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NEW YORK STATE TUG HILL COMMISSION
2015 LOCAL GOVERNMENT CONFERENCE
Watertown, NY

OPEN GOVERNMENT ISSUES IN PLANNING AND ZONING DECISION – MAKING

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INTRODUCTION – "OPEN GOVERNMENT" GENERALLY = "GOOD GOVERNMENT"

REQUIREMENTS vs. HIGHER GOALS

TWO MAIN LAWS – OML and FOIL

OML MOST RELEVANT in PLANNING and ZONING

I. OML GENERALLY

A. Open Meetings Law (OML) is an "open government law" set forth in Public Officers Law Article 7.

B. OML generally mandates that all meetings of public bodies be open to the public.

C. OML also includes exceptions or exemptions when meetings need not be open.

D. Statute clearly intended to promote rather than discourage transparency and sharing of governmental access and information.

E. If an exemption or exception is lawfully triggered, then a Board may lawfully avail itself of the opportunity to deny public access to a meeting, but is not required to do so.

II. QUORUM CONSIDERATIONS AND RECUSAL

A. What Constitutes a Quorum?

1. In order to lawfully conduct business, a Board must have attendance of a sufficient number of Members to constitute a "quorum."

2. A quorum consists of a simple majority of the entire membership of the Board.

3. Meeting participation requires Board Members' physical presence - remote participation by telephone does not constitute "attendance" [but OML allows the seldom utilized option of attendance by videoconference].

B. What if a Quorum "Dissolves?"

1. The quorum must be maintained throughout the meeting.

2. If a Board Member leaves a meeting, the remaining Members must still constitute a quorum — if too many leave, this essentially terminates the meeting.

3. Remaining Members can lawfully stay and discuss whatever they wish without violating OML, but such discussion should be discouraged as it is no longer part of an official meeting and, as a result, no action can be taken.

4. Even temporary absence of a Member or Members reducing the number to less than a quorum should be handled by temporarily suspending the meeting until a sufficient number of Members return to reconvene.

C. What if (a) Board Member(s) Recuse(s)?

1. Recusal is appropriate under certain circumstances and sometimes required.

2. Recusal is no different than absence in terms of the need for a quorum.

III. INFORMAL GATHERINGS WITH QUORUM PRESENT

A. What about "Off-Site" and/or Informal Gatherings of entire Board or Quorum)?

1. OML requires that any meetings convened by a Board for the purpose of conducting official business be properly noticed and open to the public.

2. The Law is neither limited to meetings conducted at the municipal building or official meeting place, nor can Board Members lawfully circumvent the Law merely by gathering or meeting elsewhere in a less formal setting — proverbial "around the kitchen table" discussion of Board matters by four Members of a Planning Board or Zoning Board of Appeals would violate OML.

3. Considerable confusion regarding substantially less formal gatherings at which a quorum (or even all) of the Members of a particular Board happen to be in attendance.

4. OML defines a "meeting" as "the official convening of a public body for the purpose of conducting public business".

5. If there is no spectre of conducting "official business", OML does not apply.

6. No OML violation when most or even all Members of a Board attend the same social function or are Members of the same softball team or book club.

7. While Board Members can lawfully attend the same social function or informal gathering, they should not use the "coincidence" to steal away or huddle in a corner to discuss municipal matters.

8. Quorum of one Board attending meeting of another Board does not make it a meeting of the first Board – but its obviously an open public meeting anyway.

9. "Training Workshops" (like this gathering) – typically not conducted as public meetings – don't meet OML definition of "meeting" – but conceivably might if convened by one public body – possibly subject to attorney/client privilege discussed below if attorney providing legal advice – most open to public anyway.

IV. "OUT-OF-SCHOOL" "NON – MEETINGS" (Less Than Quorum) – Not Illegal, But Should Be Discouraged

A. OML applies to "meetings" which, by definition, involve at least a quorum of the municipal body — OML does not apply to gatherings of less than a quorum.

B. Smaller meetings or gatherings sometimes occur formally, but frequently occur informally — while such smaller gatherings are not subject to or a violation of OML, they are not consistent with principles of "open government", especially in planning and zoning context.

C. "Out-of-school" meetings may include meetings/discussions between or among Board Members themselves (whether in municipal building or "around the kitchen table"), meetings or discussions between Board Members and applicants, meetings or discussions between Board Members and "public", etc.

