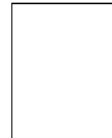


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Municipal Matters

Timely news in the area of municipal law
promotional material

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INSIDE THIS ISSUE

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The Art of Going into Closed Session

By Carlos S. Arévalo

A recent court case involving the City of Champaign offers new guidance to elected officials as to Open Meetings Act (the "Act") requirements for closed sessions. In this case, the plaintiff alleged that the city council for the City of Champaign had gone into a "secret meeting" and that the meeting violated the Act because the council allowed noncouncil members to attend, the vote to go into the closed session was not publicly disclosed, the reasons for going into closed session were not properly identified, the motion to go into closed session was improper and the meeting agenda failed to disclose that a closed session would take place. The trial and appellate courts disagreed with the plaintiff and sided with the City of Champaign officials. Because this case raised questions that are often faced by elected officials and members of public bodies while in office, we thought it would be appropriate to review and summarize it.

As most members of public bodies are aware, the Act requires that all meetings of public bodies be open to the public unless an exception applies. The 24 exceptions are very specific and are narrowly construed by courts. Most of the exceptions are designed to protect public interest or safety or safeguard personal privacy. With this as our backdrop, here are the questions raised in the Champaign case in no particular order of importance:

1. Can individuals who are not members of the council, board or applicable public body attend closed sessions?

Yes. The Act neither outlines who is allowed to attend closed sessions nor specifically prohibits a public body from inviting nonmembers

into a closed session. For instance, closed sessions are routinely attended by staff. Their presence is needed in order to assist the corporate body in the discussions at issue. Even in smaller municipalities, elected officials or members of the public bodies seldom participate in day-to-day operations and any action related to such operations and administration typically includes the involvement of staff. By way of example, discussions about purchasing a parcel of land necessarily involve administrative staff

who have been negotiating with the seller. The seller of the property may be invited to a closed session to discuss the purchase price or other terms. In matters that involve pending or probable litigation, the corporate authorities are likely going to want their attorney to provide a report on the status.

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Another scenario might involve hiring a new administrator or selecting new legal counsel where the candidates themselves may be invited to closed session. The Act also permits going into closed session to hear evidence if the public body is acting as a quasi-adjudicative body. If this were the case, a witness testifying would have to attend the closed session.

2. Is a voice vote sufficient to go into executive session?

Yes. The Act provides that the vote of each member on the question of holding a closed meeting "shall be publicly disclosed . . . and shall be recorded and entered into the minutes of the meeting." There is no requirement that a roll call vote be conducted. The requirements of the Act are satisfied so long as the public is

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The specific statutory citation [of an exception to hold a closed session] is not needed but, whenever practical, it is a matter of good practice to mirror the language of the Act.

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Welcome

In this issue, Carlos Arévalo discusses proper closed session practice in light of a recent case involving the City of Champaign.

Also included in this issue are important dates from January 2009 to April 2009.

If you have any questions, comments, or suggestions for articles in upcoming issues, please contact us.

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informed of each member's vote. As a matter of practice, however, many public bodies and their commissions or other adjunct public bodies, typically use a roll call vote. This practice facilitates the recording of the member's vote. It also has the visual and clearly audible effect of letting the public attending the meeting know that the corporate authority is going into a closed meeting.

3. Should the motion to go into closed session identify the basis for going into closed session and if so, how specific does the motion have to be?

The answer to the first half of the question is yes. The Act requires that the vote of each member and "citation to the specific exception" shall be publicly disclosed. As for the second half of the question, courts in Illinois have determined that a specific citation to the statute is not necessary as long as the public body adequately identifies the exception. For example, a proper motion with respect to the purchase of real estate should contain language that the public body will be discussing whether a "particular parcel of land should be acquired." There is, however, no need to state that the motion for closed session is pursuant to "Section 2(c)(5)." In other words, the specific statutory citation is not needed but, whenever practical, it is a matter of good practice to mirror the language of the Act. Thus, when making a motion to go into closed session to discuss litigation, the motion should clearly state whether litigation is "pending," "probable" or "imminent." The public body would have to record the reasons for finding that litigation is probable or imminent in the minutes of the closed session, but it need not state that basis in open session. Illinois courts have interpreted this exception as intended to prevent public bodies from using a distant possibility that a lawsuit will be filed as a pretext to close a meeting to the public. Moreover, using phrases such as "potential" or "contested litigation matter" is improper because they create confusion as to which litigation basis applies so it is unclear as to whether litigation falls under filed or pending litigation or probable or imminent, which would require an appropriate finding in the minutes. The goal of the procedural steps to go into closed session is to clearly announce to the public the reasons for doing so.

4. If there is more than one basis to go into closed session, is it required to have separate votes on each of the basis for holding a closed session?

No. The Act provides that a "single vote may be taken with respect to a series of meet-

ings, a portion or portions of which are proposed to be closed to the public." To comply with the requirements of the Act, however, the motion should specifically call attention to the proper exceptions. A proper motion might read as follows:

I move that we go into closed session to discuss land acquisition and pending litigation.

Though not statutorily required, a much more comprehensive motion might even specifically identify Section 2(c)(5) for land acquisition and Section 2(c)(11) for pending litigation.

