

LESSONS LEARNED
TOWN OF FAIRVIEW
MOCK PLANNING BOARD MEETING

Public Officers Law, Article 7, which is also known as the Open Meetings Law (OML) will be referred to as such for the purposes of this exercise.

Lessons from Scene 1

1. ENTER AND EXIT EXECUTIVE SESSION

The Planning Board did not follow proper procedure for entering into executive session to interview the engineering firm. It should have been done totally within a public meeting, not before the public meeting, as happened in this script. Any motion made calling for an executive session must be made within an open meeting. The motion must identify the subject matter to be discussed and must be adopted by a majority of a public body's total membership.

What is the proper procedure for entering into executive session?

- Convene an open meeting (OML§105).
- Pass a motion to go into executive session for a stated purpose listed in OML§105.
- Close the executive session and go back into open meeting.
- Make available minutes of actions taken in executive session within one week (OML§106).

How are executive sessions to be conducted?

OML §105. Conduct of executive session. 1) *Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys: matters which will imperil the public safety if disclosed; a) any matter which may disclose the identity of a law enforcement agent or informer; b) information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed; c) discussions regarding proposed, pending or current litigation; d) collective negotiations pursuant to article fourteen of the civil service law; e) the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation; f) the preparation, grading or administration of examinations; and g) the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.* 2) *Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body.*

2. MEETING MINUTES:

How should minutes be distributed, amended, corrected and approved?

In this scene, as the meeting opens, the minutes from the last meeting are handed out and read by board members. One of the members states that the minutes do not reflect what was said. The Chair of the Planning says the minutes are close enough and that nobody reads the minutes anyway. The Chair ignores the request to correct them. The board moves on to other business without voting to approve the minutes.

Approval of the minutes is not required by OML or other State statutes. If, however, the Rules of Procedures of the local board require that minutes be approved, then the chair of the board should follow that procedure.

Members of the board should have received draft meeting minutes from the previous meeting before the meeting. After the amendments have been made, the regular order of business should be followed as outlined in the board's Rules of Procedures (or bylaws).

Suggestions for distributing, amending or correcting and approving minutes:

- Distribute minutes well before the meeting so members have a chance to thoroughly review them.
- Review near beginning of next meeting.
- Record any corrections (substantive, typographical, etc.) or additions.
- Board should then vote to approve minutes.

When should minutes be available to public?

According to OML§106, minutes must be made available as follows:

- Minutes of meetings of all public bodies shall be available to the public within two weeks from the date of such meetings.
- Exception: minutes taken of an executive session must be available to the public within one week.

In addition, the following applies to the preparation of minutes:

- Decisions are not invalidated if minutes are late.
- Best practice is to prepare and distribute minutes in a timely manner.
- Before minutes are approved, it is best to mark as unapproved, draft, or non-final.

OML §106. Minutes. 1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon. 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added

by article six of this chapter. 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session.

3. HANDICAP ACCESSIBILITY

What assistance should be given to disabled, including hearing impaired citizens?

In an earlier version of this skit, a member of the public who was hearing impaired called the Town a week before the meeting and asked if she could get someone who could sign for her at the meeting. There was no one at the meeting to accommodate her. Her neighbor inquired about this at the beginning of the meeting and was told they did not have a budget for that sort of thing. She was told she could try to sign for her or take notes and that the deaf woman could "read about it in the minutes next month" after they were approved.

Included among the requirements for a meeting to be open to the public is the necessity that "all reasonable efforts" are made to ensure that the meeting hall is accessible. There was no attempt to ensure accessibility for the person who was hearing impaired to take in what was being said in real time, violating Open Meetings Law.

OML §103 (b). Open meetings and executive session. *Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty or the public buildings law.*

4. WHAT IS PROPER PROCEDURE REGARDING THE LATE ARRIVAL OF A PLANNING BOARD MEMBER?

It is recommended that the late arrival be noted in the record, in case it becomes a chronic condition and the legislative board wants to take action. Chronic absence is unprofessional, disrespectful and leaves the person a step behind, when it comes to voting. If this is an all the time occurrence, it could be cause for removal of a member of the planning board. If a member misses part of the testimony, he or she should review what was missed before voting on the issue.

