



New Jersey Libertarian Party

Open Government Advocacy Project

John Paff, Chairman

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January 19, 2009

Hon. Mark Desire, Mayor, and
Members of the Borough Council
71 Main Street
High Bridge, NJ 08829-1003

Dear Mayor Desire and Members of Council:

I write, both individually and in my capacity as Chairman of the New Jersey Libertarian Party's Open Government Advocacy Project, to ask two questions regarding the Borough Council's committee structure and how these committees' meetings relate to the Senator Byron M. Baer Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6, et. seq.

Question 1: Are committee meetings OPMA "meetings" which require "adequate notice" to be given, public observation and participation to be allowed and minutes to be taken?

The Borough's Internet site¹ provides information on the Council's committees. The site states, for example, that Council members Tom Flynn, Dean Rapp and Jon Valenta—all of whom are Republicans—serve on the Planning & Engineering Committee.²

I am assuming, perhaps incorrectly, that High Bridge Borough believes that since N.J.S.A. 40A:60-3(d) establishes that a quorum of the Borough Council is four members (or the mayor plus three members) then it is permissible for three Borough Council members (i.e. less than a quorum) to meet together at a Planning & Engineering Committee meeting without providing advance public notice or admitting the public to the meeting. In other words—and please correct me if I'm wrong—I believe that if a member of the public wished to attend a Planning & Engineering Committee meeting, he or she would be told that public attendance is not permitted.

But, N.J.S.A. 10:4-8(b) does not say that a gathering of elected officials is not an OPMA "meeting" when attended by less than a quorum of members of the public body.

¹ <http://www.highbridge.org/council.html#committee>

² Described on the site as: "Responsible for all Borough planning, engineering, infrastructure remediation, ADA compliance, affordable housing and growth management. Historical monuments, public buildings and their maintenance. Interacts and reviews projects associated with the Borough engineer and is a member of the Borough Planning Board. Recommends improvements of public buildings and grounds to public works administration and finance departments."

Rather, it says that gatherings of elected officials are not OPMA meetings when “attended by less than an **effective majority** of the members of a public body” (Emphasis supplied.)

At first blush, it appears that the terms "quorum" and "effective majority" are synonymous. But, consider the following language from Riya Finnegan, LLC v. Township Council Of South Brunswick, 386 N.J.Super. 255, 260-61 (Law. Div. 2006):

At this point, this court feels compelled to address the Open Public Meetings Act. N.J.S.A. 10:4-6 to -21. Although raised at the trial in this matter, none of the parties felt that there was an issue and therefore there was no joinder.

The Board's subcommittee consists of three members of the Planning Board. The Board consists of nine members. N.J.S.A. 40:55D-23. "No action shall be taken at any meeting without a quorum being present." N.J.S.A. 40:55D-9. A quorum of a nine-member board is five members. "All action shall be taken by a majority vote of the members of the municipal agency present at the meeting." N.J.S.A. 40:55D-9. Therefore the "effective majority," the number of members needed to take action, is three. Any three members present at a meeting to consider the business of the Board would constitute an "effective majority" of the Board.

Finnegan suggests that an “effective majority” of the High Bridge Borough Council is three members. This is because a) the Borough’s governing body consists of seven members, b) a quorum of the governing body is four members and c) a voting majority of that quorum is three members.

Do you agree that three members of the Borough Council is an “effective majority”? If so, then it follows that the Planning & Engineering Committee cannot hold a meeting unless it is properly announced, the public is admitted, etc.

Question 2: Are meetings of the Planning & Engineering Committee open to other members of the Borough Council?

Suppose the following conditions:

- a. High Bridge Borough rejects the argument, set forth above, that three members of the Borough’s governing body is an “effective majority” whose meetings are OPMA “meetings.”
- b. A week prior to the next meeting of the Planning & Engineering Committee, Councilwoman Mary Murdock—a Democrat—announces her intention to attend that meeting.

In such a case, would High Bridge Borough:

1. Treat the Planning & Engineering Committee meeting as a public meeting, since a quorum of the Borough Council was going to attend, and give “adequate notice” to the newspapers, invite the public, have minutes taken at the meeting, etc., or
2. Advise Councilwoman Murdock that she is not allowed to attend the Planning & Engineering Committee meeting, or alternatively, endeavor to get one of the Republican Planning & Engineering Committee members not to attend, thus reducing the elected representatives in attendance to three, apparently obviating the need for public notice, etc.?