D. Whether in municipal building, "public setting" (grocery store, library, ball field, etc.) or at home, "out-of-school" meetings frustrate the goal of allowing all "players" in "zoning game" full access to the information being presented and Board Members' discussion and deliberations about it.

E. Same principles apply to discussion not in-person: phone calls, letters and emails.

F. Therefore, even if not necessarily illegal, "out-of-school" gatherings/discussions should be discouraged.

G. When such a meeting is unavoidable and it happens, bring information to attention of Board at next public meeting.

V. SITE INSPECTIONS

A. What about "Site Inspections"?

1. Applicability of OML to site inspections is frequently misunderstood.

2. Site inspections are invaluable for rational governmental decision-making, especially for Planning Boards and Zoning Boards of Appeals.

3. Some or all Board Members may conduct site inspections and such gatherings are not open public meetings regardless of the number of Members in attendance.

4. Individual or a "less-than-quorum" number of Board Members can certainly visit and review sites.

5. Board Members may also conduct site inspections "en masse" so long as proper guidelines are observed.

6. Lawful purpose of a site inspection is to gather information, but not to discuss it or deliberate — in "gathering information", the Board is not really "conducting business" — "conducting business" would be subject to OML.

7. Valid policy considerations to allow and encourage site inspections ("picture worth a thousand words").

8. Sound reasons for site inspections to not be considered open public meetings:

   a. Members of the public attending such "meetings" on private properties and suffering injury.

   b. Lack of appropriate accessibility

   c. Impracticality of creating meeting minutes.

9. Strive as scrupulously as possible to merely take in information and not engage in discussion or deliberation about it among each other or with the applicant (or anyone else).

VI. EXECUTIVE SESSIONS

A. When can Executive Session be Lawfully Convened?

1. OML includes certain exceptions or exemptions pursuant to which an otherwise open public meeting may shift to a private, "behind closed doors" meeting of the Board known as "Executive Session".

2. Lawful grounds for Executive Session are misunderstood and often abused or used inappropriately.

3. Grounds are actually quite limited and should be strictly and narrowly construed.

4. Some public bodies have become notorious for playing "fast and loose" with the Executive Session grounds and, in particular, tossing around the terms "personnel", "contract" and "litigation" with little or no supportive detail to convene in Executive Session.

5. The lawful grounds for Executive Session set forth in OML do not even contain the words "personnel" or "contract", but Personnel and Contract issues are not usually relevant to planning and zoning issues anyway.

B. What about "Litigation"?

1. "To discuss litigation" is one of the "catch-all" phrases that governmental bodies often use to convene in Executive Session.

2. However, the so-called "litigation" ground for Executive Session is not so broad, vague and generic as to apply to anything that might conceivably someday involve litigation (past, present or future) in any manner, but is instead limited to "discussions regarding proposed, pending or current litigation."

3. This limitation is "intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation" — "the purpose of [the litigation ground for Executive Session] is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings."

4. Governmental bodies routinely convene in Executive Session to "discuss litigation," when what is really being discussed is decision-making that "could" or "might possibly" result in litigation; something of a "fear of litigation paranoia" — such speculation does not constitute lawful basis for Executive Session — one would be hard-pressed to envision any governmental decision, especially one of some controversy, which could not conceivably or potentially result in litigation — such a tenuous finding does not and should not justify Executive Session secrecy.

VII. ATTORNEY/CLIENT PRIVILEGED COMMUNICATIONS AND DISCUSSIONS

A. When can Privileged "Attorney/Client" Discussions Occur Behind Closed Doors?

1. Very few municipal Boards are aware of the formation of the attorney/client relationship and the resulting "attorney/client privilege" protection of the confidentiality of seeking and gaining legal advice.

2. A governmental body has the right to meet with its Legal Counsel at any time and place of its choosing to seek legal advice. This type of legal conference is exempt from OML regardless of the number of Board Members in attendance.

3. Conferring with Legal Counsel about legal issues or the seeking and gaining of legal advice is not one of the grounds for convening in Executive Session at an otherwise public meeting — meeting with Legal Counsel is entirely exempt from OML.

4. OML exemption stems from statutory protection of the sanctity of the "attorney/client privilege" — communications made between attorney and client in the context of the privileged relationship are confidential under State law and exempt from OML.

