

TOWN OF CHESTER SELECTBOARD

August 24, 2016

Present: John DeBenedetti; Heather Chase; Arne Jonynas; Dan Cote, David Pisha

Visitors: Emily Huff, Carla Westine, Thomas Hildreth, Shawn Cunningham, Jeanette Haight, Cynthia Gibbs, Jenn Jones, Cheryl Barker, Hal Wilkins, Tom Bock

Minutes

The meeting was called to order at 7:00pm by John DeBenedetti

There were no deletions or additions to this agenda.

1. Citizens Comments: there were none
2. Garrett Baxter presented Understanding and Following Vermont's Open Meeting Law: See attached Power Point presentation
3. Executive session for the purpose of Reviewing a Settlement with Fish and Wildlife relative to the permitting of the new water storage tank and transmission line and for the purposes of engaging in confidential attorney/client communication with the Town's counsel, if needed, relating to said negotiations. At 8:30 a motion was made by Dan Cote, seconded by Arnie Jonynas. The motion passed. No actions were taken and at 8:55 Heather Chase made a motion to come out of executive session, Arne Jonynas seconded the motion. The motion passed.
4. Adjourn: At 8:55 a motion was made to adjourn by Arne Jonynas and was seconded by Dan Cote. The motion passed.

Town of Chester Selectboard Training

Understanding and Following Vermont's Open Meeting Law



**Municipal Assistance Center
Vermont League of Cities and Towns
*Garrett Baxter, Senior Staff Attorney***

Agenda

- **What is the Open Meeting Law?**
- **When does it apply?**
- **Open Meeting Law Requirements:**
 - **Public notice**
 - **Agendas**
 - **Open to the public**
 - **Public comment**
 - **Minutes**
- **Exemptions**
- **Allegations, Penalties and Enforcement**



What is the Open Meeting Law?

All meetings of a public body are declared to be open to the public at all times, except as provided in section 313 of this title [on executive sessions].

1 V.S.A. § 312(a)



Open Meeting Law

Protects the interest of the public to hold its elected officers accountable by, among other ways, requiring meetings of a public body to be 'open to the public at all times,' except when in executive session, 1 V.S.A. § 312(a), and by requiring that the public be given a 'reasonable opportunity to express its opinion' on matters being considered. Id. § 312(h).

Vermont Supreme Court:

Town of Brattleboro v. Garfield, 180 Vt. 90 (2006)



Who Does the Open Meeting Law Apply To?

- Every "public body" of a municipality.
- "Public body" means any board, council, or commission of the State or one or more ***of its political subdivisions***, any board, council, or commission of any agency, authority, ***or instrumentality of the State or one or more of its political subdivisions***, or any committee of any of the foregoing boards, councils, or commissions..."

1 V.S.A. § 310(3)



What is a Public Body?

Statutory (Charter) boards/commissions/committees/etc.

- Legislative bodies (e.g. Selectboard)
- Cemetery Commissioners
- Planning Commission
- DRB/ZBA
- Board of Civil Authority
- Board of Abatement
- Water/Sewer Commissioners
- Local Liquor Control Board
- Board of Listers
- Library Board of Trustees
- Advisory Commissions
- Conservation Commissions
- Local Board of Health
- Trustees of Public Funds
- Local Emergency Planning Committee



What is a Public Body?

Public Bodies Created by Resolution

Public Body



Committee



Subcommittee



When does the Open Meeting Law Apply?

Whenever a public body is holding a “meeting”

What is a Meeting?

A gathering of a quorum of the members of a public body for the purpose of discussing the business of the public body or for the purpose of taking action. 1 V.S.A. § 310(2)



When does the Open Meeting Law Apply?

“No resolution, rule, regulation, appointment, or formal action shall be considered binding except as taken or made at such open meeting.”

1 V.S.A. § 312(a)(1)



What is a “Gathering”?

The Law applies regardless of the physical location of the members.

Phone calls, e-mails, etc. may be “meetings”

The timing of a member’s participation is not a factor.

Group emails may be “meetings”

Comments on social media may be “meetings”



Open Meeting Law

What is NOT a Meeting?

“Meeting” shall not mean written correspondence or an electronic communication, including e-mail, telephone, or teleconferencing, between members of a public body for the purpose of scheduling a meeting, organizing an agenda, or distributing materials to discuss at a meeting, provided that such a written correspondence or such an electronic communication that results in written or recorded information shall be available for inspection and copying under the Public Records act...”



