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May 28, 2010

Keith Bergman
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Dear Board Members:

On July 1, 2009, Governor Patrick signed into law Chapter 28 of the Acts of 2009, "An Act to Improve the Laws Relating to Campaign Finance, Ethics, and Lobbying." Among its many provisions, this new law repeals *M.G.L. c.39, §23B* (the *Open Meeting Law* for municipal governmental bodies) and replaces it with new provisions, *M.G.L. c.30A, §§18-25*, which will be applicable to both state and municipal bodies, effective July 1, 2010.¹

Under *M.G.L. c.39, §23B* (now repealed), the District Attorney of the county in which the violation occurred was responsible for enforcement of the *Open Meeting Law*. The new statute, however, creates a Division of Open Government as a new department of the Attorney General's office, which will be responsible both for enforcement and for the creation of education materials and the provision of training to public entities. *M.G.L. c. 30A, §§19(b) and 23(a)*. The Attorney General will also provide a form that will need to be signed by all persons serving on a municipal board or commission within two weeks of qualification for office. *M.G.L. c.30A, §20(g)*. Although this provision does not appear to apply to existing members of municipal boards and commissions, it is advisable that such members also sign the Attorney General's certification form. According to the Attorney General's Office, this certification form will be available in the first week of June.

In general, both the new law and its predecessor prohibit a quorum of the members of municipal boards and commissions from engaging in any "deliberation," except in the context of a properly noticed public meeting. The new law, however, contains a broader definition of what constitutes deliberation. Under *M.G.L. c.30A, §18*, "deliberation" is "an oral or written communication through any medium, including electronic mail, between or among a quorum of a public body on any public business within its jurisdiction." It

¹ On May 28, 2010, the Senate adopted a resolution postponing the effective date of the provisions dealing with notice posting, the conduct of meetings and enforcement until November 1, 2010.

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excludes procedural communication, such as the distribution of a meeting agenda, provided that no opinion of a member is expressed. Under the new law, a “meeting” is any deliberation by a public body with respect to any matter within the body’s jurisdiction. *M.G.L. c.30A, §18*. Social encounters or attendance by a public body at a public or private gathering are excluded from the definition of “meeting” so long as the members do not deliberate. *Id.* This allows a quorum of members of one public body to appear at another body’s meeting without posting notice, so long as the members do not deliberate.

The new law still requires the board or commission to post notice of every meeting at least 48 hours prior to such meeting. *M.G.L. c.30A, §20*. In addition to stating the date, time, and place of such meeting, the notice must now also include “a listing of topics that the chair reasonably anticipates will be discussed at this meeting.” *M.G.L. c.30A, §20(b)*. Therefore, the practice of posting a permanent notice of a board’s regular meeting days, or a notice listing all of a board’s planned meetings for the year, will no longer suffice.

In addition, notice must now be posted both with the town clerk and “in a manner conspicuously visible to the public at all hours in or on the municipal building in which the clerk’s office is located.” *M.G.L. c.30A, §20(c)*. The new law does not specify the ways in which towns may satisfy this requirement. The Attorney General has advised that the most obvious means of satisfying this requirement is with an outdoor, weather-proof bulletin board containing all meeting notices. However, the Attorney General has accepted comments on alternative methods of meeting this requirement, and is expected to publish a range of options that meet the new posting requirement.

The new law requires that, before addressing a meeting of a board or commission, a person in attendance must have permission from the chair. *M.G.L. c.30A, §20(f)*. Anyone in attendance will still be allowed to make video and audio recordings of the meeting. *M.G.L. c.30A, §20(e)*. However, under the new law, the person must first notify the chair of such recording. *Id.*

The new law gives the Attorney General the power to issue regulations or letter rulings authorizing remote participation in board and commission meetings (*e.g.*, joining a meeting by conference call) as long as all members of the board or commission are audible to each other and a quorum is physically present at the meeting location. *M.G.L. c.30A, §20(d)*. If the Attorney General allows such remote participation, then members who are participating remotely may vote and shall not be deemed absent for the purposes of *M.G.L. c.39, §23D* (which, except in specified circumstances, prohibits board and commission members from voting on permit applications if they have not been present for the hearing thereon).

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The purposes for which a board or commission can enter into executive session are substantially unchanged under the new law.¹ As a minor addition, when a board or commission is discussing an individual's reputation, character, physical condition or mental health in executive session, that individual has the right (in addition to receiving advance notice, being present and having the advice of counsel) to create either a recording or a transcription of the session, at his/her expense. *M.G.L. c.30A, §21(a)(1)*.

Under the new law, the minutes of the meetings of a board or commission must now include, not merely a summary of the actions taken, but also a summary of the discussions on each subject and a list of documents and other exhibits used at the meeting (although the documents themselves do not need to be attached to the minutes). *M.G.L. c.30A, §22(a)*. All documents and exhibits used at open session meetings, as well as the minutes and notes or recordings used to prepare the minutes, are public records. *M.G.L. c.30A, §22(e)*.

If you have any questions or concerns about implementing this new law, please feel free to contact me.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Thomas J. Harrington', with a long horizontal flourish extending to the right.

Thomas J. Harrington

² Thus, the recent ruling of the Supreme Judicial Court in *District Attorney for the Northern District v. School Committee of Wayland*, 455 Mass. 561 (2009) appears to be unaffected by the new law. In that case, the School Committee convened in open session before voting to enter executive session to discuss a draft evaluation of a Superintendent. This draft evaluation had been compiled prior to the meeting from the submissions of the committee members. The Court found that the Superintendent's professional competence must be discussed in open session, although the open session may be followed by an executive session to discuss how the employee's professional competence will affect contract or salary negotiations. In addition, the Court found that an e-mail exchange leading up to the meetings was also a violation of the *Open Meeting Law*, because it was a private deliberation by the Committee.