Local Legislation

• Local legislation refers to acts of the state legislature that apply only to a specific municipality, a specific geographic area, or a particular class of persons identified by name in the legislation.

• While municipalities have broad self-government powers through home rule authority of the Georgia Constitution, certain laws must be passed by a Local Act of the General Assembly.
Examples of Local Laws

Examples of specific local laws which must be passed by a Local Act of the General Assembly are as follows:

1. Local homestead exemptions, Art. VII, Sec. II, Para. II(2)
2. New hotel-motel tax rate changes over 5%, O.C.G.A. § 48-13-51(b)
3. Form of government changes, Art. IX, Sec. II, Para. I (c)(2)
4. Redistricting
5. Any changes to the county offices, their salaries, and their personnel, Art. IX, Sec. II, Para. I (c)(1)
6. Providing the manner of succession to fill a vacancy in office (if the local Act does not specify, the procedure in O.C.G.A. § 36-5-21 must be followed)

To pass a local Act, a member of the legislative delegation for your county must agree to sponsor a bill and a notice must be advertised in the legal organ.

Art. 9, §2, ¶II

- O.C.G.A. § 36-5-3(a): The General Assembly may provide by law for the self-government of municipalities and to that end is expressly given the authority to delegate its power so that matters pertaining to municipalities may be dealt with without the necessity of action by the General Assembly.
- Governing authority authorized to adopt “clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government…”
- “…for which no provision has been made by general law…”
- “…and which are not inconsistent with this Constitution or any Charter provision applicable thereto.”

Amendments to Charters:
O.C.G.A. § 36-35-3(b)(1)

- May amend or repeal by ordinance
  - Adopted at 2 regular consecutive meetings
  - Not less than 7 nor more than 60 days apart
  - Notice published once a week for 3 weeks within 60 days preceding final adoption
  - File with Secretary of State
### Limits to Home Rule: O.C.G.A. § 36-35-6(a)

- Cannot legislate or amend related to:
  - Composition, form, procedure for election or appointment, continuation in office and limitations thereon for members of the municipal governing authority
  - Action defining any offense, also an offense under the criminal laws of Georgia, providing confinement exceeding six months and fines/forfeitures exceeding $1,000.00

### Limits to Home Rule: O.C.G.A. § 36-35-6(a) (Cont.)

- Action adopting any form of taxation beyond that authorized by law or by the Constitution
- Action affecting the exercise of the power of eminent domain
- Action expanding the power of regulation over any business activity regulated by the Public Service Commission beyond that authorized by charter or general law or by the Constitution
- Action affecting the jurisdiction of any court
- Action changing charter provisions relating to the establishment and operations of an independent school system
- Or other areas preempted.
Why Have Boards and Authorities?

- Allow focus on discrete issues
- Provide expertise
- Provide advice and recommendations
- Narrow goals
- Insulation from politics
- But – Be wary of Open Meeting issues

Methods of Creation

- Constitutional
- Required by state law
- Permitted in accordance with state law
- Local legislation
- Ordinance
- Resolution

Characteristics & Powers of Some Boards and Authorities

- Some are separate legal entities
- Bond authority
- Can contract, borrow, own, sell
- Operate a service
- Charge fees
- Control their own budget
- Often limited power of government to control
- Finite/infinite life
- Some are advisory
- Some have unique hearing/notice requirements
Examples of Boards and Authorities
- Board of Tax Assessors
- Board of Equalization
- County Appraisal Staff
- Board of Health
- Board of Family and Children Services
- Regional Planning Boards for Mental Health/ Community Service Boards
- Parks or Recreation Boards
- Development Authority
- Hospital Authority
- Housing Authority
- Planning Commission
- Board of Zoning Appeals and Variances
- Public Library Board
- SPLOST Project Committee
- Finance Committee
- IT Committee
- Public Facilities Authority
- Airports/Airport Authority
- 9-1-1 Authority
- Regional Commissions-intergovernmental relations

Disadvantages to Boards/Authorities
- Can be difficult to control
- Conflicts
- Power to create obligations
- Difficult to eliminate
- Difficult to replace problematic members
- Political embarrassment

Registration of Authorities
O.C.G.A § 36-80-16
- All authorities must register annually with Department of Community Affairs
- Before January 1st of each year
- If fail to do so, the authority cannot incur new debt
MEETING EFFICIENCY

Does my board/commission have any rules?
- Are you authorized to adopt bylaws?
- If so, what sort of rules should you adopt?

