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Recommended Citation

John R. Nolon, Open Meetings: Land Use Mediation and the Public's Right to Know, N.Y. L.J., Feb. 19, 2003, at 5, <http://digitalcommons.pace.edu/lawfaculty/698/>.

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Open Meetings: Land Use Mediation and the Public's Right to Know

Written for Publication in the New York Law Journal
February 19, 2003

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Abstract: Great uncertainty surrounds the New York Open Meetings Law (OML), a law that permits the public to attend meetings of public bodies. Obviously, the OML becomes especially crucial in the area of land use where public governmental meetings are the norm, and conflicts usually involve several interested parties. This article delves into OML issues such as, what constitutes a public meeting, and the importance of having meetings open to the public.

Questions about Open Meetings

Recently, a number of questions have arisen regarding the impact of the Open Meetings Law on "creative" methods of dealing with land use issues at the community level. In *Matter of Riverkeeper, Inc. v Planning Board of the Town of Somers*, (Sup. Ct. West. Co. 2002), a non-profit environmental advocate was denied permission to accompany the planning board on a visit to a 628.5 acre site that was the subject of an application for a subdivision approval. The Open Meetings Law (OML) requires the meetings of public bodies to be open to the public. The question at bar was whether a site visit by a public body was the type of meeting that the OML intended the public to attend.

In a nearby suburban community, the officially appointed Master Plan Revision Committee held an educational session to learn about the strategic options the law provides to create orderly patterns of development. The meeting was closed to the public over the objection of owners of critically situated properties. This situation presents several questions: is an advisory committee of this type a public body? Is such a gathering a meeting subject to the OML? Is the public's right to observe the deliberations of public bodies in any way implicated by a meeting designed solely to educate a public advisory body? Does it matter that a majority of the Town Board and Planning Board of the community was in attendance at the workshop?

What if the Town Board or City Council appoints an advisory board for the purpose of recommending extensive amendments to the zoning laws of the community? Normally, the planning board advises the legislative body on these matters, but it is within the discretion of the local legislatures to appoint advisory committees for a host of purposes. When that purpose is to propose amendments to local zoning laws, must the meetings of the advisory board be open to public attendance?

Another local government encourages developers to engage the public in discussions about their potential projects before making formal applications to local boards for approval. Sometimes this happens after a sketch plan has been submitted to the local zoning enforcement officer. Other times it occurs before any plan has been created. In some communities, developers, at their own initiative, reach out to the community to get input in the early stages of designing their proposals. In several instances, "concept committees" have been appointed to work with potential applicants for land use approvals to develop alternative proposals for the developer to consider prior to formal application. In any of these cases, do the meetings of the groups assembled have to be held in compliance with the Open Meetings Law?

There are a variety of times during the land use approval processes, when the formal process permits informal mediations of disputes that arise. Pre-submission workshops are sometimes held as a matter of informal practice in some communities and as a matter of legal requirement in others. When such workshops are held, are they public meetings subject to the strictures of the OML? Must the public be given notice and allowed to attend and listen to the proceedings?

The law allows a variety of creative methods of resolving use matters outside normal channels. For example, state law allows comprehensive plans to be prepared by the legislative body or planning board, both established public bodies, or by an advisory group called a special board, open to the participation of interested parties as members of the board. The special board is advisory only and, after it recommends a comprehensive plan to the legislative body, the legislature must hold its own deliberative sessions on the plan, including a formal public hearing providing for public comment. Similar advisory groups can be appointed to advise local decision-making bodies in a variety of ways, such as amending the local zoning ordinance. In addition, state law allows the planning board and the applicant to waive required time periods for formal decision-making, allowing the applicant an opportunity to work with the interested public outside the normal process of public meetings and hearings. Regulations under the State Environmental Quality Review Act also allow such waivers.

Increasingly, negotiations among affected parties involved in land use decisions are mediated by professionals. These mediations have been occurring at all stages of the process: dealing with the formation of public policy, such as a

comprehensive plan or zoning amendment, and involving decisions on individual projects where disputes erupt at any point during the formal decision-making process. A 1996 study of the Lincoln Institute surveyed over 100 local land use conflicts in which mediation was used. Part of the study included a survey of over 400 participants 86 percent of whom reported favorable or very favorable views of the results of mediation. In short, they liked the mediated sessions that supplemented the traditional process of land use decision-making

Presumption of Openness

Why do these contexts raise questions about the public's right to attend? Why would those who organize and conduct these meetings want the public excluded? In short, what is at stake in addressing questions about the public's right to know.

There is no constitutional right to attend meetings of public bodies. In a democratic society, however, there is a fundamental understanding that public decision-making should be observed by the affected interests: the voters, residents, advocates, and taxpayers who care about the results. Requiring public meetings to be open is a recent, but pervasive, phenomenon. All 50 states now have laws that guarantee public access to public forums where decision-making occurs. Thomas Jefferson eloquently admonished those who doubted the wisdom of empowering the public with these words: "I know of no safe depository of the ultimate power of society but the people themselves, and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education." James Madison agreed: "Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge provides."