5. PUBLIC HEARINGS

What are the public notice requirements for a public hearing?

Planning Board Member Goodolboy commented that hearing notices must be in the paper at least five days in advance.

Required is the placement of notice on the municipal bulletin board (or a conspicuous place), in addition to, the notice being published in a local newspaper of general circulation at least 5 days before the public hearing.

Content of Notice for Public Hearing:

- Date, time & place of the hearing
- Nature of the proposed action in language that the public may understand; and
- If applicable, the location of the subject property

To comply with Open Meetings Law, there is no requirement in State law for advance notice of meetings to be printed by the media or in the official paper. However, the media must be advised of a public meeting. Please notice this distinction between meetings and hearings.

Is it permissible to start earlier or later than the time given in the notice?

The Chair felt it would be alright to begin the public hearing a half-hour earlier than the time given in the public notice because everyone “who cares” about the proposal was already there and everyone wanted to get home to see the playoff game.

- The **Open Meetings Law (§104)** requires that a time and location must be given prior to every meeting
- You may start late, but you cannot start early, and you think everyone “who cares” is already there

What are the proper procedures for opening and closing a public hearing?

The Chair did not officially declare the public hearing open and closed it rather abruptly. The Chair closed the hearing without asking if anyone else in the audience wished to speak and assumed there were no further comments. In addition, no accommodations were made to accept written comments.

- A public hearing should be officially opened and closed.
- A public hearing is usually over when all who wish to speak have been heard.
- Even after a hearing is closed, the board may choose to keep the RECORD open for the acceptance of written comments.

How should public comment be taken?

- It is best to establish procedures for accepting public input.
- You may want to ask speaker to sign in or register.
- You may wish to establish an order for calling speakers.
- It is recommended that the applicant and experts (consultants, engineers and so forth) speak or present first. Followed by organizations and individuals?
- First come, first serve.
- Time limits.
- Written comments.

5. CONFLICT OF INTEREST

Statutory versus Common Law

- Statutory conflicts of interest are stated in law, such as you have an interest in the contract in question.
- Common Law has to do with case law and a broadening sense of the appearance of impropriety. This may include a perceived or more indirect connection, such as a relative's ownership of a property or business.

What are the proper procedures for recusal?

Recusal refers to the act of disqualifying oneself from participation in an official action due to a conflict of interest. Board members should recuse themselves if there is a conflict of interest. If someone is aware of a possible conflict, he or she may bring it to the attention of that member. Members can be asked but can't be forced to recuse themselves. It is up to the member with the potential conflict; the chair does not have the "power" to declare the member ineligible to vote.

6. OVERCROWDED MEETING ROOM, WITH NO ACCOMMODATION FOR AN OVERFLOW CROWD

This meeting takes place in a room that is too small for the crowd and continues to get more crowded to the point people are standing out in the hall where they cannot hear. The Chair of the Planning Board sees people in the back of the room and in the hallway and makes no effort to accommodate them.

The public should be able to see and hear the public meeting. The meeting should have been reconvened to a larger room, so everyone interested could come into the room and hear, and if applicable, participate in the process. It is matter of common sense and degree and what reasonable people would do.

An open meeting is a meeting of a public body for which adequate notice has been given to the news media and to the members of the general public, and at which the media and the members of the general public are permitted to attend, observe, and listen as the public body conducts public business.

7. OPEN MEETINGS

Who may attend or speak at a public hearing?

A resident from the neighboring community of Temperanceville wished to speak but was told that only residents from the community holding the hearing could speak.

The Open Meetings Law requires meetings of municipal boards be open to the general public. A municipality has no right to treat non-residents any different from its residents in their right to be there, as well as to comment during public hearings.

Lessons from Scene 2
Planning Board Site Plan Approval

Public Officers Law, Article 7, which is also known as the Open Meetings Law (OML) will be referred to as such for the purposes of this exercise.

