OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

February 14, 2019

Via electronic mail
[redacted]

Via electronic mail
Ms. Kathleen Elliott
Robbins Schwartz
631 East Boughton Road, Suite 200
Bolingbrook, Illinois 60440-3098
kelliott@robbins-schwartz.com

RE: OMA Request for Review – 2018 PAC 54143

Dear [redacted] and Ms. Elliott:

This determination is issued pursuant to section 3.5(e) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(e) (West 2016)). For the reasons that follow, the Public Access Bureau concludes that the Board of Trustees of the Village of Lisle (Board) violated the requirements of OMA by permitting Trustee Anthony Carballo to attend its July 23, 2018, meeting by telephone and to address the Board, but did not violate OMA by prohibiting [redacted] from addressing the Board when he was not physically present at the meeting.

On July 24, 2018, the Public Access Bureau received a Request for Review from [redacted] alleging that the Board had discriminated against him at it July 23, 2018, meeting because it did not grant his e-mailed request to make public comment after it had permitted Trustee Carballo to comment by telephone at the same meeting. In particular, [redacted] stated that he was viewing the meeting remotely and sent e-mails to the Village manager and to all of the Board members requesting the opportunity to comment by telephone because Trustee Carballo had made "public comment" remotely. [redacted] stated that a member of the Board publicly acknowledged his request to comment, but he was not permitted to do so.

On August 6, 2018, the Public Access Bureau sent a copy of the Request for Review to the Board and asked it to respond to [redacted] allegation that the Board had not

allowed him to comment by telephone when it had allowed Trustee Carballo to speak remotely. This office also requested that the Board provide this office with a copy of its rules for public comment and for meeting attendance by means other than physical presence by a Board member. This office did not receive a response from the Board to our August 6, 2018, correspondence. On August 27, 2018, this office sent the Board a second letter requesting that it respond to [redacted] Request for Review. On September 5, 2018, counsel for the Board provided this office with a written answer on behalf of the Board, together with copies of the Board's established and recorded rules for public comment and attendance by other means. On September 7, 2018, this office sent [redacted] a copy of the Board's answer; he submitted a written reply on September 16, 2018.

DETERMINATION

It is the "public policy of this State that its citizens shall be given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way." 5 ILCS 120/1 (West 2016). "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).

Authorization for Trustee Carballo's Remote Participation

[redacted] Request for Review questioned whether the Board violated OMA by allowing Trustee Carballo to participate at the July 23, 2018, meeting by audio conference even though a motion to allow him to attend the meeting by means other than physical presence was not seconded or otherwise approved.

Section 7 of OMA (5 ILCS 120/7 (West 2017 Supp.)) provides for the attendance of a member of a public body by means other than physical presence in limited circumstances:

> (a) If a quorum of the members of the public body is physically present as required by Section 2.01, a majority of the public body may allow a member of that body to attend the meeting by other means if the member is prevented from physically attending because of: (i) personal illness or disability; (ii) employment purposes or the business of the public body; or (iii) a family or other emergency. "Other means" is by video or audio conference.

> (b) If a member wishes to attend a meeting by other means, the member must notify the recording secretary or clerk of the public body before the meeting unless advance notice is impractical.
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> (c) *A majority of the public body may allow a member to attend a meeting by other means only in accordance with and to the extent allowed by rules adopted by the public body. The rules must conform to the requirements and restrictions of this Section*, may further limit the extent to which attendance by other means is allowed, and may provide for the giving of additional notice to the public or further facilitate public access to meetings. (Emphasis added.)

Under the plain language of these provisions, a public body with a quorum physically present has the discretion to permit a member who is not physically present to participate in the meeting by audio or video conference for any of the three reasons set forth in section 7(a) of OMA and in accordance with its rules for attendance by other means.

