February 2013 Vol. 49, No. 3

ILLINOIS STATE BAR ASSOCIATION

Local Government Law

The newsletter of the Illinois State Bar Association's Section on Local Government Law

The PAC muddies the waters: Some thoughts on a recent PAC opinion about closed session discussions, litigation, and final actions

By Ruth A. Schlossberg, Zukowski, Rogers, Flood & McArdle

The Illinois Attorney General's Public Access Counselor issued a new binding opinion (PAC Opinion 12-013) on November 5, 2012 involving (among other things) the probable or imminent litigation exception to the Open Meetings Act (5 ILCS 120/2(c)11). This recent decision is a perfect example of the axiom that bad facts make bad law. That is, while it appears that the public body in question likely did invoke improperly the probable or imminent litigation exception, the PAC drew conclusions from that violation that will create new problems for governmental compliance with the Open Meetings Act. In particular, this decision is troubling both because it takes a very restrictive view of the subjects that are permitted to be discussed in executive session under the litigation exception and because of its effective suggestion that straw poll-type decisions and directions given in closed session might ultimately be viewed as "final action" and as such might violate the Open Meetings Act.

This case involves the finance committee of the Washington County Board. The Committee went into closed session to discuss a proposed ordinance authorizing a coal company to build and operate a landfill. The PAC rejected the finding that litigation was probable or imminent and further found that the finance committee rather plainly violated the Open Meetings Act by failing to publicly recite and record in the closed session minutes its basis for determining that litigation was probable or imminent. The PAC also found that the county had failed to create and maintain a verbatim recording of the closed session. However, none of these issues creates new law, and the following discussion is restricted to the PAC's more troubling analysis of permissible discussions under the litigation exception to the Open Meetings Act and to its finding that the finance committee's actions constituted unauthorized final action during the closed session.

Pending, Probable or Imminent Litigation Exception

Section 2(c)11 of the Illinois Open Meetings Act permits a public body to hold a closed meeting to consider "*litigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting.*" (5 ILCS 120/2(c)(11)).

a. Was the litigation probable or imminent?

In this case, a business had concerns about a proposed amendment to the county's landfill ordinance and asked for the opportunity to meet with the county board in closed session. In their letter they stated "*if we are unable to resolve this matter, [the company] will proceed to file an appropriate legal action against Washington County seeking judicial review of this matter.*" As a result of this letter, the county finance committee found that litigation was probable or imminent and proceeded to meet with the objector in closed session to address its concerns and to discuss the proposed amendment. (PAC Opinion 12-013 at p. 2-3).

The PAC disagreed with the finding that litigation was probable or imminent. It relied heavily on a 1983 Attorney General opinion (1983 Ill Attorney General Opinion No. 83-026) that recites the standard that for a public body to rely on the 2(c)11 exception "*there must be reasonable grounds to believe that a lawsuit is more likely than not to be instituted or that such an occurrence is close at hand.*" (PAC Opinion 12-013, p. 4). This determination can be made "*by examining the surrounding circumstances in light of logic, experience, and reason.*" *Id.* Here the PAC concluded that the letter from the objecting company had been sent by the president of the company and not an attorney representing the company and that three months had elapsed since the time the letter was sent and the committee met without any lawsuit being filed. Therefore, the PAC concluded that the litigation did not appear to be probable or imminent. (*Id*. P. 4-5).

b. Was the closed session discussion authorized under the litigation exception of the Open Meetings Act?

The finding that the litigation did not appear to be probable or imminent is not, by itself, a new or unreasonable understanding of the pending litigation exception. If the PAC's analysis had stopped there, Opinion 12-013 would be an unremarkable decision about the inappropriate use of the probable or imminent litigation exception of the Open Meetings Act. Unfortunately, after finding that the exception was improperly asserted, the PAC still proceeded to examine the content of the closed session discussions. Here is where the legal waters become muddier. If

litigation was not probable or imminent, then there was no basis for closed session and all of the discussion should have been found to be inappropriate, regardless of its content. The PAC's ensuing application of the standards for probable or imminent litigation to analyze the closed session discussions—after finding that they never should have been held at all—results in dicta from the PAC that will prove difficult for a practitioner to apply in a properly called closed session situation.