1. APPLICANT ADDRESSING THE PLANNING BOARD

Can an applicant, or their representative (an attorney for the applicant in this case), make a presentation to the planning board

- Yes, it is permissible.

2. USE VARIANCE TEST

Was it proper for Zoning Board to grant a use variance for a commercial use in an agricultural district?

It is very questionable whether a variance should have been granted as it does not appear to have met the tests. When seeking a use variance, the applicant must prove "unnecessary hardship." To prove this, State law requires the applicant to show *all* of the following:

- The property is incapable of earning a reasonable return on initial investment if used for any of the allowed uses in the district (actual "dollars and cents" proof must be submitted)
 - Another farmer, for example, could buy the land and use for farming
- The property is being affected by unique, or at least highly uncommon circumstances;
 - The property is a farm similar to other farms in the district.
- The variance, if granted, will not alter the essential character of the neighborhood;
 - The predominant use is agriculture (Agriculture District)
- The hardship is not self-created
 - Assuming the zoning had not changed since the applicant bought the land one (1) year ago, he knew the use he is proposing was not allowed when he made the purchase.

If *any one or more* of the above factors is not proven, State law requires that the ZBA must deny the variance.

In addition, when reviewing any application for a special use permit, site plan approval, use variance or subdivision approval for a proposed project that is within an Agricultural District (or the boundary of the proposed project site is within 500 feet of a farm operation within an Agricultural District), the reviewing board must evaluate and consider the potential impacts of the proposed projects on the functioning of said farm operation (s).

(Refer to: NYS Agriculture and Markets Law, Article 25 AA, Section 305; Town Law §283a; and Village Law §7-739.)

3. PUBLIC ALLOWED TO SPEAK AT AN OPEN MEETING

Are members of the public allowed to speak at meeting?

- The board may allow the public to speak in an open meeting, but it is not mandatory as is the case of a public hearing. Look to local rules of procedure.

4. SITE VISITS AND THE OPEN MEETINGS LAW (OML)

Should a planning board visit a site without notice to the public?

A site visit by the planning board that included a discussion of the proposed project should have been noticed in accordance with Open Meetings Law (OML) as follows:

- If the meeting is scheduled more than one week in advance, you must provide at least 72 hours notice to the news media and post a notice in one or more conspicuous place and on the municipal website.
- If the meeting is scheduled less than one week in advance, notice must be given to the media to the extent practicable and must be posted at a reasonable time prior to.

Content of Notice of Public Meeting:

- Date, time & place of the meeting
- Nature of the proposed action in language that the public may understand
- If applicable, the location of the subject property

According to Case Law, [*Riverkeeper v. The Planning Board of the Town of Somers* (Supreme Court, Westchester County, June 14, 2002)], a site visit does not constitute a meeting subject to OML, so long as its purpose is not "for anything other than to 'observe and acquire information.'" The board may ask questions about the physical characteristics of the site but may not discuss the merits and issues of the project. It is a tough order to follow and impossible for many.

An alternative to conducting site visits that won't be subject to Open Meetings Law is for members to visit the site by themselves or in small groups of less than a quorum.

5. ENVIRONMENTAL IMPACT ASSESSMENT

A negative declaration can't be done without completing an Environmental Assessment Form (EAF).

6. THREAT OF POSSIBLE LAWSUIT

Can the Planning Board sue the Zoning Board of Appeals (ZBA) of its own municipality?

- Yes, one board can sue another board in a municipality, although legal representation could get tricky.

7. EXECUTIVE SESSION

Is the threat of a lawsuit (Article 78) a proper reason to go into executive session? No, but they could meet with attorney to receive legal advice, which is outside the Open Meetings Law and covered by attorney/client privilege.

How do you enter into executive session?

Any motion made calling for an executive meeting must be made at an open meeting. The motion must identify the subject matter to be discussed and must be adopted by a majority of a public body's fully constituted membership.

What is the proper procedure for entering into executive session?

- Convene an open meeting (OML§105).
- Pass a motion to go into executive session for a stated purpose (OML§105).
- Close the executive session and go back into open meeting.
- File minutes of actions taken in executive session within one week (OML§106).

