

## 6- WISCONSIN'S OPEN MEETING LAW

All board and council meetings, plan commission meetings, zoning board meetings and hearings, and any ad hoc citizen or advisory meetings authorized by a governmental body must comply with the Wisconsin Open Meetings Law<sup>i</sup>. The law is intended to give the public prior notice of meetings of governmental bodies and to assure that they are held in places that are reasonably accessible and open to the public. Some meetings or portions of meetings are permitted to be held as closed sessions but, generally, discussion and decision-making at governmental meetings must be conducted in open session and motions and voting must be open and recorded.

The zoning board usually designates its secretary or a staff person to provide proper notice of board meetings and hearings. However, board members must individually determine compliance with all aspects of the Open Meetings Law in deciding whether to participate in a meeting. Though most meetings must be open to public attendance, the law does not require all meetings to provide a forum for public comment.

### WHAT CONSTITUTES A MEETING?

Under the law a *meeting* is a gathering of members of a governmental body for the purpose of exercising responsibilities and authority vested in the body. A meeting occurs when both a **purpose test** and a **numbers test** are met:



(Photo courtesy Dan Wilson)

- **The purpose test** is met when discussion, information gathering or decision-making take place on a matter within the jurisdiction of the governmental body.
- **The numbers test** is met when enough members of the body are present to determine the outcome of an action. By statute, if one-half of the members of the body are present, there is presumed to be a meeting unless the purpose test is not met.

A lesser number of members may also meet the numbers test when a supermajority of, say, 4 votes out of a 5-member zoning board are required to determine an issue. In such a case, a “negative quorum” of 2 members is sufficient to meet the numbers test, because 2 members are enough to block passage).

**Phone conferences and emails** may constitute a meeting if the numbers and purpose tests are met. A sequence of phone calls or emails to “line up votes” or conduct other zoning board business (known as a *running quorum*) constitutes an illegal meeting since it is not noticed and open to the public.

**Chance and social gatherings and conferences** where the numbers test is met are not meetings provided the purpose test is not met (i.e. no board business is discussed).

**Site inspections** by the zoning board must comply with the Open Meetings Law if the purpose and numbers tests are met. If board members travel to an inspection site together, they should refrain from discussing board business while in transit. Inspections where no testimony is taken and no discussions are held constitute meetings if the numbers test is met since their intended purpose is to gather information relating to board business.

## MEETING ACCESS AND NOTICE

### Open Meetings

Unless specifically exempted, all meetings of governmental bodies must be open to the public and reasonably accessible to the public, including persons with disabilities.

### Notice Of Meetings

Notice of a public meeting is required and may be accomplished by posting in one or more public places likely to give notice to the public and those affected by the decision.<sup>ii</sup> (A minimum of three locations is recommended.)

Paid, published notices are not required by the Open Meetings Law. However, where other statutes require paid publication of a hearing or meeting notice, the following Open Meetings Law requirements may be incorporated in the published notice (posting is recommended in addition to publication):

- 1) **24-hour prior notice.** Notice of a public meeting must be provided at least 24 hours prior to the meeting. Where such notification is impossible or impractical for good cause, notice may be provided not less than 2 hours prior to the meeting.
- 2) **Notice to media.** Notice (written, phone or fax) must be provided to any media who have filed a written request and to the governmental unit's official newspaper, or, if there is no official newspaper, to media likely to give notice in the area.
- 3) **Separate notices.** A separate notice is required for each meeting (a general notice at the beginning of the year is not sufficient).
- 4) **Content of notice.** Notice must specify the time, date, place and subject matter of the meeting, any contemplated closed session and intent to reconvene in open session within 12 hours after completion of a closed session.<sup>iii</sup> The notice must describe issues on the agenda in enough detail to allow them to be identified by those likely to be affected by any decision. It may provide for a period of public comment and discussion. However, only issues included in the public notice and agenda may be decided.

