

FIRE COUNSEL NOTES



Open Government

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The Fall 2009 Fire Counsel Notes column discussed Senate Bill 189 (Public Act 96-542) which wrought major changes to the Freedom of Information Act (5 ILCS 140) and also amended the Open Meetings Act (5 ILCS 120) by, among other changes, adding two new sections to that law—1.05 and 3.5. Section 1.05 now requires each unit of local government to designate “employees, officers, or members to receive training on compliance with this Act” [the Open Meetings Act]. (5 ILCS 120/1.05) Section 3.5 creates a new process for review of alleged Open Meetings Act violations by the “Public Access Counselor” in the Office of the Attorney General. (5 ILCS 120/3.5) Fire protection districts, as units of local government, are subject to the provisions of these new requirements and need to be aware of them. Senate Bill 189 reflects the continued emphasis from the General Assembly, at the behest of the Attorney General, for more “open government” at the local level in Illinois. To that end, it may be a good time to look at a couple of recent court decision under the Open Meetings Act to see how the courts have interpreted the law in the context of an actual meeting where OMA violations are alleged to have occurred.

In the just released opinion of *In re PETITION TO DISCONNECT CERTAIN TERRITORY COMMONLY KNOWN AS THE FOXFIELD SUBDIVISION AND ADJOINING PROPERTIES FROM THE VILLAGE OF CAMPTON HILLS*, No. 2-09-

0331 (Appellate Court of Illinois, 2d District, December 9, 2009), the Illinois Appellate Court considered a challenge to action taken by a village board in adopting an annexation ordinance at a special meeting. The action was challenged on three separate grounds, all of which were rejected by the Appellate Court. It is instructive to consider each argument to see how the court dealt with them in the context of the Open Meetings Act as applied to an actual meeting.

The challengers first argued that the notice of the special meeting was defective because it was not posted where it could be viewed at all times. Section 2.02 of the Open Meetings Act (5 ILCS 120/2.02) requires that a notice of a special meeting be posted at least 48 hours in advance of the meeting with the agenda for the special meeting included in or made part of the notice. Only matters identified in the special meeting notice and agenda may be considered at the meeting. In this case, it was asserted that the notice and agenda for the challenged meeting were only visible to the public for 14 hours before the meeting because it was posted at the village hall and was only visible during business hours when the building was open from 9 a.m. to 4 p.m. Finding no prior Illinois case which had considered this issue, the Appellate Court turned to decisions from Texas court cases for guidance. These cases held that a meeting notice need not be “continuously available” to the public at all times from its posting to meet an advance notice requirement.

Here, the Appellate Court ruled that so long as the meeting notice and agenda for the special meeting is posted at least 48 hours in advance at the public body’s principal office or the location of the meeting if there is no principal office, the court found the notice to be sufficient even though the public might not have continuous access to the notice and agenda for a full 48 hours prior to the meeting.

The agenda posted for the special meeting was also challenged. Specifically, the agenda listed “Discussion and Consideration of potential annexation of property” as one of the agenda items and the one under which the challenged action [the adoption of an annexation ordinance] was taken. It was argued by the challengers that the agenda should have identified the parcel which was being considered for annexation and its location and that in the absence of that information in the agenda, the public had insufficient notice of the proposed action by the village board and no meaningful ability to “participate in the meeting, lobby Village trustees, or rally public support against the annexation”. The Appellate Court rejected this contention. The court held that the listing in the agenda was sufficient to meet the requirements of the law that the actions taken at the special meeting be “germane” to the items listed on the agenda for the special meeting. The court differentiated the case before it, which dealt with a special meeting, and the decision in the often cited

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Rice v. Board of Trustees of Adams County, 326 Ill.App.3d 1120 (2002) case which dealt with consideration and action on matter at a regular meeting. Instead, the Court looked again to a Texas decision where the question of sufficiency of a meeting notice had been examined. After reviewing that decision in which the court held that a notice need not be "tailored to reach those specific individuals whose private interests are most likely to be affected by the proposed government action", the Appellate Court stated:

Our Open Meetings Act does not require that an agenda be specifically detailed or that it be tailored to reach those specific individuals whose private interests are most likely to be affected by the actions of the public body. It requires only that the action taken at a special meeting be germane to the agenda listed in the notice.