The Board provided this office with a copy of its ordinance adopting procedures for electronic attendance at meetings, Ordinance 2007-4117, adopted June 4, 2007. The Board's rules state that a member that meets the one of the three reasons for being unable to physically attend the meeting "should notify the Village Clerk at least 24 hours before the meeting, unless impractical, so that necessary communications equipment can be arranged."[1] The rules set forth the following procedures for permitting a person to attend electronically:

> After establishing that a quorum is physically present at a meeting where a member of the Village desires to attend electronically, the presiding officer shall state that (i) a notice was received by a member of the Village in accordance with these Rules, and (ii) the member will be deemed authorized to attend the meeting electronically unless a motion objecting to the member's electronic attendance is made, seconded and approved by two-thirds of the members of the Village.[2]

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[1]Village of Lisle, Electronic Attendance At Meetings Rules, Ordinance No. 2007-4117, June 4, 2007, at 1 (on file with author).

[2]Village of Lisle, Electronic Attendance At Meetings Rules, Ordinance No. 2007-4117, June 4, 2007, at 1 (on file with author).

The Board's rules further state that a member who is "permitted to attend electronically will be able to express his or her comments during the meeting[, and] shall be heard, considered, and counted as to any vote taken."[3]

In response to this office's inquiry as to the basis for permitting Trustee Carballo to speak at the meeting, the Board's counsel stated that the Board voted to allow Trustee Robert J. Mandel to attend the meeting by audio conference. However:

> Trustee Carballo was not allowed to electronically participate because he did not meet the requirements. Trustee Carballo was allowed to listen to the proceedings, as it was not clear if he could be disconnected without disconnecting Trustee Mandel. Later in the meeting Trustee Carballo requested to make a public comment, which the Village President allowed by vote of the Village Board.[4]

The Board's response to this office acknowledges that Trustee Carballo was not eligible to attend the July 23, 2018, meeting by audio conference because he did not meet any of the requirements of section 7(a) of OMA. Indeed, this office's review of the video recording of the meeting indicates that the Board questioned Trustee Carballo about the reasons for his not being able to attend the meeting in person and discussed whether he was eligible to attend the meeting by audio conference. A motion was made during the meeting to allow Trustee Carballo to attend the meeting by audio conference but was not seconded by another trustee on the Board. Therefore, Trustee Carballo was not authorized to participate in the meeting electronically.

This office's review of the video recording of the meeting also indicated that the Board had arranged communications equipment so that Trustee Carballo and Trustee Mandel were both on an audio conference call with the other members of the Board at the start of the meeting. When the motion to allow Trustee Carballo to attend the meeting by audio conference failed to receive a second, Trustee Carballo's connection to the Board through an audio conference set up for Board members attending electronically should have been terminated. The Board asserted that it could not disconnect Trustee Carballo from the audio conference without disconnecting Trustee Mandel. However, instead of permitting Trustee Carballo to continue to

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[3]Village of Lisle, Electronic Attendance At Meetings Rules, Ordinance No. 2007-4117, June 4, 2007, at 2 (on file with author).

[4]Letter from Kathleen Elliott, Village Attorney, Robbins Schwartz, to Matt Hartman, Assistant Attorney General, Public Access Bureau, Office of the Attorney General (September 5, 2018), at 1.

participate in the meeting by audio conference, it appears that the Board could have requested that Trustee Carballo hang up his phone or could have disconnected both Trustee Carballo and Trustee Mandel and arranged for Trustee Mandel to rejoin the audio conference with the Board.

Because Trustee Carballo continued to remain on the audio conference with Trustee Mandel and the members of the Board who were physically present, he was able to interrupt the Board later in the meeting to ask whether he was permitted to participate publicly at the meeting. The Board entertained and approved a motion to allow Trustee Carballo to make comments as a member of the public. Trustee Carballo subsequently participated through the Board member only audio connection during public comment periods and made multiple additional requests to comment throughout the meeting. Because Trustee Carballo is, in fact, an elected official and Board member, and not a member of the public during Board meetings, he should not have been allowed to participate electronically during the public comment portion of the meeting. By doing so Trustee Carballo was improperly attending the meeting remotely, notwithstanding that it was clear he was not eligible to attend under the circumstances of his absence.

