APPENDIX B

New York State Committee on Open Government Opinions
(8 Pages Follow)

State of New York
Department of State
Committee on Open Government

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July 23, 2001

OML-AO-3339

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear

I have received your letter in which you asked that I review a notice given prior to a meeting held jointly by the Town Board and the Planning Board of the Town of Monroe and comment with respect to its propriety. In brief, the notice indicated that a meeting would be held at 7:30 and that "[i]mmediately upon opening, the meeting will adjourn into executive session to discuss contractual negotiations for the acquisition of property" (emphasis added).

You expressed the belief that:

"...the intent was to let the public know that we needed to discuss an important matter (I believe that it was the acquisition of real property where the price might be affected) before we met with a second group of people. We did not want the public to show up at the appointed time and become angry with us for immediately going into executive session without any warning. Many times people that come to our meetings are coming home from work in the city and we try to let them know what's going on. There was no intention of trying to cover something up. In fact it was exactly the opposite."

In this regard, by way of background, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

"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..."

In consideration of the foregoing, it has been consistently advised that a public body, in a technical sense, cannot schedule or conduct an executive session in advance of a meeting, because a vote to enter into an executive session must be taken at an open meeting during which the executive session is held. In a decision involving the propriety of scheduling executive sessions prior to meetings, it was held that:

"The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive session' as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law section 100[1] provides that a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Cty., Chemung Cty., July 21, 1981; note: the Open Meetings Law has been renumbered and §100 is now §105].

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, an alternative method of achieving the desired result that would comply with the letter of the law has been suggested in conjunction with similar situations. Rather than scheduling an executive session, the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting. I understand that the intent was to be considerate to the public, and by indicating that an executive session is likely to be held (rather than scheduled), the public would implicitly be informed that there may be no overriding reason for arriving at the beginning of a meeting.

Lastly, based on the information that you provided, it appears that an executive session could properly have been held. Section 105(1)(h) of the Open Meetings Law states that public body may enter into executive to discuss "the proposed acquisition, sale or lease of real property....but only when publicity would substantially affect the value thereof."

I hope that the foregoing serves to clarify your understanding of the Open Meetings Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-o3339
3339

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OML-AO-4616

April 29, 2008

E-MAIL

TO:

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Barnes:

I have received your letter in which you raised questions relating to the Open Meetings Law.

In this regard, first, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "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..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

In construing the exception concerning litigation, it has been held that:

> "The purpose of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation.

With regard to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public

body must identify with particularity *the* pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

The emphasis in the passage quoted above on the word "*the*" indicates that when the discussion relates to litigation that has been initiated, the motion must name the litigation. For example, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Village of Watkins Glen." If the Board seeks to discuss its litigation strategy in relation to a person or entity that it intends to sue, and if premature identification of that person or entity could adversely affect the interests of the Village and its residents, it has been suggested that the motion need not identify that person or entity, but that it should clearly indicate that the discussion will involve the litigation strategy. Only by means of that kind of description can the public know that the subject matter may justifiably be considered during an executive session.

Second, there is no requirement that minutes of meetings be posted on a website. An agency may choose to do so, but there is no obligation to do so.

I hope that I have been of assistance.

RJF:tt

cc: Board of Trustees

OML-AO-o4616
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OML-AO-4809

September 9, 2009

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Hamilton County Industrial Development Agency. Specifically, you questioned whether repeated motions to enter into executive session to discuss "the legal and financial aspects of the Mt. Oak project", "the status of the litigation concerning Oak Mt. Ski Center", "foreclosure proceedings" and "the Oak Mt. project and the financials related to the project" were in keeping with the provisions regarding executive sessions. You submitted minutes from nine separate meetings, seven of which include an explanation that "no action was taken" during the executive session. In this regard, we offer the following comments.

First, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Section 105(1) states in relevant part that:

> "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..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

Second, it has been held judicially that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807)."

We stress that a public body may validly conduct an executive session only to discuss one or more of the subjects listed in §105(1) and that a motion to conduct an executive session must be sufficiently detailed to enable the public to ascertain whether there is a proper basis for entry into the closed session.

It would appear that the one of the pertinent grounds for entry in executive session would have been §105(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation".

Based on judicial decisions, the scope of the so-called litigation exception is narrow. While the courts have not sought to define the distinction between "proposed" and "pending" or "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner consistent with the general intent of the grounds for entry into executive session. Specifically, it has been held that:

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based on the foregoing, the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, so as not to divulge its strategy to its adversary, who may be present with other members of the public at the meeting. We note too, that the Concerned Citizens decision cited in Weatherwax involved a situation in which a town board involved in litigation met with its adversary in an executive session to discuss a settlement. The court determined that there was no basis for entry into executive session; the ability of the board to conduct a closed session ended when the adversary was permitted to attend. In the context of the matter at issue, if a representative of Oak Mt. was invited to attend the executive session, the Board, in our view, would have lost its authority to conduct a private session.