Tips
- Keep it simple
- Keep it clear
- Keep it focused
- Keep it flexible
Tips

Q: Should we just adopt Roberts Rules of Procedure?

A: It’s a wonderful fallback.

* Some Charters require Roberts!

Motions

- The most common procedural method of exercising your authority is by making motions.
- It is always desirable to put motions in writing. Of course, meetings are recorded and reported, but to ensure that there is not a mistake, it is preferable to put motions in writing and give them to the clerk or reporter for placement in the record. This ensures there is no question about what was intended.
- Consistency should be your goal. Make sure that your decisions and conditions are imposed in an even handed manner.

Quick Tips for Making Motions

1. Remember the motion will be reduced to black and white.
2. Avoid “so moved” unless it is unmistakably clear what is going on.
3. If voting to approve an action, just make sure to identify what you are approving (i.e. the Resolution, the Ordinance, the plan, the contract)
4. If denying something, particularly in the land use context, try to give reasons arising from the code you are working under.
5. Remember that a main motion is on the bottom with respect to priority. A motion to adjourn, recess, postpone or amend will take priority.
Accuracy of Motion

- Many times the agency members are engaged in earnest deliberation and debate and are attempting to craft compromise by the motion. In the give and take of deliberation, many times EVERYONE can know what the motion meant; but in black and white it does not come out very well.

- Ideally, have motions in written format. If not, perhaps use the same motion language each time. I move that the PC make a recommendation of approval of Zoning X, with the conditions that were displayed on the screen. Or, with the conditions displayed on the screen, and to include the requested 10 foot side yard variance.

Minute adoption procedures

- Fully appropriate to circulate draft minutes in advance;

- Further appropriate to question the accuracy of the minutes.

- Further it is appropriate for the minutes to be changed from what was originally circulated;

- However, any suggested change is ONLY as good as it is agreed upon by the rest of the members.

Minute adoption procedures

- And, minutes are important. Make no mistake about that. They are, legally, the official record of what transpired at the meeting. However, if a Board member makes a suggestion that the draft minutes be modified in a manner that means they are different than what actually occurred; then that is not appropriate.

- Touchstone of minutes. They must reflect what actually transpired at the meeting; good, bad or ugly.
Meeting efficiency

- No magic bullet here.
- First of all, efficiency is in some respects in the eye of the beholder. For one member, efficiency may mean a very quick meeting with little discussion and quick votes.
- For another member, efficiency may mean that the meeting is “run” properly, but there is much, much, much discussion.

Meeting efficiency

- For another member it might be a melding of these two concepts.
- Efficiency is in the eye of the beholder.
- However, if there is not unanimity on the topic of what is efficiency, then there are procedural steps that can be employed to ensure that the meeting stays on target:

Meeting efficiency (Cont’d)

- Chairman – as the presiding officer can encourage the members to be concise and efficient in their deliberations, etc.,
- The Commissioner could consider adopting procedural devices to incentivize efficient discussions (i.e., motions to call the question; motions to suspend debate; motions to set a time certain for deliberation). However, these tools are only effective if they work.
Meeting efficiency (Cont’d)

• However, those tools notwithstanding, the best way to ensure the business of the PC is handled efficiently, is to have a common understanding between all the members that an efficiently run board is the sort of thing that instills confidence into the public; and we can agree that this is a laudable goal.

• Finally, another way to incentivize efficiency is to really exploit work sessions. Ask questions, roll up the sleeves and really dig in deep. Again, a work session is not substitute for the actual meeting, but it is an invaluable tool to address questions in a way that incentivizes more efficient decision making in the big room.