Although the Board attempted to limit Trustee Carballo's comments at the meeting to the same length of comments that a member of the public who was present at the meeting would be allowed to make and did not allow him to vote, OMA does not distinguish between a member of the public body attending the meeting by other means as a member of the public body and as a member of the public. Instead, OMA provides only for a member of the public body to attend a meeting by other means pursuant to section 7 of OMA. Therefore, the Board's vote to allow Trustee Carballo to participate in the meeting as a member of the public instead of as a member of the Board is a distinction that is not supported by OMA. Moreover, Trustee Carballo's direct connection to the Board that allowed him to participate in the meeting utilized the audio conference equipment set up by the Board for the exclusive use of members of the Board who were not physically present and approved to attend the meeting. His participation in the meeting after the Board declined to approve his request to attend electronically constituted attendance at the meeting. It is undisputed that Trustee Carballo was ineligible to attend the meeting by audio conference. Thus, the Board violated sections 7(a) and 7(c) of OMA by allowing Trustee Carballo to attend its July 23, 2018, meeting remotely.

Public Comment by a Member of the Public not in Physical Attendance

As noted above, the policy of OMA is to guarantee the right of all individuals to attend all meetings of public bodies where business is discussed or acted upon. *See* 5 ILCS 120/1 (West 2016). As part of the right to attend meetings of public bodies, section 2.06(g) of OMA (5 ILCS 120/2.06(g) (West 2016)) provides that "[a]ny person shall be permitted an opportunity to address public officials under the rules established and recorded by the public

body." The intention of section 2.06(g) of OMA is provide individuals who attend a meeting of a public body the right to address the officials of that public body under the rules established by the public body. The word "attend" is defined as "to be present at: go to <~ a meeting> <~ college>[.]" Webster's Third New International Dictionary (1993), at 140. Thus, in order "to attend" a meeting of a public body, a person must be present at or go to the location of the meeting.

[redacted] alleged that the Board violated OMA because it did not permit him to provide public comment at the July 23, 2018, meeting. [redacted] acknowledged that he did not physically attend the meeting but stated he was streaming the meeting remotely. Although section 7 of OMA provides a mechanism for a member of a public body to attend and participate in a meeting by means other than physical presence, OMA does not provide a similar opportunity for members of the public to attend a meeting by means other than physical presence. Although a public body may elect to allow public comment from individuals who are not physically present at the meeting, the Board's established and recorded rules do not provide for public comment from individuals who are not physically present. Further, no provision of OMA requires the Board to do so. Because only individuals who attend the meeting have the right to address public officials and because [redacted] did not attend the meeting, the Board did not violate section 2.06(g) of OMA at its July 23, 2018, meeting when it did not provide [redacted] with an opportunity to provide public comment in accordance with its established and recorded rules.

There are no means by which the Board can remedy its violation of sections 7(a) and 7(c) of OMA when it allowed Trustee Carballo to continue to attend and participate in the July 23, 2018, meeting. With respect to the Board's violation of sections 7(a) and 7(c), however, section 7 provides that "[a] majority of the public body *may allow* a member to attend a meeting[.]" These violations can be avoided in the future if the Board alters its rules to require a majority vote of its membership prior to allowing remote attendance rather than permitting such attendance unless the Board takes action to deny the request. This office requests that the Board comply with the requirements of sections 7(a), 7(b), and 7(c) of OMA at future meetings.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter serves to close this matter. If you have any questions, please contact me at (217) 782-9054, mhartman@atg.state.il.us, or the Springfield address on the bottom of the first page of this letter.

Very truly yours,

[redacted]

MATT HARTMAN
Assistant Attorney General
Public Access Bureau

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