OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

August 1, 2023

Via electronic mail
[redacted]

Via electronic mail
Mr. Benjamin L. Schuster
Elrod Friedman LLP
325 North LaSalle Street, Suite 450
Chicago, Illinois 60654
Benjamin.Schuster@ElrodFriedman.com

RE: OMA Request for Review – 2022 PAC 74576

Dear [redacted] and Mr. Schuster:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2022)). For the reasons that follow, the Public Access Bureau concludes that the Village of Winnetka Village Council (Council) did not hold an improper closed session discussion during its December 6, 2022, meeting.

On December 8, 2022, [redacted] submitted a Request for Review concerning the closed session portion of the Council's December 6, 2022, meeting. The Village entered closed session under the exception—to the general requirement that public bodies conduct public business openly—in section 2(c)(11) of OMA.[1] That exception authorizes public bodies to hold closed session discussions concerning litigation that is pending or "probable or imminent[.]" [redacted] alleges that (1) litigation was not probable or imminent at the time of the meeting, and that (2) rather than discussing litigation in closed session, the Council discussed a resolution that it subsequently adopted in open session.

[1]5 ILCS 120/2(c)(11) (West 2022).

On December 15, 2022, this office sent a copy of the Request for Review to the Council and asked it provide copies of the agenda, closed session minutes (draft form if necessary), and closed session verbatim recording of the Council's December 6, 2022, meeting. This office also asked the Council to provide a written answer to [redacted] allegation that the section 2(c)(11) exception did not authorize the Council's closed session discussion. On December 28, 2022, the Council's attorney submitted those materials, including an unredacted copy of its written answer and a redacted version with information provided confidentially pursuant to section 3.5(c) of OMA.[2] On January 4, 2023, this office forwarded the redacted copy of the Council's response to [redacted]; he replied on January 5, 2023.

DETERMINATION

"The Open Meetings Act provides that public agencies exist to aid in the conduct of the people's business and that the intent of the Act is to assure that agency actions be taken openly and that their deliberations be conducted openly." *Gosnell v. Hogan*, 179 Ill. App. 3d 161, 171 (5th Dist. 1989). OMA requires that all meetings of a public body remain open to the public unless the public body properly invokes an exception in section 2(c) of OMA. 5 ILCS 120/2(a), (c) (West 2022). The section 2(c) exceptions are to be "strictly construed, extending only to subjects clearly within their scope." 5 ILCS 120/2(b) (West 2022).

Section 2(c)(11) of OMA authorizes a public body to close a meeting to discuss:

> Litigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting.

To properly discuss "probable or imminent" litigation in closed session, "there must be reasonable grounds to believe that a lawsuit is more likely than not to be instituted or that such an occurrence is close at hand[ ]" when considering "the surrounding circumstances in light of logic, experience, and reason." 1983 Ill. Att'y Gen. Op. No. 26, issued December 23, 1983, at 10.

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[2]"The Public Access Counselor shall forward a copy of the answer or redacted answer, if furnished, to the person submitting the request for review." 5 ILCS 120/3.5(c) (West 2022).

"The answer may take the form of a letter, brief, or memorandum. Upon request, the public body may also furnish the Public Access Counselor with a redacted copy of the answer excluding specific references to any matters at issue." 5 ILCS 120/3.5(c) (West 2022).

The Council's response to this office explained that the closed session and resolution at issue concerned a proposed plat that would consolidate four lots into a single lot, upon which a property owner planned to build a lakefront home with a private beach. The plan generated considerable opposition and media attention, partly because of a proposed land exchange in which the property owner would have obtained a portion of a public beach owned by the Village's Park District.[3] That deal, which has not been executed, triggered a lawsuit against the Park District by a neighboring property owner. The Council's response to this office stated that before the closed session portion of the December 6, 2022, meeting, the neighboring property owner's attorney made a presentation in which he also "threatened to sue the Village if the Village Council *approved* the consolidation."[4] (Emphasis in original.) The response further stated that attorneys for the property owner who intends to build the home threatened both before and during the meeting to sue the Village if it did not approve the consolidation. In his reply, [redacted] asserted that, "at the time the Council entered closed session, no litigation of any kind was 'probable or imminent,' * * * [a]s the Council had not yet considered, voted, and either accepted or rejected the resolution[.]"[5] He contended that "it seems implausible to believe that a lack of action by the Council would have resulted in the immediate filing of a legal challenge by" the property owner who intended to build a home.[6] He also stated that he is unaware of any litigation filed by either property owner since the meeting.

The Council's December 6, 2022, meeting agenda included an action item on a proposed resolution to adopt the plat of consolidation described above.[7] This office's review of a recording of the open session portion of the meeting verified that before entering closed session, the attorney for the property owner opposing the consolidation threatened to sue the Village if the Council approved the resolution, and the attorney for the property owner in favor of

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[3]Brian J. Rogal and Alex Hulvalchick, *In Winnetka, a plan to swap lakefront tracts with a billionaire has sparked debate. 'I think nature belongs to all of us'*, CHICAGO TRIBUNE, (December 11, 2022, 5:00 a.m.), https://www.chicagotribune.com/business/ct-biz-winnetka-land-swap-20221211-ffvr5d5gcjhpxcohjdym4cmk2q-story.html

[4]Letter from Peter M. Friedman, Elrod Friedman LLP, to Steve Silverman, Bureau Chief, Public Access Bureau (December 27, 2022), at 4.

[5]Letter from [redacted] to Steve Silverman, Bureau Chief, Public Access Bureau (January 5, 2023), at 2.

[6]Letter from [redacted] to Steve Silverman, Bureau Chief, Public Access Bureau (January 5, 2023), at 2.

