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Memorandum

To: Skagit County Planning Commission
CC: Gary Christensen, Director, Planning and Development Services
Jill Olson, Civil Deputy Prosecuting Attorney
From: Ryan Walters, Special Deputy Prosecuting Attorney
Date: June 12, 2009
Re: Washington State Open Public Meetings Act

I. Overview

I have been asked to provide a summary of planning commissioners' obligations to the public in terms of open meetings and communications. As you should already know, governing bodies in Washington State are required to open their meetings to the public under legislation enacted in 1971 known as the Open Public Meetings Act ("the OPMA"). The OPMA begins with this memorable declaration:

The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.¹

The Act's two basic rules require (1) all "meetings" of governing bodies, including planning commissions, to be open to the public,² and (2) all "action" taken by such bodies to occur at open public meetings.³ Because the Act defines these terms broadly, and further directs that these rules be liberally construed,⁴ the resulting legal framework does not lend itself to accurate interpretation based on the plain English meaning of the words.

¹ RCW 42.30.010.

² RCW 42.30.030.

³ RCW 42.30.060.

⁴ RCW 42.30.910. Exceptions to the openness requirements are similarly narrowly construed. *Miller v. City of Tacoma*, 138 Wn.2d 318, 324, 979 P.2d 429 (1999).

II. Definitions

A. Meeting

Under established interpretations of the Act, a “meeting” includes any situation in which a quorum of the Commission takes “action.”⁵ Thus whether a meeting has taken place is dependent on what occurred in the meeting; if anything constituting action occurs, the meeting must be public or the action is null and void.⁶

B. Action

The Act defines “action” as “the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions.”⁷ Thus, even simple conversation of a matter before the Planning Commission, or other business of the Commission, or other topics related to the Commission’s work, constitutes “action.” No vote is required to meet the definition.

III. E-mail & Telephone Communication

As discussed above, the Act does not distinguish between meetings in person and meetings via telephone or other means. Therefore, e-mail discussions of business among a quorum of the Planning Commission constitute an illegal meeting.⁸ As the Court of Appeals found in *Wood v. Battleground School District*, “the mere passive receipt of email does not automatically constitute a ‘meeting.’”⁹ The threshold for an illegal exchange, therefore, is whether a quorum of the Planning Commission engages in the e-mail discussion. Case law does not settle whether an e-mail sent to the entire commission, but replied to by fewer than a quorum, would violate the Act or not. The best practice, therefore, is to avoid all e-mail communication among members, or at least any e-mail Replies-to-All.¹⁰

IV. “Chain” Meetings

Outside of a public meeting, exchanges between commissioners and staff and then back to a majority of commissioners, or between several commissioners and a single commissioner and then relayed back to a majority of commissioners (either individually or as a group), whether by telephone, e-mail, or in-person communication constitute a “chain” meeting. Chain meetings are almost certainly as illegal under the OPMA as any other type of meeting.¹¹

V. Executive Sessions

The OPMA allows governing bodies to meet behind closed doors in an executive session for a defined list of purposes, for example, “to evaluate the qualifications of an applicant for public employment,”¹² and “to consider matters affecting national security.”¹³ The exception related to the receipt of legal advice is similarly narrow:

⁵ For more on the quorum requirement, see *Eugster v. City of Spokane*, 128 Wn. App. 1, 8, 114 P.3d 1200 (2005).

⁶ RCW 42.30.060(2).

⁷ RCW 42.30.020.

⁸ *Wood v. Battleground Sch. Dist.*, 107 Wn. App. 550, 27 P.3d 1208 (2001).

⁹ *Id* at 564.

¹⁰ E-mails exchanged among members may also be public records that the county is obligated to disclose under the Public Records Act.

¹¹ See discussion of holdings of other jurisdictions on this topic in *Wood v. Battleground Sch. Dist.* at 563, and the Washington Attorney General's Open Records & Open Meetings Deskbook, at 1.3A (available at <http://www.wa.gov/ago/records/chapter1.html>).

¹² RCW 42.30.110(1)(g).

¹³ RCW 42.30.110(1)(a).

To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.¹⁴

Because the purposes for which a governing body may meet in executive session are quite limited, and because actions of the Planning Commission itself (as opposed to later action of the Board of Commissioners adopting a recommendation of the Planning Commission) would rarely give rise to litigation, we do not foresee any situations in which it would be appropriate for the Planning Commission to hold an executive session.

VI. Other Rules

The Act includes three additional provisions that the Planning Commission should keep in mind as it conducts its business.

First, secret voting is in all cases prohibited, including for election of officers.¹⁵ Any such vote is null and void.¹⁶

Second, holding a public meeting means admitting every member of the public; no one may be excluded or may be required to sign in to attend such a meeting.¹⁷ The OPMA does not, however, prevent the Planning Commission from limiting the time attendees may speak at the meeting, nor does it prevent the commission from prohibiting all public comment at a meeting. The Commission must follow the county's public participation rules, however.

Third, if the public disrupts a meeting, the Planning Commission may remove the disrupter. If removal is insufficient, the Commission can order the room cleared, except for the news media, and continue the meeting.¹⁸

VII. Penalties

Any person may bring a civil suit in Superior Court against any member of the Planning Commission who attends a meeting (remember, meeting is broadly defined, and an email conversation may constitute a meeting) where action is taken without compliance with the Act. The member in attendance is subject to personal liability in the amount of \$100 per meeting and the public agency could have to pay plaintiff's costs.

¹⁴ RCW 42.30.110(1)(i).

¹⁵ RCW 42.30.060.

¹⁶ Id.

¹⁷ RCW 42.30.040.

¹⁸ RCW 42.30.050.