Open Meetings Act & Closed Sessions – Beware in Preparing Session of the Open Session

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PRACTICE AREAS

Municipal & Public Entity Law

Open Meetings Act

The Michigan Court of Appeals recently handed down a decision that is important for any municipality that holds special meetings or goes into closed session to discuss pending litigation. Many municipalities have occasion for one reason or another to go into a closed session during a special meeting. And municipalities of course know that they must post notice of their special meeting at least 18 hours in advance.

It is also nearly inevitable that municipalities may have occasion to go into a closed session to discuss pending litigation. Of course, they can go into closed session for only a specific purpose set out in the Open Meetings Act. That Act allows closed sessions to discuss with their attorney trial or settlement strategy in connection with specific pending litigation where doing so in an open session would have a detrimental effect on the trial or settlement position of the municipality. During a closed session conducted based on that purpose, the municipality's attorney likely gives advice or recommendations on trial or settlement strategy. But since no decisions can be made in closed session, the municipality must close the "closed session" part of the meeting and then go back into open session for any decisions. That raises the question of how much detail the open session minutes must provide as to any decision the municipality makes regarding the trial or settlement strategy.

The Michigan Court of Appeals recently handed down a decision that is instructive on both the 18-hour special meetings notice requirement and the detail required to be in open session minutes that follow a closed session where litigation or settlement strategy is discussed. *Citizens for Public Accountability v Northville Charter Twp*, unpublished per curiam (decided 5-26-11).

THERE ARE TWO KEY POINTS:

1. The 18-hour requirement for special meetings does not require posting for 18 business hours. Nor does it mean putting the notice in a spot that is publicly available for 18 hours. (In *Northville Charter Twp*, the Court upheld the notice even though it was posted in a part of the township hall that was not accessible to the public for the full 18 hours, the notice was posted.)
2. Though rare in our judgment, a court can find a municipality to have violated the Open Meetings Act if its open session minutes are too skimpy. The *Northville Charter Twp* Court ruled the township violated the Open Meetings Act because its minutes of the open session that followed the closed session were too skimpy and did not reflect the actual "decision." On July 24th, the township held a closed session to consider settlement of pending litigation. The agenda item merely said "REIS litigation." The minutes of the July 24th meeting state that the purpose of the closed session was to "discuss with the township attorneys the litigation and settlement issues…" Minutes of the open session that followed the closed session then say this about the "decision" made: "Township Board authorizes the Township Supervisor and Clerk to execute any appropriate documents, if presented as outlined, and recommended by the Township attorney." In reality, the Township Board's decision was to sign a consent judgment to settle the REIS litigation. The Court held that the minutes do not adequately reflect the actual decision made, and therefore do not meet the Open Meetings Act's requirements. The Court suggested that the proper way would be to (1) state the actual decision to settle the case; (2) state the documents the attorney presented during the closed session; or (3) state if the documents presented were full, final, or draft settlement proposals.

If you have questions about the Open Meetings Act in general or its provisions on notice and closed sessions, feel free to contact Anne Seurynck (616.726.2240) of the Foster Swift Municipal Practice Group.