The third argument made by the challengers was that the special meeting itself was in violation because it was inconvenient and inaccessible contrary to Section 2.01 of the Open Meetings Act. Specifically, the challengers argued that the public was forced to leave the building where the meeting was held and wait outside in a parking lot on a "cold and blustery night" while the village board held a closed session which lasted until 1:15 a.m. when the board resumed its meeting in open session and took up the adoption of the challenged annexation ordinance. In examining this argument, the Appellate Court looked back to the decision in Gerwin v. Livingston County Board, 345 Ill. App. 3d 352 (2003) which had interpreted the requirement of Section 2.01 that meetings be "convenient and open to the public". Gerwin had held that holding a meeting on a controversial landfill proposal in a room which was too small to accommodate the number of members of the public who desired to attend the meeting did not meet the requirements of Section 2.01. Here, the Appellate Court determined that a different situation existed. Merely because the challengers were inconvenienced when required to leave the meeting during the closed session and wait until the "wee hours" of the morning for the meeting to resume open session did not rise to the level of inaccessibility and inconvenience which existed in the Gerwin case. The court

pointed out that the General Assembly did not, in enacting the Open Meetings Act, require that meetings be held only in good weather or that provisions be made for the public when a proper closed session is conducted.

A second case worth looking at is Wyman v. Schweigart and the City of Champaign, 385 Ill. App. 3d 1099 (4th Dist., 2008) in which violation of the Open Meetings Act was asserted on multiple grounds. There it was argued by the challenger that a "secret meeting" had been conducted. After examining the grounds asserted to constitute violations of the Open Meetings Act, the Appellate Court found that there were no violations. Specifically, the court found that the "pending litigation" and "property acquisition" exceptions under the Open Meetings Act which permit a closed session to be held were properly invoked even though the motion made to enter the closed session did not specifically reference that the litigation was "pending". The court came to this conclusion because the record of the meeting contained a reference to "land acquisition and pending litigation". [In so doing, the court distinguished one of its own earlier decisions, Henry v. Anderson, 356 Ill. App. 3d 952 (4th Dist., 2005), where it had ruled that in order to validly enter into a closed session under the litigation exception the litigation had to be "pending" [filed] or there had to be finding in the record of the meeting that litigation is "probable or imminent".] The court in Wyman noted that "generally calling attention to an exception is sufficient to meet the requirement that public body cite the 'specific exception contained in [s]ection 2 of the [the] Act which authorizes the closing of the meeting to the public.'" It found that a reference in the record of the meeting was sufficient to meet this requirement.

The court in Wyman also found that it was not necessary that each board member's vote on the motion to enter closed session be recorded individually. The contention that a voice vote fails to meet the requirement of the Act was also rejected. Because there was evidence from the meeting record and the evidence presented by the village that the voice vote was unanimous, the court found that the public could thereby ascertain how each member had voted on the motion to enter the closed session and the action of the board to enter into closed session was valid.

The court also rejected the contention that the agenda for the meeting during which a closed session was held had to disclose that there would be a closed session. Citing the plain language of Section 2a of the Open Meetings Act (5 ILCS 120/2a), the court noted that it was clear that a closed session could be held during any properly noticed open meeting to consider a topic which was properly the subject of a closed session.

Last, the court in Wyman rejected the contention that only members of the "public body" [here, members of the city council] could attend a closed session. The court agreed with the trial court that the Open Meetings Act does not specify who may and may not be present for a closed session and that it is the determination of the public body which controls who should be in attendance until such time as the General Assembly modifies the law.

What do these two cases tell us? The answer is that courts when confronted with a challenge under the Open Meetings Act to a public body's meeting or action, will generally take a common sense approach in interpreting the law. Having said this, the lesson for public bodies, like fire protection district boards of trustees, is that care needs to be taken in complying with the Act since dissatisfied persons can mount challenges based on what can be the very technical requirements of the Open Meetings Act. While the decisions in the Campton Hills and the Wyman cases show that good faith efforts to conduct the business of the district in compliance with the Act should not result in Open Meetings Act problems, courts will only protect public bodies, like fire boards, where there is reasonable compliance. For example, consider whether the court in Campton Hills would have taken the same view if a notice of a special meeting were posted in a closed fire station with no public access whatsoever prior to the time of the meeting? Or consider in Wyman whether the outcome might have been different if the city manager had not made a passing reference to "land acquisition and pending litigation" which made it in the minutes of the meeting? Districts should take from these cases that they need to be familiar with and adhere to the requirements of the Act so that they do not find themselves explaining to a court why an Open Meetings Act violation did not occur. ■