, Rm 121  
 95 Pleasant Street  
 Gardner, MA 01440

RE: Submission of Zoning Amendment Proposal- An Ordinance to Amend The Code Of The City Of Gardner, Chapter 675 Thereof, Entitled "Zoning," add "Sports Betting" to the Zoning Table of Uses.

Dear Madam President and Colleagues,

At the April 18<sup>th</sup>, 2023 Meeting of the City Council, we voted to grant the Mayor Leave to withdraw Item 10892 due to concerns regarding the process outlined in Chapter 40A, Section 5 of the General Laws.

We believe this proposal to have been in the best interest of the City of Gardner, as a way to build our economic base, provide for our residents, and plan for our future. We cannot stay stagnant as a City and must continue to do everything we can to better Gardner for ourselves and future generations of Gardnerites – which is what we believe this original proposal provided for the City.

Whereas Section 5 of Chapter 40A of the General Laws states that the City Council may initiate Zoning Amendments, we, as City Councilors, working in the best interest of the City and our Constituents, propose this ordinance and request that the City Council refer this Item to the Planning Board and schedule a joint public hearing.

We have attached the relevant section of the General Laws and the original proposal submitted by Mayor Nicholson that was formally withdrawn and removed by the City Council to this correspondence for supporting materials.

Respectfully submitted,

Dana Heath  
 Ward 2 Councilor

Karen Hardern  
 Ward 4 Councilor

George Tyros  
 Councilor At-Large

James Boone  
 Councilor At-Large

Paul Tassone  
 Ward 3 Councilor