RECORD MAINTENANCE & BEST PRACTICES

Records Maintained by Clerks

• Ante Litem Notices
• Annexation Notices
• Agenda Books
• Ordinances
• Resolutions
• Executed Agreements
• Any other document approved by the governing authority
Maintain the Record

- Keeping complete and accurate records is vital for efficient government
- Serves as reference for historical purposes
- Provides supporting documentation for litigation
- Compliance with Record Retention laws

Record Retention Recap

- Must designate a records custodian
- Must establish a records retention schedule that follows the State Archives Division’s standard records retention schedule
- County may retain longer
- May only destroy records per law or it’s a misdemeanor

Record Classifications

The four classifications are:

- **TRANSITORY**: Information of a temporary nature that does not meet the requirements for longer retention prescribed by O.C.G.A. § 50-18-94(1).
- **TEMPORARY-SHORT TERM**: Information that needs to be retained less than fifteen years.
- **TEMPORARY-LONG TERM**: Information that needs to be retained for fifteen years or longer, but which does not need to need to be retained permanently.
- **PERMANENT**: Information that for legal, historical, fiscal, or administrative reasons needs to be retained forever.
Sample State Records Retention Schedules

<table>
<thead>
<tr>
<th>Record Title</th>
<th>Description</th>
<th>Retention</th>
<th>Classification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Code Violations</td>
<td>Any violations of the Code of Ordinances pertaining to the property.</td>
<td>3 years Temporary</td>
<td>- Short Term.</td>
</tr>
<tr>
<td>Open Records Act Requests and Correspondence</td>
<td>Inquiries from members of the public requesting access to information under the Georgia Open Records Act (O.C.G.A. § 30-1-50 et seq.)</td>
<td>5 years Temporary</td>
<td>- Short Term.</td>
</tr>
<tr>
<td>Maps, Plans, and Drawings</td>
<td>Records documenting the location of roads, subdivisions, water and sewage lines</td>
<td>Permanent</td>
<td>Permanent Vital Record</td>
</tr>
<tr>
<td>Meeting Notices</td>
<td>Official notification of the time and place of regular and special meetings.</td>
<td>5 years Temporary</td>
<td>- Short Term.</td>
</tr>
<tr>
<td>Minutes and Agendas</td>
<td>Official record of agency meetings and the decisions made.</td>
<td>Permanent - O.C.G.A. § 36-36-3(e)</td>
<td>Permanent Vital Record</td>
</tr>
<tr>
<td>Policies and Procedures</td>
<td>Standard operating practices for business processes</td>
<td>Permanent - Retain</td>
<td>Permanent Vital Record</td>
</tr>
<tr>
<td>Resolutions and Ordinances</td>
<td>Local laws and actions adopted by the board of county commissioners.</td>
<td>Permanent</td>
<td>Permanent Vital Record</td>
</tr>
<tr>
<td>Calendars</td>
<td>Desk calendars and other scheduling media; does not include court calendars.</td>
<td>Retain for useful life</td>
<td>Transitory</td>
</tr>
<tr>
<td>Reference Files</td>
<td>Copies of records, publications, and other materials used to answer routine inquiries and questions.</td>
<td>Retain for useful life</td>
<td>Transitory</td>
</tr>
<tr>
<td>Accident Reports</td>
<td>Reports of accidents involving government owned vehicles.</td>
<td>7 years - O.C.G.A. § 9-3-33</td>
<td>Temporary - Short Term.</td>
</tr>
<tr>
<td>Annexation Records</td>
<td>Demonstrating the approved addition of property to the city boundaries.</td>
<td>Permanent</td>
<td>Permanent Vital Record</td>
</tr>
<tr>
<td>Right-of-Way Agreements</td>
<td>Agreements with property owners specifying the terms of access to property for public works purposes</td>
<td>Permanent</td>
<td>Permanent Vital Record</td>
</tr>
</tbody>
</table>
General Guidelines

Certain guidelines apply to all records listed in the schedule:

• These retention periods apply to all record formats. The retention periods shown in this guideline apply to all records and information created by the local government regardless of physical format (paper, film, electronic, etc.).