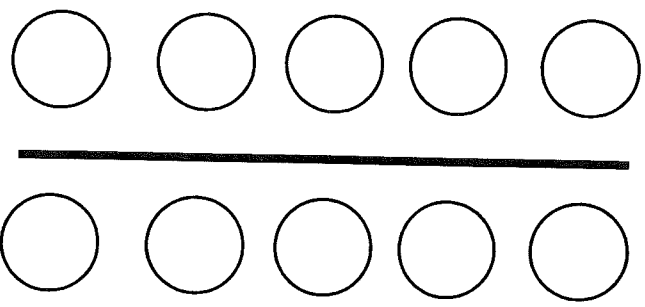
1 V.S.A. § 310(2)

What is a Quorum?

- A quorum is:
 - The minimum number of members of a public body needs to hold a meeting; and
 - The minimum number of members of a public body needs to take action.

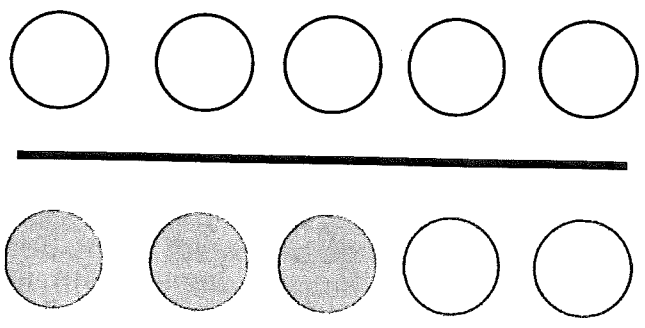


What is a Quorum?



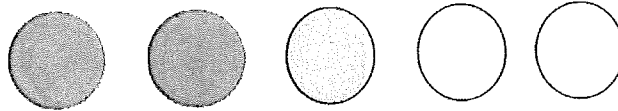
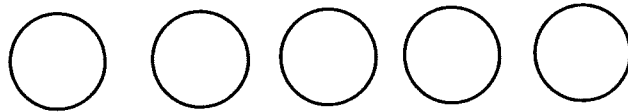
"When joint authority is given to three or more, the concurrence of a majority of such number shall be sufficient and shall be required in its exercise." 1 V.S.A. § 172

What is a Quorum?



"When joint authority is given to three or more, the concurrence of a majority of such number shall be sufficient and shall be required in its exercise." 1 V.S.A. § 172

What is a Quorum?



Majority-of-a quorum-rule



What is a Quorum?

Quorum Exceptions Board of Civil Authority Tax Appeals

- . . . The act of a majority of the board present at the meeting shall be treated as the act of the board, except that when the board is dealing with election issues, subdivision 2103(5) of Title 17 shall control.

24 V.S.A. § 801



What is a Quorum?

Quorum Exceptions Board of Civil Authority Election Matters

- . . . Except as otherwise provided in this title, those members of the board of civil authority present and voting shall constitute a quorum, provided that official action may not be taken without the concurrence of at least three members of the board.

17 V.S.A. § 2103(5)



What is a Quorum?

Quorum Exceptions Board of Civil Authority Elections Matters (when the polls are open)

- . . . A quorum of the board of civil authority shall be available at all times when the polls are open, and those members of the board of civil authority present at a polling place shall constitute a quorum for the transaction of business relating to the conduct of the election and the qualification and registration of voters at this polling place.

17 V.S.A. § 2451



What is a Quorum?

Quorum Exceptions Board of Abatement

- . . . The act of a majority of a quorum at a meeting shall be treated as the act of the board. The above requirement in respect to a quorum need not be met if the town treasurer, a majority of the listers, and a majority of the selectmen are present at the meeting.

24 V.S.A. § 1533



Meeting Electronically

“As long as the requirements of this subchapter are met, one or more of the members of a public body may attend a regular, special or emergency meeting by electronic or other means without being physically present at a designated location... [and] may fully participate in discussing the business of the body and voting to take an action...”

1 V.S.A. § 312(a)(2)



Meeting Electronically

Requirements of meeting electronically:

- All votes that are not unanimous must be taken by roll call;
- Each member not physically present must:
 - identify him/herself when the meeting convenes;
 - be able to hear the conduct of the meeting and be heard throughout.



1 V.S.A. § 312(a)(2)

Open Meeting Law Requirements



Open Meeting Law requires that...