What records must be prepared and kept from an executive session?

Tape Recording is not necessary; however, if the session is tape recorded, the tapes would be subject to the Freedom of Information Law (FOIL). The tapes must keep for 4 months from time minutes are issued.

Where a public body makes an official decision or action during an executive session, it must record or summarize that action and the date and vote thereon in its minutes. Minutes do not need to be prepared if there are no votes are taken during an executive session.

Minutes of executive session balance the need for transparency and access to information with occasional need for confidentiality.

OML§106. Minutes. 2. *Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.*

Open Meetings Law §106. Minutes. 3.

- Minutes taken of an executive session must be available to the public within one week:
 - Decisions are not invalidated if minutes are late.

Who may be brought into executive session?

OML §105. Conduct of executive sessions. 2. Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body.

It is allowable to ask a relevant expert/party into an executive session who is not on the board. You can invite the applicant in. You can exclude the clerk or the attorney.

Is voting allowed during executive session?

It is ok to vote while in executive session. However, according to OML §105 (1), states "...no action by formal vote shall be taken to appropriate public monies." The action to approve expending funds for the **Market Analysis** was not permissible under Open Meetings Law.

Where a public body makes an official decision or action during an executive session, it must record or summarize that action, record the date, and vote thereon in its minutes. If no votes are taken during an executive session, no minutes need be prepared. You must file the minutes of actions taken in executive session within one week. If minutes are not approved until the next meeting, the draft minutes should be available within one week and until the minutes are formally approved.

Going into Executive Session regarding the selection of consultant (professional services)

- The legislative board must follow the municipal procurement procedures or competitive bidding process, which was not done in this scene.
 - The procurement process usually calls for a request for quotations, a review process, and selection based on criteria set up in advance.
- If the board has a consultant on retainer, they could be used for services within their contract, which again was not the case in this scene.
- The legislative board can not appropriate money while in executive session.
- In this scene, the board approved a contract for more money than the contractor had quoted. A board should not approve a contract for more than the job would cost.
- There appears to be Conflict of Interest issues or at the very least an appearance of impropriety that should be addressed:
 - **Giving contract to the Board's Engineering Firm, but this contract falls outside of their contract.**
 - **Inflated price to Engineering Firm.**
- Does the Municipality have an Ethics Board?

Must the board take a roll call vote in executive session?

The only information required to be in the record of an executive session is a list of motions made and votes taken on the motions.

At the end of the scenario, the Chair calls for a vote, by saying, all those in favor of approving the Market Analysis signify by stating aye, those opposed? The ayes have it.

Motion should be a vote for an action. If it does not pass, perhaps it should be rephrased to the reverse course of action as the motion. Each person's vote should be recorded for the record.

How do you close a meeting?

Must close executive session first and then go back into the regular public meeting before closing the meeting and going home (or to Rocky's Bar).

8. OLDER COMPREHENSIVE PLAN

During the executive session the municipality's outdated Comprehensive Plan was discussed. They need to update the plan or draft a new Comprehensive Plan. In the meantime, they do not to follow old Comp Plans that have been replaced by newer studies, zoning changes, policy statements, and in this case the new County Agricultural Plan. All decisions in the County should consider this plan.

9. GENERAL MUNICIPAL LAW S §239-m REVIEW

Should the application have been sent to the county planning agency?

County Referral would have been required for both the use variance and the site plan, which are among actions that must be referred to the county planning agency if they apply to real property within five hundred feet of:

- (i) the boundary of any city, village or town; or
- (ii) the boundary of any existing or proposed county or state park or any other recreation area; or
- (iii) the right-of-way of any existing or proposed county or state parkway, thruway, expressway, road or highway; or
- (iv) the existing or proposed right-of-way of any stream or drainage channel owned by the county or for which the county has established channel lines; or
- (v) the existing or proposed boundary of any county or state owned land on which a public building or institution is situated; or
- (vi) the boundary of a farm operation located in an agricultural district, as defined by article twenty-five-AA of the agriculture and markets law, except this subparagraph shall not apply to the granting of area variances.