

THE OPEN MEETINGS ACT & LOCAL BOARDS & COMMISSIONS

By Andrea M. Pike and Carlito H. Young

All meetings of local government boards, committees, and commissions (both statutory and non-statutory) should conduct themselves as a public body under the Open Meetings Act, MCL 15.261, et seq. (OMA), because they may be legally obligated to comply with the OMA. If the body is doing work for the legislative body, it can be subject to the OMA because it is acting in the public interest and acting on behalf of the legislative body. Based on a recent court decision, it is better to comply now than be forced to do it all over again in compliance with the OMA later.

Creating the Committee

It is advisable to have every local government board, committee, and commission defined by an ordinance or have the committee create bylaws or rules of procedure to avoid future problems. It is important to define the committee and explain why it was created and what it is tasked to do. The legislative body can create an ordinance that defines the member, duties, the terms (years), how often to meet, and the basis for removal. The length of a committee and how often it meets will depend on whether its tasks are temporary, permanent, or periodic.

In lieu of an ordinance, the committee could create bylaws or procedures, but it would be beneficial to have the legislative body approve it to set parameters, so the committee is not acting outside of the scope of its duties. It is important to check the municipality's charter for guidance about creating committees. It is advisable to put in any documents creating the committee that the committee shall comply with the OMA and that it cannot allocate funds, which is a task reserved for the legislative or governing body. The committee will need to appoint members, a chair, and a recording secretary so there is someone in charge of running the meetings, posting notices, setting the agenda, taking minutes, etc.

Committee Membership

The committee could be a subcommittee comprised of less than a quorum of the legislative or governing body, but it is still advisable in that circumstance to still comply with the OMA. To obtain members of the public, a municipality will want to post a notice of open membership for a committee and accept applications. The municipality shall choose an applicant that has the appropriate background and experience for the duties the committee is tasked with. The applicants can be chosen by an individual, such as the city/village manager, mayor/president, or the governing/legislative body.

It is important to state the reasons for removing a member of the committee, other than expiration of the term. It is common to state that removal can be for malfeasance, misfeasance, or nonfeasance. The removal of a member prior to the expiration of a member's terms should be decided at a hearing before the legislative or governing body. The hearing is a chance to explain the wrongdoing or issues of a member and provide the member with an opportunity to defend the reason for removal. If you have an existing committee that does not have an ordinance, bylaws, or procedures to look for guidance, you can still create them. However, if you are looking to remove a member of a committee and there is no procedure set forth, do not simply kick them off or remove them since that could result in legal issues. You can let the member know that he or she can resign or have a hearing before the legislative or governing body.

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Open Meetings Act (OMA) Compliance

The purpose of the OMA is to promote government openness by providing greater public access and input into decision making and governing processes. The OMA requires public bodies, which can include committees, to conduct open, public meetings so there is transparency. The committee must provide notice of their meetings to comply with the OMA. The Notice must contain the name of the public body to which the notice applies, its telephone number if one exists, and its address. MCL 15.264(a). The notice must be posted at the municipality's principal office and any other location considered appropriate by the public body, including but not limited to the municipal's public website and meeting location. Meetings shall only be held, in a place available to the public, after proper notice has been given. MCL 15.263(1); MCL 15.265(1).

The committee must keep minutes of each meeting showing the date, time, place, members present, members absent, any decisions made at a meeting open to the public, and the purpose or purposes for which a closed session is held. The minutes shall include all roll call votes taken at the meeting. MCL 15.269(1). The committee shall make corrected minutes available at or before the next subsequent meeting after correction. The corrected minutes shall show both the original entry and the correction. MCL 15.269(1). There are exceptions to conducting everything in public, such as consulting with an attorney regarding trial or settlement strategy in connection with pending litigation, which can occur in closed session after a motion is passed, at a public meeting, to go into closed session. MCL 15.263; MCL 15.268(e).

OMA Implications

If the OMA is not followed, the work of the committee can be invalidated, even if it was just advising or making a recommendation to the legislative or governing body. Although the OMA discusses decisions and deliberations, the courts have recently expanded what is considered to be a decision. On July 31, 2024, the Michigan Supreme Court held that the City of Warren medical marihuana review committee was a public body because it was a governing body that was empowered by the city's

marijuana regulatory ordinance to score medical marijuana provisioning center license applications. *Pinebrook Warren LLC v. City of Warren*, ___ NW3d ___ (2024). The Michigan Supreme Court, in Pinebrook Warren, ruled that the actions of the review committee must be considered in addition to the language in the ordinance. Id. The Court held that it was the review committee, not the city council, that "did the work." The Court held that the scoring was exercising a governmental function, and as a result, the review committee was a public body that was subject to the OMA. The Court explained that the de facto work was scoring and ranking the applications, explaining that the scoring was not advisory because the review committee decided who would obtain dispensary licenses. Id. at 7. The Court reasoned that "the ordinance empowered the Review Committee to perform work that was integral to the licensing selection process." Id. at 9. Based on this ruling, the licenses originally issued by the Warren city council, based on the recommendation of the review committee five years prior were invalidated.

A decision made by a public body may be invalidated for the following reasons:

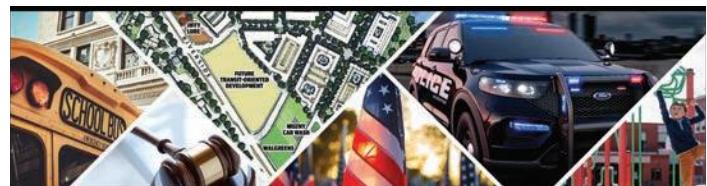
- It failed to meet open to the public and held in a place available to the general public;
 - It did not allow all people to attend (including the right to record the meeting);
 - It did not make the decision at an open meeting; or
 - It failed to deliberate toward a decision at an open meeting unless it was permitted to be closed.
- MCL 15.270(2).

The committee's work may also be invalidated if the public body has failed to give notice as required by the OMA and the court finds that the noncompliance or failure has impaired the rights of the public under this Act.

MCL 15.270(2). A person or entity can file a lawsuit to compel compliance and if they succeed in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action. MCL 15.271(4). There is a criminal aspect too. A public official who intentionally violates this act is guilty of a misdemeanor punishable by a fine of not more than \$1,000.00. A public official who is convicted of intentionally violating a provision of this Act for a second time within the same term shall be guilty of a misdemeanor and shall be fined not more than \$2,000.00, or imprisoned for not more than one year, or both. MCL 15.272.

Historically, it has been our experience that judges have been tough on public bodies when it comes to an alleged OMA violation. Like the State's other transparency statute, the Freedom of Information Act, MCL 15.231 et seq, a reviewing judge generally focuses on the obvious pro-transparency language in the OMA when analyzing a claim. Thus, it is imperative for public bodies and committees to err on the side of transparency when conducting their work for the municipality. L

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