You publicly notice your meetings. 1 V.S.A. §312(c);

You produce and post your agenda. 1 V.S.A. § 312(d);

Your meetings are open to the public. 1 V.S.A. § 312(a)(1);

You allow for public comment at your meetings. 1 V.S.A. § 312(h);

You take minutes of your meetings. 1 V.S.A. § 312(b).



WHY?

Public Notice



Public Notice

Three types of meetings:

1. Regular
2. Special
3. Emergency

Each type of meeting has its own notice requirements.



Public Notice

Regular meetings: Meetings scheduled to occur consistently at the same date, time and place. Ex. the first Monday of each month at 7pm in the Town Office.

Special meeting: Any meeting called for some date, time or place other than the regular meeting date, time, or place.

Emergency meeting: Only when necessary to respond to an unforeseen occurrence or condition requiring immediate attention.



Public Notice: Regular Meetings

Regular Meetings don't need to be individually noticed.

Meeting schedule (date, time and place) must be: **clearly designated** by statute, charter, regulation, ordinance, bylaw, resolution; and made available to any person upon request.

1 V.S.A. § 312(c)(1)

Typically adopted by resolution at a public body's organizational meeting (first meeting after Town Meeting Day) and posted year-round at the town office.



Public Notice: Special Meetings

Special Meetings : time, place and purpose must be "publicly announced" at least 24 hours before the meeting by:

- (1) Posting notices in or near the town clerk's office and in a least two other designated public places in town;
- (2) Giving oral or written notice to members of the public body, unless previously waived;
- (3) Provide notice to any person who has provided a written request for such notice; and
- (4) Notify any editor, publisher or news director of a newspaper or radio station serving the area.



1 V.S.A. § 312(c)

Public Notice: Emergency Meetings

Emergency Meetings are held only when necessary to respond to an unforeseen occurrence or condition requiring immediate attention of the public body.

"Some public notice" must be given as soon as possible **BEFORE** the meeting.

No requirement to have an agenda.



1 V.S.A. § 312(c)(3)

Agendas



Agendas

48 hours prior to a REGULAR meeting, and
24 hours prior to a SPECIAL meeting,

An agenda must be posted:

- in or near the town office and in at least two other designated public places in town;
- to a website, if one exists, that the body either maintains or designates as the body's official website; and
- made available to any person prior to the meeting upon specific request.



1 V.S.A. § 312(d)(1)

Agendas

The Open Meeting Law does not state what must be included in the agenda or even provide a definition of what an "agenda" is.

Ordinary meaning controls: **"a list or outline of things to be done, subjects to be discussed, or business to be transacted."**

-Webster's Third New International Dictionary

- An agenda should give actual notice of the topics to be addressed and the action that may be taken;
- A vague or inaccurate agenda (one that is not followed) likely violates the spirit, if not the letter, of the Open Meeting Law.



Agendas

- Any additions to, or deletions from the agenda must be made as the first act of business at the meeting.
- Any other adjustments to the agenda may be made at any time during the meeting.



1 V.S.A. § 312(d)(3)

Agendas Meeting Electronically

If a quorum or more of the members of a public body attend a meeting held at a designated location without being physically present then these additional requirements must be met . . .



Agenda Meeting Electronically

- The agenda for the meeting must designate at least one physical location where the public can attend and participate in the meeting; and
- At least one member of the body or staff/designee must be physically present at each designated meeting location.

1 V.S.A. § 312(a)(2)(D)



Open to the Public



Open to the Public

The Open Meeting Law clearly emphasizes the openness of and accessibility to government.

All meetings of a public body are **declared to be open to the public at all times**, except as provided in section 313 (Executive Session) of this title.

1 V.S.A. § 312(a)(1)

The law encourages **openness** and **accessibility** and will be **liberally construed in favor of openness and accessibility** to meetings for the public.



Trombley v. Bellows Falls Union High School District No. 37, 160 Vt. 101 (1993).

Public Comment



Public Comment

The protections of the Open Meeting Law include not only a "**right-to-know**" about the meeting but also a "**right to be present, to be heard, and to participate.**"



State v. Vt. Emergency Bd., 136 Vt. 506 (1978)

Public Comment

At an open meeting the public shall be given a reasonable opportunity to express its opinion on matters considered by the public body during the meeting as long as order is maintained. Public comment shall be subject to reasonable rules established by the chairperson. This subsection shall not apply to quasi-judicial proceedings.



1 V.S.A. § 312(h)

Public Comment

At an open meeting the public shall be given a reasonable opportunity to express its opinion on matters considered by the public body during the meeting as long as order is maintained. Public comment shall be subject to reasonable rules established by the chairperson. This subsection shall not apply to quasi-judicial proceedings.