**Class 1 notice** – 1 newspaper publication at least one week before the act or event.<sup>iv</sup>

**Class 2 notice** – 2 newspaper publications, at least once each week for consecutive weeks, the last at least one week before the act or event.<sup>v</sup>

## Posting

A notice must be displayed in at least 3 public places likely to give notice to the public and those affected by a decision.<sup>vi</sup>

In computing the time for publication, the first day of publication is excluded and the day of the event/meeting is included.<sup>vii</sup> Newspaper publication must be in the community's *official* newspaper or, if no official newspaper is designated, in a newspaper likely to give notice in the affected area.<sup>viii</sup>

## Notice Contents

The following information should be included in the notice:

- Name of the governmental body that will meet.
- Date, time and location of hearing.
- Name of the applicant, appellant or petitioner.
- Location of property involved.
- General description of the proposed project and nature of the request (variance, conditional use/special exception or appeal).
- Subject matter, statutory authority (recommended) and notice of any anticipated closed session and any intent to reconvene in open session within 12 hours after completion of a closed session.<sup>ix</sup> (Review the exemptions and procedures for closed sessions.)
- Notice that interested persons may present testimony regarding matters on the agenda at the meeting/hearing or in writing to the board.
- Contact information for further information about the petition or application.

## Proof Of Notice

An affidavit of publication by a newspaper editor or his/her designee showing the name of the newspaper and dates of publication affixed to a copy of the published notice is presumptive evidence of publication.<sup>x</sup> A similar affidavit by a person posting legal notice showing the time, place and manner of posting serves the same function for posted notices.<sup>xi</sup>

## Agency Notification



### Department of Natural Resources (DNR) notification.

The appropriate local DNR office must be provided with 10-day prior notice of hearings on shoreland, shoreland wetland and floodplain zoning appeals, variances and conditional uses/special exceptions and provided with copies of related decisions within 10 days.<sup>xii</sup>

### Department of Agriculture, Trade and Consumer Protection (DATCP) notification.

DATCP must be notified of any approval in the case of a conditional use/special exception or variance in an exclusive agricultural zoning district under the state farmland preservation program.<sup>xiii</sup>

### Media Notification

The information provided in a published or posted notice must be provided by phone, fax or written copy to any media requesting it and to the community's official newspaper. If an official newspaper is not designated, notice must be given to news media likely to give notice in the area.<sup>xiv</sup>

### Notice To Other Parties

Notice must also be given by mail to the parties in interest.<sup>xv</sup> The parties include:

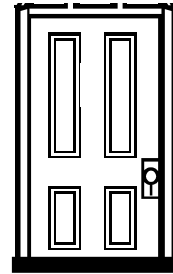
- the applicant/appellant/petitioner,
- a zoning officer whose decision is appealed and
- adjacent/nearby property owners as specified by ordinance.

## CLOSED SESSIONS

### Permitted Exemptions For Closed Sessions

Statutes provide specific exemptions from the Open Meetings Law, including but not limited to . . .

- **Deliberation concerning a case** that was the subject of a quasi-judicial hearing.<sup>xvi</sup> (The courts have determined a case to be an adversarial proceeding with opposing parties, not merely a petition for appeal or variance or an application for a conditional use permit.<sup>xvii</sup>)
- **Potentially damaging personal information.** (Financial, medical, social or personal histories or disciplinary data of *specific* persons that would be likely to have a substantial adverse effect on the reputation of a person.<sup>xviii</sup>)
- **Conferring with legal counsel.** (About strategy regarding current or likely litigation.<sup>xix</sup>)
- **Request to an ethics board.** Consideration of a request for confidential written advice from a local ethics board.<sup>xx</sup>



### Conduct Of Closed Sessions

1. Convene in open session. The body must initially convene in open session.
2. Move to closed session. To convene in closed session (from open session), the presiding officer must announce the specific subject matter and statutory authority for closure. A motion and recorded individual vote by a majority of the body are required to convene in closed session.
3. Attendance at closed sessions. Only members of the zoning board and those essential to the business for which the session was closed may attend a closed session. The zoning administrator or staff person who presented testimony and the

municipal counsel (if he/she represented the zoning department at hearing) should not attend closed sessions. Generally, members of the local governing body may not attend closed sessions of the zoning board. The board is not a subunit of the governing body since the governing body does not review board decisions. Therefore the statutory exemption which allows a parent body to attend closed meetings of its subunits does not apply.