Here the PAC sought to apply the standard articulated in its 1983 opinion that "*the only matters which may lawfully be discussed at the closed meeting are the* strategies, posture, theories, and consequences of the litigation itself" and that the exception may not be "*utilized to conduct deliberations on the merits of a matter under consideration regardless of how sensitive or controversial the subject matter may be*." (PAC Opinion 12-013, p. 4). Thus, according to the PAC, even if there are reasonable grounds to believe that litigation is probable or imminent, a public body may not use the closed session "*to discuss taking an action or to make a decision on the underlying issue that is likely to be the subject of the litigation*." *Id.*

Here the PAC found that the closed session was used to discuss the substance of the issues being discussed—that is, the proposed ordinance and hosting agreement—and not the pending litigation. *Id.*, p. 5 The PAC decision also suggests that there may well have been a negotiation or discussion in closed session between the company and the committee related to that ordinance and agreement. *Id.* Thus, the executive session was used to resolve substantive differences with the company (by discussing the merits of the proposed ordinance and agreement) rather than to discuss the potential litigation. The PAC concluded that the County's finance committee did not have authority to discuss the ordinance and hosting agreement itself in executive session. *Id.*

c. What discussion is permitted in a properly authorized Closed Session?

At least in theory, there is nothing controversial in the PAC's conclusion. The closed session meeting appears to have considered the merits of a proposed ordinance rather than a specific litigation related issue. Since no litigation was actually imminent or pending, those substantive discussions should have been held in open session. The concerns raised by this decision, however, are more practical and perhaps more subtle. Specifically, it is worth asking how the PAC might have ruled if, in fact, it had found that litigation was probable or imminent. What type of discussion in closed session might have been acceptable in that case and where would a regulated body draw a bright line between issues related to the litigation and the substance of the agreement when, in fact, the two are inexorably intertwined? It might be extremely difficult to bring a board into executive session to discuss proposed litigation (or a proposed settlement) without entering into a discussion relating to the substance of the claim against the municipality and the merits of the body's case. How is it possible to discuss litigation strategy without a full understanding of the substantive merits of a position? This PAC decision may make it difficult to candidly and fully discuss a body's position in situations where the litigation exceptions have been properly invoked. That is, if the risk of litigation is real, then the "*strategies, posture, theories and consequences of imminent or probable litigation*" might well, of necessity, include a discussion of the merits of a matter.

Given the PAC's willingness to discuss the substance of the inappropriate closed session discussions, it is interesting that the PAC does not then comment on the wisdom or legality of entering into negotiations on the merits of an ordinance with a third party in executive session. Such negotiation plainly is not permitted when the closed session itself is not permitted as was the case here. But would it be permitted if the finding that litigation was probable or imminent had been properly made? The 1983 Opinion upon which the PAC relies suggests that any discussion of the merits—regardless of with whom—would not be permitted in closed session. And at least one other commentator has suggested that the presence of a non-member of the public body may be evidence of improper consideration of matters in closed session that ought to have been discussed in open session. Schwing, *Open Meeting Laws 3d at* 652 (citing Meyer & Marshall, the New Hampshire Right to Know Law: An Update, 20 N.H. Bar J. 98, 103 (1979)). But it is worth asking whether there is any situation in which a closed door negotiation with a plaintiff would be appropriate under the litigation exception to the Open Meetings Act?

Final Action Analysis

The second potentially troubling issue raised by this PAC decision is the PAC's finding that the finance committee violated Section 2(e) of the Open Meetings Act which prohibits the taking of *final action* at a closed meeting. Section 2(e) of the Open Meetings Act provides that "[n]o final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted." 5 ILCS 120/2(e).

