



Recent Court Decisions Make Clear that Municipalities Must Identify Specific Litigation to be Discussed During Closed Meeting

Thomas R. Meagher

Foster Swift Municipal Law News

August 14, 2018

Introduction

The Michigan Open Meetings Act (“OMA”) is meant to enhance transparency, but its application is not always straightforward. Often, violations of the OMA are not intentional, but rather occur due to lack of knowledge about the law’s requirements.

Generally, the OMA requires that public bodies conduct meetings, make decisions, and conduct deliberations at meetings open to the public. However, the OMA provides exceptions allowing public bodies to go into closed session in some circumstances. For example, MCL 15.268(e) of the OMA permits a public body to go into closed session to discuss pending litigation with their attorney where doing so in an open session would have a detrimental financial effect on the trial or settlement position of the public entity.

New Cases from the Court of Appeals

The Michigan Court of Appeals (the “Court”) has recently addressed the scope of this exception in three related cases:

- *Bobic v. Delta College Board of Trustees* (2017, unpublished)
- *Andrich v. Delta College Board of Trustees* (2017, unpublished)
- *Anklam v. Delta College Board of Trustees* (2018, published)

The decisions involve similar sets of facts. Specifically, the Court analyzed the propriety of a Board calling for a closed session to discuss with counsel “specific pending litigation” without identifying the specific case it would be discussing. Additionally, in each case the Boards returned to open session to pass motions to accept their attorneys’ recommendations, but failed to indicate to what those recommendations pertained.

AUTHORS/ CONTRIBUTORS

Thomas R. Meagher

PRACTICE AREAS

Appellate Practice

Licensing - Professional - Business - Government

Municipal Litigation

Open Meetings Act



In each decision, the Court began its analysis by describing the purpose of the OMA, which is to: “promote governmental accountability by facilitating public access to official decision making and to provide a means through which the general public may better understand issues and decisions of public concern.” The OMA is interpreted broadly with those goals in mind.

In all three cases, the Court held that a public body must specify in the motion the case to be discussed in closed session, and not merely indicate that its discussion will relate to “specific pending litigation.”¹

Recommendation

In order to comport with the above decisions, we suggest that the agenda include a separate item indicating that the Board intends to go into closed session to discuss a specific case (for example, *Smith v. Jones; Saginaw County Circuit Court*). We suggest that the motion at the open meeting use the precise language from MCL 15.268(e), making sure to identify the specific case. Thus, the motion could be:

“I move to go into closed session to consult with the [municipality’s] attorney regarding trial or settlement strategy in connection with specific pending litigation, being *Smith v. Jones; Saginaw County Circuit Court*, because an open meeting would have a detrimental financial effect on the litigation or settlement position of the Township.”

That motion should be followed by a roll call vote.

In closed session that case and that case alone should be discussed. Presumably, counsel will make a recommendation concerning settlement strategy and/or continued litigation and when returning to open session, if appropriate in the given matter, the Board could make a motion to accept counsel’s recommendations offered during closed session.

Importantly, the Court now has held that it is not sufficient for the motion only be to “accept counsel’s recommendation during closed session,” but that instead more specific information regarding the motion is necessary. An approach could be to make the motion “I move to accept counsel’s recommendation regarding additional settlement and litigation activities in the case of *Smith v. Jones; Saginaw County Circuit Court*, as addressed during closed session.”

¹ Interestingly, the plaintiffs in these cases did not argue that the defendants violated subsection 8(e) by going into closed session to discuss unnamed litigation, but rather violated MCL 15.267(1) and 15.269(1), which both address procedural requirements pertaining to recording the “purpose or purposes” of decisions to go into closed session in board minutes. Plaintiffs argued that the “purpose or purposes” of such decisions is not clear unless the case name is identified pursuant to subsection 8(e).

If you would like to know more about how to comply with OMA rules and regulations, contact Thomas Meagher at 517.371.8161 or at tmeagher@fosterswift.com.