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To: Board of Selectmen
Town Administrator/Executive Secretary

From: Petrini & Associates, P. C.
Town Counsel

Date: May 19, 2010

Re: Open Meeting Law Changes Effective July 1, 2010

On July 1, 2009, Governor Patrick signed Chapter 28 of the Acts of 2009, entitled “An Act to Improve the Laws Relating to Campaign Finance, Ethics and Lobbying” (the “Act”). Among the changes adopted pursuant to the Act is a new Open Meeting Law (“OML”) that will take effect on July 1, 2010. Prior to adoption of the Act, the OML applicable to local governments was set forth in G.L. c. 39, §§23A-23C; these sections will be repealed as of July 1, 2010 and replaced with the new uniform OML for all state, county and local governments, set forth in G.L. c. 30A, §§18-25.

The new OML contains significant changes from the prior version, and all municipal officials should familiarize themselves with these changes in preparation for implementation on July 1, 2010. Some of the changes are intended to address advances in technology since enactment of the original OML, while others are simply aimed at increasing the effectiveness of the law in ensuring open government. We have yet to see how some of the new provisions will be interpreted and applied. We expect the Attorney General’s Office, which will have regulatory and enforcement authority over the new OML, to adopt regulations in the near future, hopefully prior to the July 1, 2010 effective date of the law, to provide interpretation and clarification of the new provisions. This office will issue a supplemental advisory once the regulations have been adopted. In the meantime, it is important for town officials to be aware of the changes and prepare to comply beginning on July 1. A summary of the key changes is set forth below.

1. **G.L. c. 30A, §18 - DEFINITIONS**

A. Deliberation – The new definition of deliberation encompasses communication through “any medium” including electronic mail. We anticipate that the Attorney General’s Office may provide clarification as to whether “any medium” will include not only e-mail as explicitly stated in the definition, but other forms of electronic communication such as blogging, social networking websites, and chat rooms as well. Also of significance is the exclusion of distribution of certain administrative information from the definition of “deliberation”. The new definition is as follows:

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; provided, however, that “deliberation” shall not include the distribution of a meeting agenda, scheduling information or distribution of other procedural meeting or the distribution of reports or documents that may be discussed at a meeting, provided that no opinion of a member is expressed.

B. Intentional Violation – This term was not previously defined and is defined in the new OML as follows:

An act or omission by a public body or a member thereof, in knowing by violating the open meeting law.

C. Meeting – The prior definition was limited to a “corporal convening.” The new definition has been broadened, presumably to encompass electronic discussions and remote participation. Within this broad definition, certain meetings for specific purposes have been excluded. Attendance of a quorum of a public body at another public body’s advertised meeting is excluded as long as the visiting members communicate by open participation and do not deliberate. This exception will allow, for example, a quorum of the Board of Selectmen to attend and participate openly in an advertised Planning Board meeting without also advertising a Board of Selectmen’s meeting. Additionally, deliberations of a quasi-judicial body for purposes of reaching a decision are excluded. For example, the deliberations of a zoning board of appeals for purposes of reaching a decision after the close of a public hearing on an application for special permit will no longer constitute a meeting for purposes of the OML. The new definition is as follows:

A deliberation by a public body with respect to any matter within the body’s jurisdiction; provided, however, “meeting” shall not include:

- a. an on-site inspection of a project or program, so long as the members do not deliberate;
- b. attendance by a quorum of a public body at a public or private gathering, including conference or training program or a media, social or other event, so long as the members do not deliberate;
- c. attendance by a quorum of a public body at a meeting of another public body that has complied with the notice requirements of the open meeting law, so long as the visiting members

communicate only by open participation in the meeting on those matters under discussion by the host body and do not deliberate;

- d. a meeting of a quasi-judicial board or commission held for the sole purpose of making a decision required in an adjudicatory proceeding brought before it; or
- e. a session of a town meeting convened under section 10 of chapter 39 which would include the attendance by a quorum of a public body at any such session.