The county argued that no formal recommendation had been acted upon but that a general consensus was reached that the committee would not object to the full board's approval of the ordinance and hosting agreement. Thus, according to the county, no final action was taken by the finance committee in either open or closed session regarding such a recommendation. Rather, the County described the Committee as having come to a "general implied consensus without objection rather than taking formal action." However, the PAC concluded that when the finance committee informally agreed during the closed session either to recommend passage, or to at least not oppose the proposed ordinance and hosting agreement, they had effectively taken final action without ever entering open session or publicly deliberating on the matters. The PAC concluded that "*when such a consensus is reached in a closed session, even if it is reached informally, as a practical matter, that consensus constitutes a final action*."

This author does not disagree that final action needs to be taken in open session. However, this decision raises a very real question about what constitutes "final action". The PAC's opinion suggests that the prospect that "consensus", straw polls or even directions given to staff to proceed in a certain manner that take place in a closed session might be interpreted by the PAC as constituting a final action. Without this type of direction to other board or staff members, it would be difficult to proceed with government business including settlement discussions or strategy for future litigation steps. The PAC cited no specific authority to support its conclusions related to consensus reached in closed session constituting final action. In fact, there is clear case law requiring that final action be taken in open session (see, e.g., *Jewell v. Board of Education, DuQuoin Community Unit Schools, District (19 Ill.App.3d. 1091 (5th Dist.))*, but that case law also makes clear that the statute does not prohibit the Board from polling members at a closed session. *Id.* At 1094.

While this author does not disagree with the PAC or the *Jewell* decision requiring that final action to be taken in public, nothing in the recent PAC decision offers much guidance to other public bodies about what actions actually constitute final action and are subject to the open session requirements.

Again, it is worth asking whether the PAC's decision about what constitutes "final action" would have been different if it had found that litigation was probable or imminent. Would direction to staff to further research the question or to return with more answers or analysis be final action? What if the Committee had instead decided that the proposed ordinance was not yet ready to proceed to the Board for consideration? Would withholding a recommendation in that case constitute final action? Would the committee's decision to wait on a recommendation constitute final action? And consensus regarding final action in this Opinion involving a disputed ordinance and contract looks very different from consensus in a non-litigation situation such as, for instance, a real estate purchase. Would a Board be prohibited from using closed session to agree that "we will offer $10,000 for the building, but we are willing to go to $15,000"? Certainly this constitutes consensus, but we do not believe the PAC meant to require that it be voted upon in open session as a final action. Yet the PAC's language—"*when such a consensus is reached in a closed session, even if it is reached informally, as a practical matter, that consensus constitutes a final action*"—suggests as much. Moreover, in light of the new Open Meetings Act rules requiring clear identification on the agenda of the general subject matter of any final action to be taken by a public body, the finding that informal decisions or direction could constitute final action means that public bodies may need to delay taking even informal but "final" action or otherwise risk violating the Open Meetings Act. This could change the way municipalities can use closed sessions to continue moving matters forward.

Conclusion

In short, this PAC decision makes it very difficult for a public body to identify what discussion is permissible when in closed session to discuss litigation. Local government law practitioners might be forced to question whether they could render effective assistance of counsel if after going into closed session, they then must tell their clients that they are forbidden by the PAC from discussing the merits of their case. Moreover, the PAC's "final action" language means that even if discussions are permitted or proper, it is no longer clear what type of direction to staff consensus or polling is even permitted any longer in closed session. This author does not believe that the PAC intended to tie the hands of practitioners or public bodies in this way, but the PAC's somewhat casual *dictum has* the potential to cause significant problems. We urge them to reconsider the wisdom of this finding. ■

The author would like to thank the ILGL Nuts & Bolts Conference Call Members of December 13, 2012, and the members of the ISBA Local Government Section Council meeting of December 14, 2012.