1 V.S.A. § 312(h)



More problems

Public Comment Managing Public Participation

There is a difference between a meeting **IN** the public and a meeting **FOR** the public.



Managing Public Participation What are your ground rules?

A governmental entity....is justified in limiting its meeting to discussion of specified agenda items and in imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose of conducting public business. But any restriction must not discriminate on the basis of a speaker's viewpoint.

*Child Evangelism Fellowship of S.C. v.
Anderson Sch. District Five, 470 F.3d1062 (4th Cir.
2006)*



Public Comment Managing Public Participation

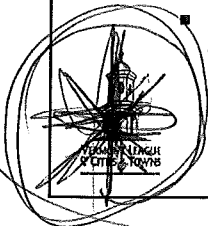
- Public bodies should utilize rules of procedure to strike a balance between encouraging public participation and the efficient operation of its meetings.
- Rules of procedure can limit the duration and type of public comment as a way to maintain order, so long as:
 - the limitations are:
 - reasonable;
 - content neutral; and
 - they are applied equally to all members of the public.



Public Comment Managing Public Participation

Tips to prevent/deal with the “unruly speaker”:

- Comments must have a bearing on the topic of discussion;
- Under no circumstances can a board member/general public personally attack another;
- All remarks (from board members and the public) must be addressed to the chair.
- Members of the public must first be recognized by the chair before providing comment.




Public Comment During Quasi-Judicial Hearing?


Quasi-judicial hearings are IN the public, but not FOR the public.

At an open meeting the public shall be given a reasonable opportunity to express its opinion on matters considered by the public body during the meeting so long as order is maintained. Public comment shall be subject to reasonable rules established by the chairperson. **This subsection shall not apply to quasi-judicial proceedings.**



1 V.S.A. § 312(h)

<h1>Minutes</h1>


<h1>Minutes</h1>
<p>Minutes must be kept at all meeting. They must give <u>a true indication of the business of the meeting</u> which includes, at a minimum:</p> <ol style="list-style-type: none">1. All topics and motions that arise;2. All members of the public body present;3. All other active participants;4. All motions, proposals, and resolutions made and their result; and5. Results of any votes, with a record of individual votes if a roll call is taken. <p style="text-align: right;">1 V.S.A. § 312(b)(1)</p> 

8:30
SLB

Minutes

- Minutes must be available after (five) 5 **calendar days** from the date of the meeting for inspection and copying.
- Minutes must also be posted no later than (five) 5 **calendar days** from the date of the meeting to a website, if one exists, that the public body has designated as its official website.

1 V.S.A. § 312(b)(2)



Minutes

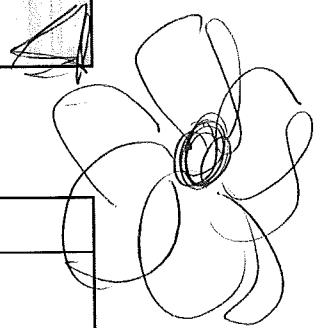
- With the exception of draft minutes that have been substituted with updated minutes, posted minutes cannot be removed from a website earlier than one year from the date of the meeting for which the minutes were taken.

1 V.S.A. § 312(b)(2)





Open Meeting Law Exemptions:

Deliberative and Executive Sessions and Others



OML Exemptions Deliberative Session vs. Executive Session

 An **executive session** is a closed portion of an open meeting.

 A **deliberative session** is where a public body weighs, examines, or discusses the reasons for or against an act or decision based on the evidence received at a public hearing held in conjunction with a quasi-judicial proceeding.



OML Exemptions Deliberative Session

“Nothing in this section . . . shall be construed as extending to . . . the deliberations of any public body in connection with a quasi-judicial proceeding.”



1 V.S.A. § 312(e)

OML Exemptions Deliberative Session

What are “Deliberations”?

“Means weighing, examining and discussing the reasons for and against an act or decision, but expressly excludes the taking of evidence and the arguments of parties.”



1 V.S.A. § 310(1)

OML Exemptions Deliberative Session

What is a “Quasi-Judicial Proceeding”?

A case in which the legal rights of one or more persons who are granted party status are adjudicated, which is conducted in such a way that all parties have opportunity to present evidence and to cross-examine witnesses presented by other parties, which results in a written decision, and the result of which is appealable by a party to a higher authority.