If High Bridge Borough elects No. 1 above, then it would appear that the Borough’s general policy is that Planning & Engineering Committee meetings are open to other Borough Council members and that if a quorum of Borough Council decides to attend, then the Planning & Engineering Committee meeting becomes a OPMA public meeting.

Having watched local government for some time, I’ve seen many cases where the members of the minority party complain that they and the public are shut out of the decision-making process. One way the majority party shuts them out is by deliberating important matters in a committee and not inviting the minority members to the committee meetings. But, if committee meetings are open to all members of a governing body, the political minority on the High Bridge Borough Council—i.e. the Democrats—could force Planning & Engineering Committee meetings to be open to them and the public simply by having one Democratic council member attend.

I’ve never seen the political minority in any New Jersey municipality employ this technique, which causes me to believe that High Bridge Borough and other municipalities around the state probably adhere to No. 2 above, which is to disallow municipal governing body members from attending meetings of the body’s committees of which they are not members. But this answer also makes me wonder because such a policy would seem to run afoul of N.J.S.A. 10:4-11 which makes it unlawful for a public body or an individual to “fail to invite” some of the governing body’s members “to a meeting for the purpose of circumventing the provisions of this act.”

I certainly don’t expect you to try to resolve this entire issue for me. Rather, I just would appreciate knowing what High Bridge would do if, in accordance with the suppositions listed at the beginning of this question, Democratic Councilwoman Mary Murdock announced her intention to attend a Planning & Engineering Committee meeting.

I appreciate your time. I look forward to receiving your response.

Sincerely,



John Paff

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February 13, 2009

Mr. John Paff
New Jersey Libertarian Party
Open Government Advocacy Project
P.O. Box 5424
Somerset, NJ 08875-5424

Re: Open Public Meetings Act

Dear Mr. Paff:

The Mayor and Council have forwarded your January 19, 2009 letter to me for a response since I am the Borough Counsel. Although the Borough appreciates your comments, I must respectfully disagree with the conclusions that you have reached.

More specifically, contrary to the conclusion you proposed in response to Question 1 in your letter, an "effective majority" is the same as a "quorum." Numerous cases have so indicated.

In addition, the Riya case that you cited as the basis for your conclusion clearly was dicta by the trial court that is not binding on any other court. Indeed, the trial court specifically noted that, "because the plaintiff has not challenged the action, no decision can be made here to affect the outcome of this case" with regard to the language that you quoted on page 2 of your letter.

Moreover, in case you are not aware of it, the Appellate Division reversed the trial court's decision in the Riya case. See 394 N.J. Super 303 (App. Div. 2007). Although the New Jersey Supreme Court recently reversed the Appellate Division in an Opinion dated December 22, 2008, holding that the zoning ordinance at issue was arbitrary, capricious and unreasonable and also constituted impermissible inverse spot zoning. Neither the Appellate Division nor the Supreme Court gave any credence to the language that you cited, with the Supreme Court expressly stating about the trial court's opinion that it "could not adopt that opinion entirely."

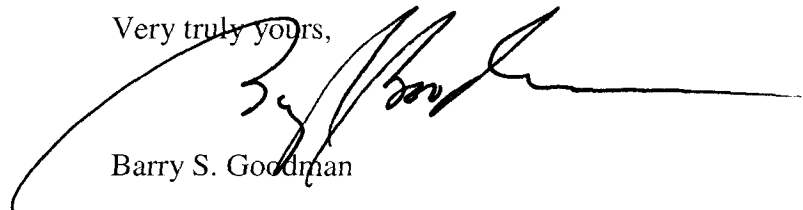
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With regard to the second question raised in your letter, as I am sure you can appreciate, we certainly are not in a position to give an advisory opinion as you requested. However, please rest assured that no Council members are shut out of meetings if they desire to attend and, if more than three members from the Mayor and Council want to attend a committee meeting, then appropriate notice and all other provisions of the Open Public Meetings Act will be followed.

It also should be noted that the Borough's committees that you reference have functioned in an advisory capacity with all decisions being made by the Mayor and Council that would affect the public. As I am sure you are aware, such advisory committees are exempt from the requirements of the Open Public Meetings Act.

I trust that this response to your letter adequately deals with the issues that you have raised.

Very truly yours,

A handwritten signature in black ink, appearing to read "Barry S. Goodman", is written over the typed name. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Barry S. Goodman

BSG:ams