5. Several practical considerations to appreciate:

   a. The ability to confer with Counsel should certainly not be abused to facilitate closed-door meetings that stray from (or never even start out following) their intended purpose — the mere utterance of the words "attorney/client privileged communication" does not make it so — the mere presence of Counsel at a meeting certainly does not alone mean that the meeting falls within the protection of the privilege.

   b. When "attorney/client privileged" conferences are held, it is essential that the discussion truly be limited to seeking and gaining of legal advice and not "morph" into discussion and deliberations of policy matters, applications or the like — it is especially incumbent upon Counsel himself or herself to make sure that the limitation is strictly observed and, if necessary, tell the public officials that they are straying and that further discussions on whatever they are discussing cannot lawfully continue behind closed doors.

c. "Attorney/client privileged" conferences are best held completely separate and apart from public meetings, not to add any level of "secrecy," but rather to avoid interruption of an ongoing public meeting and having to explain the subtleties and nuances of the privilege to an often (sometimes with good reason) skeptical or distrusting public.

6. Generally speaking, legal issues requiring advice of Counsel can either be identified in advance of the decision-making meeting or, when complex legal issues arise, the decision may often be delayed to a future meeting, after the Board has had the opportunity to obtain the legal advice it may need.

7. None of this is to suggest that legal advice should only be obtained in closed-door conferences or that a governmental body seeking such advice must do so privately — most legal advice given by most attorneys to most legislative bodies, Planning Boards and Zoning Boards of Appeals is given right at the open public meeting of the governmental body without difficulty.

VIII. FOIL – DISCLOSURE OF "RECORDS"

A. Freedom of Information Law (FOIL) is an "open government law" set forth at Public Officers Law Article 6 — FOIL derives from federal Freedom of Information Act (FOIA).

B. FOIL requires "agency" to make "records" available for public inspection and copying — in planning/zoning context, "records" basically includes all public documents submitted to Planning Board/ZBA and/or municipality itself with little limitation.

C. Includes all application forms, maps, plans, reports and supporting materials — also includes all review letters, comment letters and correspondence submitted by other agencies and members of the public.

D. "Records" not limited to "hard copies" of documents or letters submitted to municipal building — "Records" also includes letters, memoranda, notes **(including emails)** submitted to individual Board Members at home or place of business.

E. FOIL (similar to OML) "open government" goal is enable anyone who wishes to review and/or obtain copies of whatever documents, materials and records exist that may be reviewed or considered by Planning Boards and/or ZBAs as part of the application review and deliberation process — FOIL pertains to existing records and does not require agency to create records or documents that do not already exist – FOIL request should describe documents with reasonable specificity.

IX. FOIL EXEMPTIONS

A. FOIL (like OML) is liberally construed in favor of disclosure — exemptions have limited applicability in planning/zoning context.

B. Exemptions include "unwarranted invasion of personal privacy", trade secrets, documents relating to law enforcement activities and criminal investigations.

C. FOIL exemption most applicable to planning and zoning situations is for most "inter-agency" or "intra-agency" communications — typically may include communications between Planning Board or ZBA and Planning/Zoning Staff, communications between or among Board Members themselves and communications with other agencies — attorney/client privileged communications of legal advice and Draft Decisions are exempt.

D. However, notes between and among Members, while likely exempt from required FOIL disclosure, still violate principles of open/good government and should be discouraged.

E. Like OML, possible applicability of FOIL exemption does not <u>prohibit</u> disclosure and goal of law is to be interpreted in favor of disclosure whenever possible.

Mark Schachner is the senior principal attorney of MILLER, MANNIX, SCHACHNER & HAFNER, LLC in Glens Falls, New York, just south of Lake George in Warren County. While the firm maintains a general practice of law, his efforts are concentrated in the areas of municipal, environmental, land use and planning/zoning law. Mr. Schachner and his colleagues represent numerous municipalities in Essex, Franklin, Fulton, Hamilton, Saratoga, Warren and Washington Counties. His practice includes extensive participation in regulatory proceedings before the New York State Department of Environmental Conservation, Adirondack Park Agency and Lake George Park Commission.

Mr. Schachner is a graduate of Brown University and Boston University School of Law. He is author of the chapter entitled "Environmental Law - New York State Environmental Quality Review Act ("SEQRA")" in the book Pitfalls of Practice published by the New York State Bar Association in 1993 and 2002. He has lectured about municipal, environmental, planning and zoning law matters at numerous conferences throughout the State. Mr. Schachner was selected as one of four Upstate New York Government/Cities/ Municipalities "Super Lawyers" in 2009; the only attorney in the area to achieve this distinction. He is a Director-at-Large of the New York Planning Federation and was the Keynote Speaker at the Federation's 2014 Annual Conference.

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