D. Preliminary Screening – This term was previously undefined. It is used in the context of an exemption from the OML which allows a screening committee to enter executive session for purposes of conducting a preliminary screening of job applicants. The term is defined in the new OML as follows:

The initial stage of screening applicants conducted by a committee or subcommittee of a public body solely for the purpose of providing to the public body a list of those applicants qualified for further consideration or interview.

E. Public Body – It should be noted that this term replaces the term “governmental body” as it was used throughout the OML prior to the amendment and includes “a multiple-member board, commission, committee or subcommittee within a...town”. This is a sweeping definition that effectively encompasses all bodies consisting of more than one member. “Subcommittee” is defined within the definition of “public body” to include any multiple member body created to advise or make recommendations to a public body.

2. **G.L. c. 30A, §19 – ATTORNEY GENERAL’S ROLE**

This section establishes the new Division of Open Government (“DOG”) within the Attorney General’s Office to enforce and provide education and training on the new OML. Enforcement authority was previously delegated to local District Attorney’s Offices and will now be centralized in the Office of the Attorney General. The Attorney General’s Office has announced that the DOG will focus on education and outreach as the office assumes responsibility for enforcement, and Robert A. Nasdor has been appointed Director of DOG. The Attorney General’s Office will be required annually to report to a new Open Meeting Law Advisory Committee with information regarding the enforcement of the OML during the preceding year.

3. **G.L. c. 30A, §20 – GENERAL RULE AND NOTICE REQUIREMENTS**

This section creates the general rule that, except as otherwise provided in Section 21, all meetings of a public body shall be open to the public. Except in an emergency, the public body is required to post notice at least 48 hours in advance. The definition of emergency has not been changed from the prior version of the law. The calculation of time for posting notice now excludes Saturdays as well as Sundays and legal holidays, so notice must be posted by Thursday before a Monday meeting. The notice must include not only the date, time and place of the meeting, but also a listing of topics that the chair reasonably anticipates will be discussed at the meeting. Essentially, this means the agenda should be posted as notice.

A cumbersome component of the new notice provisions is the requirement that notice be posted 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.** The Attorney General's Office is reviewing various alternatives for complying with this requirement. It is expected that some combination of website posting, audio recording of meeting notices available by telephone at all hours, placing an outward facing computer monitor or electronic bulletin board in a window of the municipal building, posting notice on the local cable channel, and/or posting in an alternate building such as a police or fire station, will be determined to be sufficient. We will include the Attorney General's determination on this issue in our supplemental advisory.

Section 20 also allows the Attorney General's Office to authorize remote participation by members of a public body not present at the meeting location. If the Attorney General's Office elects to authorize this practice, we will advise you. An adjustment has also been made to the provision authorizing recording of a meeting; the new law allows video or audio recording or transmission of the meeting through any medium and requires the chair to inform other attendees of any such recordings at the beginning of the meeting. This amendment brings the OML in line with the Anti-Wire Tap Law, G.L. c. 272, §99, which prohibits recording an individual without his knowledge.

Within 2 weeks of qualification for office, all persons serving on a public body must certify on a form prescribed by the Attorney General the receipt of a copy of the OML, any regulations promulgated by the Attorney General, and a copy of the educational materials prepared by the Attorney General. We will distribute the form for this certification once the Attorney General's Office has prepared it. The certifications must be maintained in accordance with the applicable records retention schedule.

4. **G.L. c. 30A, §21 – EXECUTIVE SESSIONS**

There are no significant substantive changes to the purposes for which a public body may enter executive session. The purposes have been reorganized to combine certain exceptions that were previously separated and to separate certain exceptions that were previously combined within a particular exception number, but the substance remains substantially unchanged. However, public bodies should be aware of significant procedural changes. Before entering executive session, the chair must state all subjects that may be revealed without compromising the purpose for which the session was called. Additionally, the collective bargaining/litigation exception may only be used if the chair explicitly states prior to entering executive session that an open meeting may have a detrimental effect on the bargaining or litigating position of the public body.

5. **G.L. c. 30A, §22 – MINUTES**

Prior to the amendment, minutes were required to include the date, time and place of the meeting, the identity of the members present or absent, and all action taken. The new OML requires all of this information to be included, as well as a summary of the discussions on each

subject, a list of documents and other exhibits used at the meeting, the decisions made, and the recording of all votes. The new OML provides that minutes must be created and approved in a timely manner. Minutes must be made available within 10 days of a request, whether in approved or draft form.