[7]Village of Winnetka Village Council, Regular Meeting, Agenda Item 9(c) (December 6, 2022).

consolidation threatened to sue the Village if it failed to approve the resolution.[8] There is no indication that these were idle threats, or that taking no action at the meeting would have staved off litigation. Even if postponing the vote could have been expected to delay the filing of a lawsuit, the Council eventually would have had to act on the proposed consolidation. A likelihood that litigation would be *immediately* filed is not required for section 2(c)(11) to authorize a closed session discussion. Instead, there must be reasonable grounds to believe litigation was "probable **or** imminent." (Emphasis added.) 5 ILCS 120/2(c)(11) (West 2022). Because the Council had received seemingly credible threats of litigation from attorneys for both the property owner supporting the consolidation and the property owner opposing it, the surrounding circumstances provided a sufficient basis for the Council to reasonably believe litigation was at least probable when it voted to enter closed session at its December 6, 2022, meeting. The fact that such litigation apparently has not ensued does not render unreasonable the Council's belief that litigation was probable or imminent at the time of the meeting.

With respect to the substance of the closed session, section 2(c)(11) authorizes discussion of "legal theories, defenses, claims, or possible approaches to litigation." *City of Bloomington v. Raoul*, 2021 IL App (4th) 190539, ¶36, 184 N.E.3d 366, 372 (2021). Generally, "it is not permissible for a public body to use the closed session to discuss taking an action or to make a decision on the underlying issue that is likely to be the subject of the litigation." Ill. Att'y Gen. Pub. Acc. Op. No. 12-013, issued November 5, 2012, at 4.

[redacted] Request for Review alleged that the Council discussed in closed session the plat consolidation resolution rather than litigation. He stated that the Council voted to approve the resolution after the closed session without discussing it. The recording of the open session portion of the meeting shows that after returning from closed session, the Village considered an amended version of the resolution with language added to clarify that approval of the plat of consolidation was not an adjudication, determination, or opinion on the eastern property line, and that the Village reserved the right to determine the property line for purposes of applying the Village zoning code if that issue was presented to the Village in the future. The Village's attorney explained that the purpose of the amendment was to make it clear that the plat of consolidation under consideration does not convey or transfer property, and that any determination about the property line would be addressed under the zoning code if necessary. The Village President called for a vote after emphasizing that the Council would address additional concerns about the lakefront development at subsequent meetings. The Council then unanimously voted to approve the plat consolidation.[9]

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[8]Village of Winnetka Village Council, Regular Meeting, December 6, 2022, Video Recording, *available at* https://www.youtube.com/watch?v=fHRb_GNhTcc.

[9]Village of Winnetka Village Council, Regular Meeting, December 6, 2022, Video Recording, *available at* https://www.youtube.com/watch?v=fHRb_GNhTcc.

The Council's response to this office emphasized that the Council did not discuss the merits of the plat consolidation in closed session. The Village confidentially provided additional argument about how it confined its discussion to the scope of section 2(c)(11). In his reply, [redacted] asserted that the statements made after the Council returned from closed session appear to demonstrate "that a significant portion of the closed session was devoted to discussion of the resolution itself, and not any alleged 'litigation,' and that this discussion was not, in fact, a related topic, but the primary topic of discussion in closed session."[10]

While section 2(b) of OMA expressly provides that the exceptions permitting closed session discussions are to be strictly construed, courts have recognized the practical necessity of addressing interrelated topics in order to have meaningful discussions. In *Galena Gazette Publications Inc., v. County of Jo Daviess*, 375 Ill. App. 3d 338, 344-345 (2d Dist. 2007), the appellate court rejected the plaintiff's contention that a closed session discussion under the exception for "[t]he purchase or lease of real property for the use of the public body[ ]"[11] improperly strayed into peripheral topics such as whether promotional materials could be displayed at the property. The court explained that "[t]he participants did not discuss the racking of promotional literature separately from their consideration of the proposed subleasing arrangement * * *. To abstract any such discussions from the larger context would ignore the participants' purposes in raising the issue of the display of promotional materials." *Galena Gazette Publications Inc.*, 375 Ill. App. 3d at 344. Similarly, in *Gosnell*, 179 Ill. App. 3d at 175-76 (5th Dist. 1989), the court concluded that a school board's closed session discussion of complaints against an employee, under the exception for employees' performance, permissibly included a discussion of goals for the employee because the complaints and goals were inextricably intertwined. The court explained that "when a related topic plays an integral part in the discussion of the original topic to be considered in closed session, business practicality and efficiency dictate that the related topic be discussed along with the primary topic." *Gosnell*, 179 Ill. App. 3d at 177.

This office's review of the verbatim recording confirmed that the closed session discussion was permissible under section 2(c)(11) of OMA. Although we are unable to fully explain our reasoning because the verbatim closed session recording and most of the Village's argument about the scope of the section 2(c)(11) exception were provided confidentially, we note that our review of the recording corroborated the Council's assertion that Council members did not deliberate about the merits of the resolution or whether to vote for or against it. To the extent that the discussion did concern the resolution that the Council subsequently voted on in open

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[10]Letter from [redacted] to Steve Silverman, Bureau Chief, Public Access Bureau (January 5, 2023), at 2.

[11]5 ILCS 120/2(c)(5) (West 2004).

session, that discussion was inextricably intertwined with considerations about probable or imminent litigation and protecting the Village from potential liability. Under the circumstances, it would not have been possible for the Council to have a meaningful discussion about probable or imminent litigation facing the Village if the resolution was excluded from that discussion. Accordingly, this office concludes the Village's closed session discussion did not violate OMA.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, please contact me at (312) 814-6756 or steven.silverman@ilag.gov. This file is closed.

Very truly yours,

[redacted]

STEVE SILVERMAN
Bureau Chief
Public Access Bureau

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