4. Motions and decisions. Motions and decisions must be recorded. Where feasible, vote in open session.
5. Matters for discussion. The body may consider only the matter(s) for which the session was closed.
6. To reconvene in open session. Once a body convenes in closed session it may not reconvene in open session for at least 12 hours, *unless* public notice of its intent to return to open session was given in the original notice of the meeting. Absent such notice, the body should amend its agenda to place any closed session at the end of the agenda.<sup>xxi</sup> When there is good cause, 2-hour prior notice of a planned closed session and reopening can be provided to allow reopening a meeting but this approach is rarely necessary.

## VIOLATIONS AND LIABILITY

### Protecting Yourself

Zoning board members can be sued individually or as a group for alleged violations. Forfeitures (\$25-\$300) can be levied against members who break the law. The municipality may not reimburse members for these forfeitures.

There are basic steps local officials and plan commissioners can take to decrease the likelihood that they will violate the Open Meetings Law and incur personal liability.

- **Determine proper notice.** At the beginning of a meeting, each member of the zoning board should determine whether the meeting had proper notice. If compliance is questionable, the municipal attorney should be able to provide counsel on the matter.
- **Limit closed sessions.** Members should vote against convening closed sessions that are not authorized by specific exemptions of the Open Meetings Law. They should also insist that proper procedures be used to close and reopen sessions. Members who vote against convening a closed session may participate in the closed session if it is held.
- **Document the proceedings.** A log or minutes documenting proper notice and recording motions, rationale and any votes on abbreviated notice, amended agendas or closed sessions is a useful defense against allegations of Open Meetings Law violations (most often made by media or persons displeased by decisions).

## Decisions May Be Voided

A court may void an action taken by a body at an illegal meeting if it finds that the public interest in enforcement of the Open Meetings Law outweighs any public interest in sustaining the body's decision.

### NOTES:

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- <sup>i</sup> ss. 19.81-19.98, Stats.
  - <sup>ii</sup> OAG 86-76, 65 Op. Att'y Gen. 250 (1976) & s. 19.84(1) Stats.
  - <sup>iii</sup> ss. 19.84(2) & 19.85(2), Stats.
  - <sup>iv</sup> ss. 985.07 & 985.01(1), Stats.
  - <sup>v</sup> ss. 985.07 & 985.01(1), Stats.
  - <sup>vi</sup> s. 985.065(2)(a), Stats. concerns requirements for an official newspaper; s. 985.05(1), Stats. provides a posting option if there is no official newspaper; s. 985.02(2), Stats. provides guidelines for posting & s. 985.01(3), Stats. defines *municipality*.
  - <sup>vii</sup> s. 985.09, Stats.
  - <sup>viii</sup> ss. 985.03 & 985.05, Stats.
  - <sup>ix</sup> s. 19.85 (2), Stats.
  - <sup>x</sup> s. 985.12, Stats.
  - <sup>xi</sup> s. 985.02(2)(d), Stats.
  - <sup>xii</sup> ss. NR 115.05(6)(h) & NR 116.20(2)(d) Wis. Adm. Code; DNR notification is usually accomplished by providing a written copy of the notice.
  - <sup>xiii</sup> s. 91.75(5) Stats. Forms for notifying DATCP are available at 608-224-4648.
  - <sup>xiv</sup> ss. 19.84(1)(b) & 985.065, Stats.
  - <sup>xv</sup> ss. 59.694(6) & 62.23(7)(e)6, Stats.
  - <sup>xvi</sup> s. 19.85(1)(a), Stats.
  - <sup>xvii</sup> *state ex rel. Hodge v. Turtle lake*, 180 Wis.2d 62 (1993) 508 n.w.2d 301
  - <sup>xviii</sup> s. 19.85 (1)(f), Stats.
  - <sup>xix</sup> s.19.85(1)(g), Stats.
  - <sup>xx</sup> s. 19.85 (1)(h), Stats.
  - <sup>xxi</sup> s. 19.85(2), Stats.

[Paraphrased from *Zoning Board Handbook*, © 2001, University of Wisconsin-Extension, by Michael D. Dresen and Lynn Markham, Center for Land Use Education, UW-Stevens Point]

**(See page 216 of the Appendix for the actual statutory language of the Open Meeting Law.)**