With regard to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity *the* pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co. , Inc. v. Town Board, Town of Cobleskill, 444 NYS 2d 44, 46 (1981), emphasis added by court].

The emphasis in the passage quoted above on the word "the" indicates that when the discussion relates to litigation that has been initiated, the motion must name the litigation. For example, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Hamilton County IDA." If the IDA Board seeks to discuss its litigation strategy in relation to a person or entity that it intends to sue, and if premature identification of that person or entity could adversely affect the interests of the IDA and its constituents, it has been suggested that the motion need not identify that person or entity, but that it should clearly indicate that the discussion will involve the litigation strategy. Only by means of that kind of description can the public know that the subject matter may justifiably be considered during an executive session.

Accordingly, it is our opinion that the IDA should have been more articulate in describing the "litigation" which was the subject of its discussion. If the discussion pertained to foreclosing against the owners of Oak Mt., the motion should have so indicated, and the discussion should have been limited to the IDA's litigation strategy. Additionally, in our opinion, an update on the status of legal proceedings would not necessarily rise to the level of discussion concerning strategy, and, therefore, may not have been an appropriate topic for executive session.

To the extent that it was necessary to discuss the financial history of a particular person or corporation, pursuant to the Open Meetings Law, §105(1)(f), any such discussion should have been similarly limited to financial information, in our opinion, after which the Board should have returned to public session.

On behalf of the Committee on Open Government, we hope that this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Industrial Development Agency

OML-AO-o4809
4809

State of New York
Department of State
Committee on Open Government

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OML-AO-4813

September 16, 2009

E-Mail

TO:

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear

I have received your letter in which you asked that I review minutes of meetings of the Mamaroneck Town Board for the purpose of offering advice concerning the adequacy of its motions for entry into executive sessions.

In this regard, having reviewed the minutes of several meetings, I note that §106 of the Open Meetings Law requires that minutes consist of a "record or summary" of motions; it does not require that minutes contain a verbatim account of a motion. Whether the references to motions to enter into executive session as they appear in the minutes reflect the entirety of the words used in the motions, or merely a summary of the motions, is unknown to me. Nevertheless, in an effort to provide guidance, I offer the following comments.

By way of background, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "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..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

The provision that deals with litigation is §105(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be

contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation.
With regard to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity *the* pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co. , Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

As such, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Town of Mamaroneck."

One of the phrases that appears repeatedly in the minutes is "employment history." The provision concerning the possibility of discussing that subject in executive session is §105(1)(f), which permits a public body to enter into executive session to discuss:

> "...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..." (emphasis added).

Due to the presence of the term "particular" in §105(1)(f), I believe that a discussion of "employment history" may be considered in an executive session only when the subject involves a particular person or persons.

It has been advised that a motion involving §105(1)(f) should be based on its specific language. For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session.

Similarly, with respect to "collective bargaining", the only ground for entry into executive session that refers to that topic is §105(1)(e), which permits a public body to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law." Article 14 of the Civil Service Law is commonly known as the "Taylor Law", which pertains to the relationship between public employers and public employee unions. As such, §105(1)(e) permits a public body to hold executive sessions to discuss collective bargaining negotiations with a public employee union.

In terms of a motion to enter into an executive session held pursuant to §105(1)(e), it has been held that:

> "Concerning 'negotiations', Public Officers Law section 100[1][e] permits a public body to enter into executive session to discuss collective negotiations under Article 14 of the Civil Service Law. As the term 'negotiations' can cover a multitude of areas, we believe that the public body should make it clear that the negotiations to be discussed in executive session involve Article 14 of the Civil Service Law" [Doolittle, supra].

A proper motion might be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the police union."

Lastly, references were made to matters relating to the leasing of real property. The provision of potential relevance, §105(1)(h), permits a public body to conduct an executive session to discuss "the proposed acquisition, sale or lease of real property...but only when publicity would substantially affect the value thereof." In some circumstances, disclosure of the location of a parcel could substantially affect the value of the parcel. For instance, if a municipality wants to purchase a parcel for a new facility and is considering several locations, none of which are known to the public, disclosure of the sites could result in speculation or current owners raising prices, to the detriment of taxpayers. That being so, it has been advised that a motion under §105(1)(h) should indicate that the public discussion of the proposed action would "substantially affect the value" of the property.

I hope that I have been of assistance.

RJF:jm

cc: Town Board
Christina Battalia

OML-AO-o4813
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