New York's Open Meeting Law is found in Article 7 of the Public Officers Law. It declares that "[i]t is essential to the maintenance of a democratic society that the public business be preformed in an open and public manner...." It is said that this raises a *presumption of openness* regarding all public body assemblages. The OML requires that all meetings of all state and local public bodies be open to the general public and that such meetings be held after adequate public notice, defined as conspicuous posting in one or more designated public locations. The law does not require that the public be permitted to speak, but only to observe.

Quieter Means of Deliberation

Against the weight of this wisdom, why would a master plan committee, zoning advisory group, consensus committee, or stakeholders' group, convened by a mediator, need to be held in private?

In the Riverkeeper case, it was because the landowner resisted allowing any individuals other than members of the Somers planning board from entering his private domain. The court held that a site visit is not a deliberative public meeting and denied the public the right to observe it. It noted that the visit was conducted solely for the purposes of observation and acquiring information to better understand the application. The court cited advisory opinions of the Committee on Open Government noting that all deliberations regarding information obtained on a site visit should occur at open meetings which the petitioner would be invited to attend. In *New Rochelle v. the Public Service Commission*, the court held that a tour by Commission members of areas affected by proposed utility routing was not a public meeting, but designed solely to provide commissioners with greater understanding of the issues. (150 A.D.2d 441, 2d Dept. 1989)

The members of the Master Plan Review Committee wanted their educational workshop to be held in private to enhance its educational value. The meeting was structured as a participatory exercise consistent with sound adult-education pedagogy. It was designed to eliminate distractions and to encourage active participation on the part of those attending. Members were encouraged to ask provocative questions in an atmosphere where no one would be second-guessing their motivations or positions. The sessions were managed so that specific properties, positions, and past controversies were not at issue. The session spanned a time that included breakfast and lunch and meal times were part of the session and food was provided to all who were invited.

Whether the meetings of advisory bodies are subject to the OML is itself an interesting question. Meetings of committees and subcommittees composed of members of public bodies themselves are subject to the OML. Several cases, however, hold that advisory committees established to deal with particular public issues where the committee has no power to make a binding or final decision are not. In *Goodson Todman Enterprises, Ltd. V. Town Board of Milan*, it was held that an advisory committee created to recommend revisions to the town's zoning law was outside the scope of the OML. (151 A.D.2d 642, 2d Dep't 1989). Whether a special board to recommend a comprehensive master plan to the legislative body is subject to the OML may be a slightly different matter since state law provides specifically for the creation of such an advisory group. In fact, most communities readily open all meetings of committees established to advise regarding land use matters, including revision of the comprehensive plan.

When a developer decides on his own to establish a concept committee of stakeholders representing all interests affected by the land's development, that committee is clearly not a public body whose meetings must be open. The group may wish to deliberate in private to avoid the posturing that can occur when the press and other parties are in attendance. Public meetings must be held in rooms big enough to accommodate all interested in attending, and there is some

benefit to holding informal discussions designed to advise a developer in more intimate settings, conducive to building trust and having quieter deliberations.

Is the result different when members of the decision making body are invited? Clearly, when a majority of the planning board, for example, is invited to a meeting by a developer to discuss a matter pending before the board, the OML applies. The fact that the meeting is convened by someone who is not a public officer is not dispositive. "Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action." (*Orange County Publications v. City of Newburgh*, 60 A.D. 409 (2d Dep't 1978)). But where one or two members of the decision-making body are invited as observers to meetings of affected stakeholders, it is doubtful that the gathering is a meeting, under the OML. Although the definition of "meeting" is to be broadly interpreted, when an informal stakeholders group is formed which involves fewer than a quorum of the decision-making body, and which has no authority to make any final or binding decision, it is doubtful that the OML net has been cast far enough to cover it.

Even when a stakeholders' group is formed at the behest of the planning board and charged to be fact finders, issue spotters, and advisors to the board which retains its independent authority to make fact based decisions in the public interest, it is doubtful that such a group is subject to the OML. Where no quorum of the planning board is appointed or present and such a group is vested with no authority to act, can it be said that its meetings are public and required to be open?

Conclusion

Having identified a small circumference of land use "deliberations" that may take place in private, the questions persists: why is it necessary to exclude the public? In many cases, trained mediators and experienced public officials resist closing meetings that may be held privately. Closed meetings can offend those left out and create problems in subsequent open public meetings where their suspicions and upsets will be aired. Any private interactions that need to occur to bring parties to settlement are conducted outside the courtroom and can be conducted outside the formal meeting process, as well.

Those with experience in managing the public can accommodate openness in most cases. They start, as does the law, with a strong presumption that meetings relating to public matters, even if not public meetings in a legal sense, should be open. The public will understand the need of advisory groups, even public bodies, to be educated in proper settings. In most other instances, the organizers of meetings outside the scope of the OML can create ways of making their meetings productive while involving public observers. Madison and Jefferson would be delighted to know that democracy is still vital enough at the local level to find us worrying about how to manage robust public curiosity about the outcome of land use disputes.