



New Jersey Libertarian Party

Open Government Advocacy Project

John Paff, Chairman

P.O. Box 5424

Somerset, NJ 08875-5424

Phone: 732-873-1251 - Fax: 908-325-0129

Email: lpsmc@pobox.com

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Theresa Casagrande, Administrator
Borough of Spring Lake Heights
555 Brighton Ave
Spring Lake Heights, NJ 07762 *(via PDF email to tcasagrande@springlakehts.com)*

Dear Ms. Casagrande:

I write, both individually and in my capacity as Chairman of the New Jersey Libertarian Party's Open Government Advocacy Project to pose a question regarding the borough form of municipal government. Attached as "Exhibit A" is a post I distributed to several e-mail lists that provides some background.

Spring Lake Heights Borough's Interlocal/Intergovernmental Relations Committee consists of three members—Council Members Martin, Maccanico and Kegelman. I'm assuming that like many other municipalities, Spring Lake Heights takes the position that three members of the borough council is less than an "effective majority"¹ of the entire council, so that there is no need to give "adequate notice" of the Interlocal/Intergovernmental Relations Committee's meetings nor is there any legal requirement to admit the public to those meetings, take meeting minutes, etc.

My question is this: Suppose that, for whatever reason, Councilman O'Brien, who is not a members of Interlocal/Intergovernmental Relations Committee, decided that he was interested in attending one of this committee's meetings. In other words, suppose that you were to become aware that the three committee members, plus O'Brien, were going to attend a Interlocal/Intergovernmental Relations Committee on January 29, 2009. Would you:

1. Treat it as a public meeting, giving "adequate notice" to the newspapers, invite the public, have minutes taken at the meeting, etc., or

¹ Note that in Exhibit A, a court has suggested that three borough council members constitutes an "effective majority" and that Rutherford Borough Mayor John Hipp opines that *two* council members constitutes an "effective majority." Regardless of whether you agree with the court or Mayor Hipp, for the purposes of this question, I will assume that you agree that four council members constitutes an "effective majority" in accordance with N.J.S.A. 10:4-8(b) and that a gathering of four council members is a "meeting" for which notice must be given, the public has the right to observe, etc.

2. Advise Councilman O'Brien that he is not allowed to attend the meeting, or alternatively, endeavor to get one of the Interlocal/Intergovernmental Relations Committee members not to attend, thus reducing the attendees to three, apparently obviating the need for public notice, etc.

If Spring Lake Heights elected No. 1 above, then it would appear that the Borough's general policy is that council committee meetings are open to other council members and that if an "effective majority" of council members decide to attend, then the committee meeting becomes a OPMA public meeting. But if this is the case, that would allow a political minority on the council to force committee meetings to be open to the public.

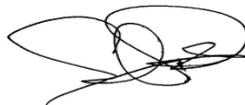
Having watched boroughs government for some time, I've seen many cases where the mayor and four council members belong to the dominant political party while the other two council members belong to another party. While I'm not exactly sure of the Spring Lake Heights Council's political makeup, let's suppose that this is the case there. My experience shows that the two members of the political minority often complaint that they and the public are shut out of the decision-making process. One way the majority shuts them out is by deliberating important matters in committee and not inviting the minority members to the committee meetings. It seems to me that if Spring Lake Heights elected No. 1 above, then the two members of the political minority could simply attend every committee meeting and thus force each one of those meetings into being a properly noticed public meeting.

The fact that I've never seen any council minority, anywhere in New Jersey, employ this technique, causes me to believe that Spring Lake Heights and other boroughs around the state probably adhere to No. 2 above, which is to disallow council members from attending the meetings of committees of which they are not members. But this answer also does not make sense to me because such a policy would seem to run afoul of N.J.S.A. 10:4-11 which makes it unlawful for a council majority to "fail to invite" some of the council 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 issue for me. Rather, I just would appreciate knowing what the Borough would do if it became evident that one or more non-committee members wanted to attend a committee meeting.