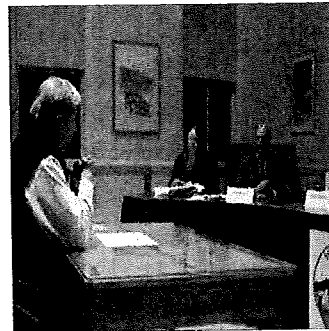
1 V.S.A. §310(5)(B)



OML Exemptions Deliberative Session

Examples:

- Tax appeal hearings before the Board of Civil Authority;
- Appeals from health orders;
- Vicious dog hearings;
- Employment termination hearings;
- Board of Health hearings;
- Tax abatement requests before the Board of Tax Abatement;
- Laying out, altering, reclassifying or discontinuing public highways, etc.



OML Exemptions Deliberative Session

Decisions May Be Made In Deliberative Session

- After a public body has heard all of the evidence in a hearing it may adjourn, privately discuss and weigh the merits of the case, and then circulate drafts of an opinion for comment and approval.
- "A written decision issued by a public body in connection with a quasi-judicial proceeding need not be adopted at an open meeting if the decision will be a public record."



1 V.S.A. § 312(f)

OML Exemptions Deliberative Session

Deliberations (public or private):

- Do not need to be warned/noticed;
- Do not need an agenda;
- Are not open to the public;
- Do not require the taking of minutes;
- Do not require votes to be publicly declared:
 - Minutes/written decision speaks for the public body.



OML Exemptions Executive Session

All meetings of a public body are declared to be open to the public at all times, except as provided in section 313 of this title. (Executive session)

1 V.S.A. § 312(a)(1)

Vermont's Open Meeting Law is to be construed liberally, except that the exceptions must be construed strictly.

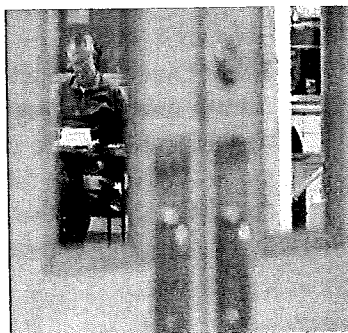
Vermont Supreme Court,
Blum v. Friedman,
172 Vt. 622 (2001).



OML Exemptions Executive Session

Executive Session is a closed meeting within a public meeting.

The law permits boards to exclude the public from a portion of an open meeting to discuss certain topics specifically provided for in the statute authorizing executive sessions.



OML Exemptions Executive Session

A public body may only enter a private executive session when:

1. There is a motion to go into executive session that indicates the nature of the business;
2. The reason for the executive session is one permitted by statute (1 V.S.A. § 313);
 - No other matter may be discussed; and
3. The motion is approved by a majority vote of those board members present in open session.
 - The result of the vote must be recorded in the minutes.



OML Exemptions Executive Session

- **Attendance in executive session shall be limited to:**
 - members of the public body, and
 - [in the discretion of the public body]
 - its staff;
 - clerical assistants and legal counsel;
 - persons who are subjects of the discussion or whose information is needed.



1 V.S.A. § 313(b)

OML Exemptions Executive Session

- No formal or binding action shall be taken except actions relating to the securing of real estate options.
- To take action, the board must come out of executive session, and then vote to take the action during the course of an open public meeting.
- Minutes need not be taken, but if they are they shall be exempt from VT's Public Records Act.



Reasons for Executive Session One Motion

1. Negotiating or securing real estate purchase or lease options. 1 V.S.A. § 313(a)(2)
2. The appointment or employment or evaluation of a public officer or employee (but the public body must make a final decision to hire or appoint in an open meeting and it must explain the reasons for its final decision). 1 V.S.A. § 313(a)(3)
3. A disciplinary or dismissal action against a public officer or employee (but such officer or employee has the right to a public hearing if formal charges are brought). 1 V.S.A. § 313(a)(4)



Reasons for Executive Session One Motion

4. A clear and imminent peril to the public safety.
1 V.S.A. § 313(a)(5)
5. Discussion or consideration of records or documents that are exempt from the public records laws (but that does not give authority to discuss the general subject to which the document pertains). 1 V.S.A. § 313(a)(6)
6. Municipal or school security or emergency response measures, the disclosure of which could jeopardize public safety.
1 V.S.A. § 313(a)(10)



Reasons for Executive Session One Motion

Making The Motion:

"I move that we enter executive session to discuss a clear and imminent peril to the public safety pursuant to Title 1, Section 313(a)(5) of the Vermont Statutes."