• These retention periods are the minimum requirements imposed by the state. Each retention period in this schedule is the minimum length of time the record must be retained. The decision to retain specific information longer than the minimum retention period should be made by local government administration and legal counsel. Such a decision should be documented in the records management plan and/or local ordinance.

• These retention periods are intended to guide local governments. Each local government must adopt a retention schedule (O.C.G.A. § 50-18-99(d)). Records retention periods should be established to serve the needs of the local government, but the retention period can never be less than the minimum retention periods indicated in this schedule.

General Guidelines (cont.)

• These retention periods apply to records under normal business conditions. The retention periods in this schedule apply to records created and used under normal business conditions. If a particular series of records is required for litigation, audit, or other special administrative needs, it must be retained for as long as needed.

• Disposition requirements are stated in the following manner—from the creation of the record or following an event or occurrence. For example, Accounts Receivable Files have a retention of retain 5 years (after creation) while Bank Loan Records are retained for 5 years after settlement of the loan (an event).

Uniform Electronic Transactions Act

O.C.G.A. § 10-12-1, et seq

• Act applies “to any electronic record or electronic signature created, generated, sent, communicated, received or stored on or after July 1, 2009.”

• “Each governmental agency of the state shall determine whether, whether, and the extent to which, it will create and retain electronic records and convert written records to electronic records.”

• “If a law requires that a record be retained, such requirements shall be satisfied by retaining an electronic record.”

• Must accurately reflect record

• Must remain accessible for retention period required by law
O.C.G.A. § 10-12-12. Retention of records

(a) If a law requires that a record be retained, such requirement shall be satisfied by retaining an electronic record of the information in the record which:

1. Accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and
2. Remains accessible for the retention period required by law.

(b) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with subsection (a) of this Code section.

(c) A record retained as an electronic record in accordance with subsection (a) of this Code section shall satisfy a law requiring a person to retain a record for evidentiary, audit, or like purposes unless a law enacted after July 1, 2009, specifically prohibits the use of an electronic record for the specified purpose.

(g) This Code section shall not preclude a governmental agency of this state from specifying additional requirements for the retention of a record subject to the agency’s jurisdiction.

What is a contract?

- Georgia law defines a contract as “an agreement between two or more parties for the doing or not doing of some specified thing.” O.C.G.A. § 13-1-1.

- Additionally, to “constitute a valid contract, there must be parties able to contract, a consideration moving to the contract [something given in exchange for something else], the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate.” O.C.G.A. § 13-3-1.
What is a contract?

- Although contracts can be verbal in many situations (e.g. paying a neighbor’s son to mow the lawn is technically a contractual event, even if there is no written agreement), written contracts memorialize the agreement and clarify the parties’ understanding of the contractual terms.
- Counties are legally required to reduce all contractual terms to writing. O.C.G.A. § 36-10-1.
- Agreements should be spread upon the minutes.

Contract Review

It is extremely important for a local government staff member who is familiar with the agreement’s subject matter to carefully read the entire prior to submitting it for legal review.

- First, legal counsel will never be as familiar as the local government’s staff with the business terms and customary trade language provided in the description of work/services.
- Second, in the case of outside legal counsel, an initial review by a local government’s staff can identify obvious non-legal issues, resulting in a better, revised document that will reduce legal review time and cost.

Exhibits

- Resist the temptation to simply reference external information (e.g. plans, drawings) in agreements without actually incorporating that information into the body of the agreement itself, or as an exhibit attached to and clearly referenced in the agreement.
- Exhibits should be identified in the body of the agreement and expressly adopted into the agreement with verbiage such as: “The work to be performed is described in Exhibit ‘A’, attached hereto and incorporated herein by

- All Exhibits referenced in an agreement should actually be attached to the original agreement prior to execution. Should be clearly designated on their face as the exhibit referenced in the agreement, e.g. Exhibit “C” or Exhibit “1.”
Maintenance of Originals

It is advisable, and in some instances required, that all local government contracts be in writing and spread upon the minutes of a meeting of the local government’s governing authority.