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

Sincerely,



John Paff

Exhibit A

According to statute, a borough's municipal governing body consists of an elected mayor plus six elected council members, for a total of seven. N.J.S.A. 40A:60-2. A quorum consists either of four members of council or the mayor plus three members of council. N.J.S.A. 40A:60-3(d).

I'm trying to understand exactly how many members of a borough municipal governing body can meet together to discuss public business without having to announce a formal "meeting" in accordance with the Open Public Meetings Act (OPMA). I'm finding that this is not a straightforward question.

N.J.S.A. 10:4-8(b) defines the term "meeting" as follows:

"Meeting" means and includes any gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon the specific public business of that body. Meeting does not mean or include any such gathering (1) attended by less than an effective majority of the members of a public body, or (2) attended by or open to all the members of three or more similar public bodies at a convention or similar gathering.

According to Riya Finnegan, LLC v. Township Council of South Brunswick, 386 N.J. Super. 255, 260-61 (Law. Div. 2006), three members of a nine-member planning board constitute an "effective majority" because a) a quorum of the nine-member board is five members and b) a majority of five is three. Thus, three members of a nine member board apparently cannot gather together without calling a formal, public OPMA "meeting."

Applying Finnegan's logic to a borough council, a gathering of three council members is an "effective majority" because three is a majority of a quorum of four. But, John Hipp, Mayor of Rutherford, has expressed an interesting and novel theory that takes this logic a step further.

Mayor Hipp points out that a borough mayor's voting power is specifically limited by N.J.S.A. 40A:60-5(c) which states that "the mayor shall preside at meetings of the council and may vote to break a tie." Apparently, then, a borough mayor is not allowed to vote unless the council vote is tied.

Mayor Hipp theorizes that if the mayor and three council members (i.e. a quorum that can legally transact business) are at a meeting and a motion is passed by the three council members by a vote of 2 to 1, then the mayor cannot legally vote because that vote would not "break a tie." Thus, Mayor Hipp reasons, two members of the borough council constitute an "effective majority."

If this argument is logically sound, it follows that two members of a borough council cannot meet together to discuss municipal business without giving public notice of the meeting, taking minutes and otherwise abiding by the OPMA.

I'm not sure what to think about this.

Suppose that a borough council's administrative code established a committee of two or three council members but specifically held that the committee's meetings were not open to the council members who were not committee members. It could be argued that the committee meetings are not OPMA "meetings" because the first sentence of N.J.S.A. 10:4-8(b) requires a "meeting" to be "open to" all the members of a public body.

But if this is the case, then the administrative code could likewise establish a committee of five or six council members--more than a quorum--and that a meeting of these five or six members, sitting as a committee, wouldn't be a "meeting" as defined by N.J.S.A. 10:4-8(b).

N.J.S.A. 10:4-11 appears to be intended to prevent such a result. That statute says that "no person or public body shall fail to invite a portion of its members to a meeting for the purpose of circumventing the provisions of this act." So, if a borough council established a committee of five or six members and took the position that committee meetings could be held without the public present, it would seem that a court would, or at least should, find that the committee meetings were OPMA "meetings." Otherwise, a council could shut out the public by deliberating all of its business in private, unadvertised meetings of committees that contain all but one member of the council.

The only way I can make sense of this is if OPMA, implicitly, prevents a borough council from disallowing council members who are not members of a committee from attending the committee's meetings. In other words, implicit in OPMA must be a requirement that every council committee meeting and subcommittee meeting must be "open to" all council members thus making each committee meeting and subcommittee meeting an OPMA "meeting" provided that it is attended by an "effective majority" of the council.

If this (i.e. that a council cannot, through its administrative code, establish a committee that can hold meetings that one or more members of the council are not allowed to attend) is true, then Mayor Hipp is correct that no two members of a borough council can meet together, as a committee or not, to discuss public business without formally giving the public formal notice of the meeting and otherwise abiding by the OPMA. It would follow that no two members of a borough council could speak to each other on the telephone or email each other about borough business because that would also be a "meeting" held "by means of communication equipment."

I'd would appreciate hearing anyone's comments on this question.

Thank you.

John Paff
Somerset, New Jersey