All documents and other exhibits, such as photographs, recordings or maps, used by the public body at an open or executive session become part of the official record of the session along with the minutes. This requirement poses challenges with respect to unique or rare items used as exhibits, as well as the volume of documents and other materials that will be required to be maintained as records of meetings. We expect the Attorney General's Office to provide further guidance on this issue and will address this further in our supplemental memorandum.

The new OML also contains provisions to coincide with the Public Records Law. In general, the minutes of an open session are public records, subject to the following exceptions:

1. Materials used in a performance evaluation of an individual bearing on his professional competence, provided they were not created by the members of the body for the purposes of the evaluation; and
2. Materials used in deliberations about employment or appointment of individuals, including applications and supporting materials; provided, however, that any resumé submitted by an applicant shall not be exempt.

Minutes of an executive session may be withheld only as long as publication may defeat the lawful purposes of the executive session and no longer, provided that the executive session was held in compliance with Section 21. When the purpose has been served, the minutes, preparatory materials and documents and exhibits of the executive session shall be disclosed unless the attorney-client privilege or an exemption to the Public Records Law applies. The public body or its chair or designee shall, at reasonable intervals, review the minutes of executive sessions to determine whether continued non-disclosure is warranted. Such determination must be announced at the next meeting, and the announcement must be included in the minutes of that meeting.

Upon request for executive session minutes, the public body must respond within 10 days and release any non-exempt minutes. If the body has not already performed the required review of such minutes, the review must then be performed and all non-exempt minutes must be released not later than the body's next meeting or 30 days, whichever occurs first. No fee may be assessed for this review time.

6. **G.L. c. 30A, §23 – ENFORCEMENT**

This section establishes a procedure for filing a complaint alleging a violation of the OML. The complaint must first be filed with the public body itself, at least 30 days prior to filing with the Attorney General's Office and no later than 30 days after the date of the alleged violation. The public body is then responsible for sending a copy of the complaint to the

Attorney General's Office within 14 business days of receipt, along with notification of any remedial action taken. Extensions of the 14-day period may be granted upon request for good cause shown.

The Attorney General's Office will then review the complaint and must hold a hearing before imposing any civil penalty on the public body. The Attorney General's Office must determine whether the body as a whole or one or members is responsible, and whether the violation was intentional or unintentional. Penalties may include:

1. An order compelling immediate and future compliance with the OML;
2. An order compelling attendance at a training session authorized by the Attorney General;
3. An order nullifying in whole or in part the action taken at the meeting;
4. Civil penalties upon the public body (not the individual) of not more than \$1,000 for each **intentional** violation;
5. Reinstatement of an employee without loss of compensation, seniority, tenure or other benefits;
6. An order compelling minutes, records or other materials to be made public; or
7. Other appropriate action.

A person aggrieved by the Attorney General's order may seek judicial review by filing an action in Superior Court within 21 days of receipt of the order. The order shall be stayed pending judicial review, except that the public body shall not implement any action pending judicial review if the order nullifies such action. The Attorney General's Office has authority to file an action in Superior Court to compel compliance with its orders.

As an alternative to the administrative review by the Attorney General's Office described above, the Attorney General or 3 or more registered voters may initiate a civil action to enforce the OML in Superior Court.

It shall be a defense to the imposition of a penalty that the public body, after full disclosure, acted in good faith compliance with the advice of the public body's legal counsel.

7. **G.L. c. 30A, §24 – INVESTIGATIONS**

This section establishes a procedure whereby the Attorney General may conduct an investigation to ascertain whether a violation of the OML has occurred. Public bodies and officials are required to cooperate with such investigations by making information available.

8. **G.L. c. 30A, §25 – INTERPRETATION**

This section authorizes the Attorney General's Office to promulgate rules and regulations to carry out enforcement of the OML, to interpret the OML, and to issue letter rulings or advisory opinions.

We recommend that all public officials familiarize themselves with the changes scheduled to take effect on July 1, 2010 as summarized above.