5. Does the Act require that the agenda disclose the public body's intent to hold a closed session?

No. The Act in Section 2(a) states as follows: At any open meeting of a public body for which proper notice under this Act has been given the body may, without additional notice under Section 2.02, hold a closed meeting in accordance with the Act. Only topics specified in the vote to close under this section may be considered during the closed meeting. As a final point, we would caution that except for approval of closed session minutes, any motion for final action must be made in open session and must be an item of the published agenda.

This language allows the public body to decide during a properly noticed open meeting to go into a closed session without additional notice. Thus, the agenda that has been posted does not need to specify that the public body will go into a closed session nor the basis for doing so. It is only required that if the public body goes into closed session, as noted in question number 3 above, it must identify the basis for doing so in the motion and vote. Moreover, once the basis for going into closed session has been identified and a vote has been taken, discussion in closed session must be limited to the stated basis. It would be improper to discuss pending litigation if the motion to go into closed session had only identified land acquisition. We note and recommend that if during closed session for land acquisition, the public body determines that it also needs to discuss pending litigation, even if somehow related to land acquisition, the proper procedure would be to return to open session and have a vote to go into closed session for pending litigation.

Hopefully, these questions and answers enhance your understanding of closed session procedures and will serve you in future meetings. When in doubt, however, we will be more than happy to assist you to keep your meetings "legal" and in compliance with the Act.

Q's and A's of Municipal Government

Other than notifying the property owner when his property is in violation of our building code, is there anything else we should be doing?

In addition to following the procedures found in the building codes that have been adopted, the Building Code Violation Notice Posting Act (50 ILCS 810/0.01 et seq.) requires municipalities and counties that have enacted a building code to post a notice of any violation "in a conspicuous place near the main entrance of such building." Furthermore, the notice must be a minimum of 9 inches in height and 14 inches in width. At the top, in large letters, it must state "Notice of Violation." The text of the notice is required to contain a reference to the provision of the building code violated and may contain "such other information respecting the nature of the violation as the building code department deems advisable."

The statute also requires the building code department to remove the notice "forthwith" when the cause of the violation is removed. Any other person removing, or defacing, the notice is guilty of a petty offense and faces a fine not to exceed \$100.

In the International Building Code, the code official is required to serve a notice of violation or order to the person responsible for the violation. When a notice is issued a stop work order, in writing, is given to the owner of the property involved, or the owner's agent, or the person doing the work. Such notice shall also state the conditions under which work will be permitted to resume.

Important Deadlines to Remember:

At least every 6 months: review executive session minutes in closed session to see if they can be released to the public. If any minutes can be released, this must be done in open session.

Within 30 days after a bill is received or within 30 days after the date when goods or services are received, whichever is later, the Local Government Prompt Payment Act requires that such bill be approved or disapproved by the appropriate local governmental official. In addition, if an approved bill is not paid within the 30 day period, an interest penalty of 1% of any amount approved and unpaid "shall be added for each month of fraction thereof" until final payment is made.

30 days before the passage of a new or amended building code or zoning ordinances that establishes constructed related activities that are applicable to structures within a municipality, notice must be listed at the Illinois Building Commission website.

30 days before a municipality incorporates, by reference, certain regulations (prepared by a nationally recognized trade or service association, such as the International Code Council) and public records (county state or federal), must be filed with the clerk for not less than 30 days before adoption.

Within 30 days after the passage of a municipal ordinance that imposes any fine, penalty, imprisonment or forfeiture, or making an appropriation, it must be published in either pamphlet form or in a newspaper with general circulation in the municipality. Ordinances that impose a fine, penalty, etc., are not effective until 10 days after publication.

Dates to Remember:

Jan. 19: First day for filing nominating petitions for the April 7 election (1/20 if closed for Martin Luther King's birthday).

Jan. 20: Last day to file petitions for referenda on the April 7 ballot.

Jan. 26: Last day for filing nominating petitions and receipt for filing statement of economic interest with the local election official for the April 7 election.

Before Jan. 31: Certificates stating there have been no change in the ownership or use of property that is exempt from property taxes must be filed with the county clerk.

Feb. 1: The chief administrative officer, or designee, of a unit of government, is required to certify to the county clerk the names and mailing addresses of those persons required to file statements of economic interest pursuant to the Illinois Governmental Ethics Act.

March 10: Last day to register to vote for the April 7 election.

March 31: If there have been changes in the zoning map during the previous year, this is the last day for a notice to be published about the changes.

April 1: Last day to file a certified copy of any ordinance or resolution imposing or discontinuing a retailer's occupation tax (or home rule sales tax), or changing the rate, with the Dept. of Revenue to take effect July 1.

April 7: Consolidated election

April 21: Deadline for the county clerk to complete the validation and counting of provisional ballots; tabulate absentee ballots.

April 28: Last day for the county clerk to canvass April 7 election results.

April 30: If your fiscal year starts on May 1 and you have adopted the Optional Budget Officer System in lieu of an appropriation ordinance, the budget for the coming fiscal year must be passed.

ZRFM Welcomes New Attorneys

Greg Preves, who was most recently a law clerk with the Second District Appellate Court, joined ZRFM in October and is working in corporate and litigation matters. Greg is a graduate of Loyola University Chicago School of Law and received his undergraduate degree from Carleton College.

Suzanne Stevens joined ZRFM in November and brings extensive litigation experience to the firm. She received her Juris Doctor from University of Connecticut School of Law and her undergraduate degree from Mount Holyoke College in Massachusetts.

