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BOARD OF SELECTMEN

MEMORANDUM TO MUNICIPAL CLIENTS

TO: BOARD OF SELECTMEN/MAYOR/TOWN AND CITY COUNCIL
TOWN MANAGER/TOWN ADMINISTRATOR/EXECUTIVE SECRETARY

Re: New Developments in the Open Meeting Law

The new Open Meeting Law (“the Law”), G.L. c.30A, §§18 through 25, took effect on July 1, 2010 and made significant changes to the statutory definitions, requirements for posting notice, minute taking, and many other procedures. In addition, the Attorney General’s Division of Open Government assumed authority over implementing and enforcing the Law and issued emergency regulations on a variety of issues. On October 1, 2010 the Attorney General issued a final version of these regulations, 940 CMR 29.00, *et seq.* (which may be viewed at the Attorney General’s website, www.mass.gov/ago), which differ from the emergency version in several significant ways. There is also news regarding two issues not addressed in the regulations but that are of interest to municipal boards, which will be summarized below.

Posting Meeting Notices

As you may recall, there was much debate over the statutory requirement that all meeting notices must be posted “in a manner conspicuously visible to the public at all hours” in or on the City or Town Hall. In the emergency regulations, the Attorney General addressed this issue by providing a series of alternative posting methods for those communities where 24-hour access to posted notices would be problematic, including the use of another municipal building with 24-hour access, newspaper notices, or a computer monitor visible from outside the building. The emergency regulations did not authorize a municipality to use posting on its website as the only form of notice, and required public bodies to take the additional step of posting at another accessible building. In contrast to the emergency regulations, the final version, 940 CMR 29.03(2)(b), does authorize a municipal public body to comply with the alternative posting requirements by simply posting its meeting notices on the municipality’s official website. No additional form of posting is required other than the traditional filing with the municipal Clerk’s office. Any municipality that uses a website, or any of the other approved alternative posting methods to meet the 24-hour access requirement, must prepare a written description of how notices may be accessed during the hours when City or Town Hall is closed, and have such description visible to the public on or adjacent to the main and handicapped accessible entrances to City or Town Hall. Of course, regardless of which posting method is used, notices meeting all the statutory requirements must be posted at least 48 hours before the meeting, excluding Saturdays, Sundays and legal holidays.

Memorandum to Municipal Clients

Page 2

Notices for District Meetings

Another change regarding notices concerns the posting of meetings of a district public body, such as a regional school committee or a water district governing board. The emergency regulations had provided that proper notice include physical posting at each municipal member's City or Town Hall. While such posting will still meet the statutory requirement, the final regulations, 940 CMR 29.03(3)(b), provide that posting meeting notices on the district's official website will, in itself, provide valid alternative posting.

Open Meeting Law Complaints

Another important change to the regulations clarifies the complaint process. Under the Law, a resident or other individual claiming that a public body violated the Open Meeting Law is required to make a complaint in writing and file it initially with the public body itself, rather than with the Attorney General. The public body must then respond in writing to the complainant and the Division of Open Government within 14 days. Under the applicable final regulation, 940 CMR 29.05(1), all complainants shall use the complaint form developed by the Division of Open Government, available on the Attorney General's website. The provisions of ~~940 CMR 29.05(2)~~ state that municipal clerks should provide any person requesting a form with a printed copy of the official complaint form or, if a paper copy is unavailable, direct the person to the Attorney General's website.

The Law and the regulations provide that the public body's response should describe any "remedial action" taken. If the board believes that it fully complied with the Law and that the complaint is groundless, a response is still required but, in our opinion, the response may simply describe the relevant facts and provide a statement that there was no violation of the Law.

Meetings of "Quasi-Judicial" Boards

The revised Open Meeting Law includes new exemptions from the definition of "meeting," creating certain situations where the presence of a quorum of a public body is not subject to the Law's provisions. One of these exemptions is for "a meeting of a quasi-judicial board or commission held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it." G.L. c.30A, §18. This suggested that a board conducting a "quasi-judicial" proceeding (a hearing on a license application, for example) could meet after the hearing to deliberate and reach a decision without it being considered a "meeting," with no notice, minutes or public accessibility required. Since this exemption runs counter to the very purpose of the Open Meeting Law as a whole, we cautioned our clients not to use this exemption until the Attorney General determined how to interpret this exemption. The Division of Open Government has now done so, and this may be found at the "Open Meetings FAQ" section of the Attorney General's website. The Division has determined that the use of the term "adjudicatory proceeding" should be restricted to proceedings of state public bodies, which were already governed by the open meeting

Memorandum to Municipal Clients

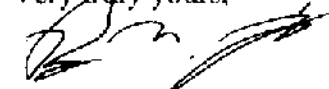
Page 3

provisions of G.L. c.30A before the laws were amended this year. For municipal public bodies, therefore, the quoted exemption will never apply and should therefore not be utilized by local boards. For example, after a license hearing, a licensing board must continue to conduct its deliberations and decision-making in an open session, as it did under the former Open Meeting Law.

Remote Participation

Finally, we have had several inquiries as to whether remote participation by board members (via speaker phone, Skype, or video conferencing, for example) is allowed under the new Open Meeting Law. General Laws c.30A, §20(d) provides that the Attorney General may authorize some form of remote participation, subject to certain conditions. Although the Division of Open Government solicited public comment on this issue in September, to date the Division has not promulgated a regulation on the subject. Unless and until the Attorney General authorizes remote participation by regulation or letter ruling, remote participation by members of a public body in a meeting of that body will continue to be prohibited.

Very truly yours,



Brian W. Riley