

LOCAL OFFICIALS MUST BE PREPARED FOR CHANGES TO THE Open Meeting Law

BY JAMES LAMPKE

Chapter 28 of the Acts of 2009, generally known as the Ethics Reform Act, included significant changes to the state's open meeting law and public records law. While some parts of Chapter 28 became effective on July 1, 2009, and at other dates, the key changes to the open meeting law and public records law, which will affect how local boards operate, will take effect on July 1, 2010.

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The new law represents significant changes to the way local officials conduct meetings, including new rules for posting meetings, going into executive session, keeping minutes, and more. Since a hearing is a form of a meeting, these new rules will also affect the conduct of local hearings. Many of the changes in the new law are positive, but some will impose additional obligations on local officials and could be problematic, at least until there is further guidance and assistance from the state.

While all the changes to the open meeting law are important, certain key changes are most likely to affect local officials in the very beginning. These changes include appearing before other local boards, new notice and posting requirements, changes to the executive session process, and changes to how minutes and documents used at meetings are to be maintained.

In order to be prepared for July 1, local officials can start training on—and in some cases begin implementing—many of the changes now.

Appearing Before Other Boards

Changes to the open meeting law will affect situations where members of one board attend meetings of another board. Under current law, based on interpretations by many district attorneys, a majority (i.e., a quorum of members) of one board cannot appear, whether by plan or happenstance, at the meeting of another board and speak, unless Board A was posted to meet with Board B. So, if three of the five members of a board of selectmen decided, independently of each other, to attend a meeting of the town's finance committee, and those three selectmen wanted to speak at the finance committee meeting, under prevailing interpretations the three selectmen could not speak, as that would mean that a quorum of the board of selectmen was in essence meeting and engaging in the public's business, unless the board of selectmen had posted a meeting to occur at the finance committee meeting. Two of the selectmen could speak, as that would not constitute a quorum of the board of

selectmen meeting and engaging in the public's business.

The changes to the open meeting law address this problem. By definition, under the new law, it is not a "meeting" if a quorum of a board appears at another board's properly posted meeting, so long as the visiting members communicate only in the form of "open participation" on matters discussed "and do not deliberate." Thus, effective July 1, if a quorum of Board A happens to attend a meeting of Board B and the members of Board A want to participate in Board B's meeting, the members can do so, even if they did not post a meeting of their board, so long as they only participate by "open participation" on matters discussed "and do not deliberate." If Board A knows that a quorum will attend a meeting of Board B, and Board A wants to participate fully as Board A, all it needs to do is post a meeting of Board A to meet with Board B. If there is no plan to attend and deliberate with Board B, however, the members of Board A may attend and



participate in Board B's meeting without prior posting.

Notice and Posting Requirements

A notice of a meeting still must be posted at least forty-eight hours in advance, but under the new law, Saturdays join Sundays and holidays as days not counted for giving the required forty-eight-hours notice.

In a significant change, the board chair will be required to list, in the notice, matters that the chair "reasonably anticipates will be discussed at the meeting." While a "notice" of a meeting is not the same as the agenda, with this new requirement

current law, posting is typically done on a bulletin board maintained by the city or town clerk in the municipal building. Under the new law, the posting must be "conspicuously visible to the public at all hours in or on the municipal building" where the clerk's office is located.

This new requirement is being generally interpreted to mean that the notice of a meeting (which, as noted above, must contain more than the presently required information of time and place of the meeting) must be visible to people even during times that the municipal building is closed. Many interpret this as requiring an enclosed

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the notice is becoming more akin to the agenda. Logically, a chair would reasonably anticipate that scheduled items will be discussed; thus, scheduled items need to be included in the notice of the meeting, along with other items that the chair anticipates will be discussed.

This raises the question of whether matters not listed on the notice can be discussed. Prevailing wisdom is that they can. For example, while the chair may have listed on the notice matters that he or she anticipates will be discussed, other members of the board may bring up matters that are not listed. And, presuming that the chair did not anticipate that those items would be discussed, the chair could also bring up new items. In addition, it is very common for members of the public to bring up matters that are not listed in the meeting notice.

The idea is not to limit the public's business from being done, but rather to give as much notice as possible to the public as to what business will be discussed.

The posting requirements for meeting notices will also change on July 1. Under

bulletin board outside of the building where the city or town clerk's office is located. Another possibility being discussed is having a computer monitor visible from outside the municipal building that shows a running "slide show" of meeting notices. As the *Municipal Advocate* went to press, the attorney general's office was soliciting input from local officials and developing guidelines and regulations to clarify this and other provisions of the revised open meeting law.

Conduct of Meetings

Under the new law, the chair is required to announce at the beginning of the meeting if anyone is making a video or audio recording or transmission of the meeting, and a person wishing to do so must inform the chair. This would appear to include the governmental body itself, so chairs should announce whether the board or anyone else is making a video or audio recording or transmitting the meeting.