Reasons for Executive Session Two Motions

7. After making a specific finding that premature general public knowledge will clearly place the public body or a person involved at a substantial disadvantage, the public body may discuss:

- A. contracts;
- B. labor relations agreements with employees;
- C. arbitration or mediation;
- D. grievances, other than tax grievances;
- E. pending or probable civil litigation or a prosecution, to which the public body is or may be a party
- F. confidential attorney-client communications made for the purpose of providing professional legal services to the body.



1 V.S.A. § 313(a)(1)

Reasons for Executive Session Two Motions

Making a Specific Finding of Substantial Disadvantage

First motion: "I move to find that premature general public knowledge of [*the pending contract with ABC Company*] will clearly place [*the town*] at a substantial disadvantage by [*disclosing its negotiation strategy*]."

Second motion: "I move that we enter executive session to discuss the [*town's contract with ABC Company*] under the provisions of Title 1, Section 313(a)(1)] of the Vermont Statutes."



OML Exemptions The Others

The Open Meeting Law does not apply to:

- Site inspections for the purposes of assessing damage or making tax assessments or abatements;
- Clerical work or work assignments of staff;
- Routine day-to-day administrative matters that do not require action by the public body provided no money is appropriated, expended or encumbered.



1 V.S.A. § 312(g)

Open Meeting Law: Penalties and Enforcement



OML Penalties and Enforcement

What happens when you don't follow the requirements of the open meeting law?

- Potential criminal liability for individuals;
- Potential civil suit against the public body; and
- Actions taken may not be binding;



OML Penalties and Enforcement

“A person who is a member of a public body and who knowingly and intentionally violates the provisions of this subchapter, a person who knowingly and intentionally violates the provisions of this subchapter on behalf or at the behest of the a public body, or a person who knowingly and intentionally participates in the wrongful exclusion of any person or persons from any meeting for which provision is herein made, shall be guilty of a misdemeanor and shall be fined not more than \$500.00.”



1 V.S.A. § 314(a)

OML Penalties and Enforcement

Potential Criminal Liability for a person who:

- Knowingly and intentionally violates the law;
- Knowingly and willfully violates the law on behalf of or at the behest of a public body; or
- Knowingly and intentionally participates in the wrongful exclusion of any person or persons from any meeting.

Misdemeanor, punishable with a fine up to \$500.

1 V.S.A. § 314(a)



OML Penalties and Enforcement

Potential Civil Suit:

- The Attorney General, or any person aggrieved by the alleged violation, may bring suit for injunctive relief or declaratory judgment against a public body in Superior Court:
 - Suit must be brought within one year of the alleged violation;
 - Must first give written notice to the body alleging a specific violation and requesting a specific cure; and
 - Must give an opportunity for the body to respond to the allegation and an opportunity to cure it if applicable.

1 V.S.A. §§ 314(b),(c)



OML Penalties and Enforcement

Potential Civil Suit:

Upon receipt of the written notice, the public body must respond PUBLICLY within 10 calendar days.

The body must either:

1. Acknowledge the violation and state an intent to cure the violation within 14 calendar days, OR,
2. State that the body determines no violation has occurred and that no cure is necessary.



A failure to respond within 10 calendar days will be treated as a DENIAL of the violation.

OML Penalties and Enforcement

Potential Civil Suit:

Within 14 calendar days AFTER the body acknowledges a violation, the body must cure the violation by ratifying or declaring void any action taken or resulting from that meeting which resulted from a violation due to:

1. not being noticed in accordance with the law;
2. wrongfully excluding from it a person or the public; or
3. an executive session not authorized by the law.



OML Penalties and Enforcement

Potential Civil Suit:

- For those violations, and any others:
 - The public body must also adopt specific measures that prevent future violations of the law.

1 V.S.A. § 314(b)(4)



OML Penalties and Enforcement

Potential Civil Suit:

Following acknowledgment or denial of a violation and, if applicable, following the 14 calendar day period, the Attorney General or any person aggrieved by an alleged violation may bring an action in Superior Court.

If the public body is found to be in violation it shall be assessed:

- reasonable attorney's fees
- and
- other litigation costs reasonably incurred

UNLESS . . .



OML Penalties and Enforcement

Potential Civil Suit:

1. The public body had a “reasonable basis in fact and law” for its position...AND
 - It acted in good faith

OR



2. It cured the violation

1 V.S.A. § 314

Questions

?

Contact VLCT's
Municipal Assistance Center:
(800) 649-7915
info@vlct.org