The new law does not change the present requirement that a person can only speak when recognized by the chair.

Executive Sessions

Generally, the same statutory reasons for executive session exist. Reason Number 1 (discussing the character or reputation, physical or mental condition of someone) and Reason Number 2 (discussing discipline or complaints) have now been combined in a new exemption Number 1.

A new right has also been added for executive sessions under exemption Number 1. Now the subject of the meeting also has the right to have "an independent record to be created of said executive session by audio-recording or transcription, at the individual's expense."

The process for going into executive session will change on July 1. In addition to the current requirement of having to specify the reason for the executive session, the chair must also state "all subjects which may be revealed without compromising the purpose for which the executive session was called." Thus, if going into executive session under the litigation or real property exemption, for example, the chair must also announce more details as to the subject of the litigation or real estate issue, unless doing so would compromise the need for the executive session.

For exemptions dealing with litigation, collective bargaining, real property and preliminary screening committee interviews of candidates, under the new law the chair must also declare that an open session may have a detrimental effect on that reason.

The need for board chairs to ensure that they state the correct exemption for an executive session was highlighted in a key open meeting law case—District Attorney for the Northern District v. School Committee of Wayland—that was decided by the Supreme Judicial Court on the last day of 2009. In June 2004, the Wayland School Committee went into executive sessions to discuss a superintendent's evaluation under the stated reasons of "matters relating to Collective Bargaining as set forth in [the open meeting law (M.G.L. Ch. 39, Sect. 23B)]" and for "purposes of matters relating to Collective Bargaining and Personnel as set forth in [the open meeting law]." When

the executive session was challenged, the Supreme Judicial Court found that the school committee had incorrectly stated the reasons for the executive session. The court found that the collective bargaining exemption was not applicable, as the superintendent was not union personnel and, therefore, was not covered under collective bargaining. And, based on the minutes, the court found that the discussion in the executive session was on the evaluation of the superintendent, not on contract renewal or salary negotiations, which would have been proper subjects for an executive session if the proper exemption (i.e., for non-union personnel) had been stated.

Among the lessons to be learned from this case is that, when going into executive session, it is critical to state precisely the proper exemption. Starting on July 1, it will also be necessary in many instances to state additional information as noted above. A failure to do so runs the substantial risk of a board being found in violation of the open meeting law, with the actions being voided.

To a large degree, this problem can be avoided with some planning. An "Executive Session Quick Index Guide" available for free from the City Solicitors and Town Counsel Association (www.massmunilaw.org/publications.htm) offers precise language for motions to go into executive

session under each exemption. The guide has been revised to include the requirements under the new law and includes in the suggested motions a reminder that the chair must declare, where necessary, that an open session would have a detrimental effect on the subject matter.

Documents and Minutes

One of the major changes to the open meeting law concerns how documents used at a meeting must be handled. Under the new law, any document or exhibit "used" at a meeting becomes part of the official record of the meeting and must be maintained as such. Thus, going by the plain language of the statute, reports, plans, photographs, studies, memos, etc., used presumably by anyone at the meeting, must now be maintained as part of the official record of the meeting.

This will create administrative burdens on communities, as these documents will have to be maintained and stored as part of the official record. There will also be logistical issues of dealing with people who used documents at a meeting and leave without giving a copy to the board.

The meeting minutes requirements are also different under the new law. Minutes will have to also include a "summary of the discussion on each subject," and they must include a listing of each document and exhibit used at a meeting.

Under the new law, documents used at an open session are not shielded under the public records law exemptions, except for evaluation materials and employment materials.

For executive sessions, the documents used can be withheld if exempted from disclosure under the public records law, but only for so long as the release would defeat the purpose of the executive session. When the purpose of the executive session has been served, the documents must be released unless they remain exempt from disclosure under attorney-client privilege or a public records law exemption.

New requirements call for periodic review of executive sessions to see if the subject matter has been addressed and the minutes can now be released.

Help Is Available

As of July 1, oversight of the open meeting law will be transferred from the various district attorney's offices to the Office of the Attorney General. This change is intended to provide for consistency throughout the state in the interpretation of the law. A new Division of Open Government within the attorney general's office is charged with enforcing the open meeting law and assisting municipalities with compliance. The division, created in March and headed by Robert Nasdor, will work to make the law as beneficial to the public and local governments as possible. The division will be able to issue, through the attorney general, advisory opinions, letter rulings and other important guidelines interpreting the new law. The attorney general will also be able, in certain cases, to authorize alternative notice methods for meetings.

Local officials must learn the new open meeting law procedures in advance of the effective date of July 1, 2010. This can be done by attending training programs offered by many organizations, such as the MMA, county selectmen groups, the City Solicitors and Town Counsel Association, and others. Local officials are urged to consult their municipal counsel for assistance in implementing the new law. This important new law warrants close examination to ensure local compliance. ❁



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