- Georgia law requires that all county contracts must be in writing and spread upon the minutes. O.C.G.A. § 36-10-1.
- Thus, the county clerk should have on file in writing and entered on the minutes of the county governing authority at least one fully and properly executed original of every agreement entered into by the county. O.C.G.A. § 36-10-1.

General Contractual Provisions to Include in Every Local Government Service Contract

- Multi-year provisions
- Cannot Bind Future Boards
- Hold Harmless
- Indemnification
- Insurance
- E-Verify Compliance
  - Independent Contractor
  - Subcontractors

Multi-Year Lease, Purchase, Lease-Purchase Agreements

- O.C.G.A. §36-60-13
  - Must terminate at close of calendar or fiscal year
  - Automatic renewal unless positive action
  - Total obligation stated
  - Title to any supplies, materials, equipment or personal property shall remain with the vendor until fully paid for by municipality
  - Applies to agreements of “all kind for the acquisition of goods, materials, real and personal property, services, and supplies”
  - Some exceptions (may not result in a cumulative amount of debt loading in excess of 10% of the assessed value of all taxable property within such county or city)
Cannot Bind Future Boards: 
**O.C.G.A. § 36-30-3**

- “One council may not, by an ordinance, bind itself or its successors so as to prevent free legislation in matters of municipal government.”
- Why does such a restriction make sense?
- Some exceptions:
  - Intergovernmental Agreements
  - Industrial wastewater treatment services (O.C.G.A. § 36-60-2) – allows cities and counties to contract for as long as 50 years
  - Valid multi-year contracts

Indemnity for Contractors

- Indemnity provisions executed by a local government for the benefit of another violate the gratuities clause of the Georgia Constitution.
  - The gratuities clause provides that local governments “shall not have the power to grant any donation or gratuity or to forgive any debt or obligation owing to the public.”
- Further, one could also argue that indemnity provisions executed by a local government for the benefit of another constitute an impermissible waiver of sovereign immunity.
- Local governments should initially strive to have such provisions stricken. However, if a contractor insists on such a provision, it should at least be qualified along the following lines: “except to the extent, if any, allowed by law.”

Hold Harmless and Indemnification for your Agency

- Contracts may (and should) include language requiring the contractor to defend, indemnify, and hold harmless the local government, its officers, boards, commissions, etc., from and against any and all claims, injuries, suits, judgments, damages, losses, and liability of any kind.
Insurance

- Protection for local governments entering into agreements should include various types of insurance
- Common Types:
  - General Liability Insurance
  - Property Insurance
  - Automobile Liability Insurance
  - Workers' Compensation Insurance
  - Professional Liability Insurance
  - Builder's Risk Insurance
- The County should be listed as an additional insured and may elect to request certificates of insurance

Compliance with Immigration Requirements

- In recent years, the General Assembly has passed legislation requiring local governments to verify the legal status of certain individuals and entities that interact with or contract with a local government.

E-Verify Compliance

- Compliance with E-Verification requirements must occur when a local government enters into a public works contract. The definition of a public works contract is somewhat unclear in this instance. However, according to a memorandum provided by the Attorney General of Georgia, a public works contract has been defined as:

  - any contract to be performed on public property of the state and involving a fixed asset. This term includes a broad range of contracts such as repair, maintenance, design, and consulting contracts and within its meaning includes all “construction contracts” and “public works construction contracts.”


Common Types of Contracts
**Intergovernmental Contracts: Ga. Const. Art. 9, §3, ¶1**

- Between governmental entities
- Related to facilities or functions the governments are authorized to undertake
- Not to exceed 50 years

**Bonds**

- **Bid bonds** - to "insure" that the bidder can perform what they are bidding to perform  
  (O.C.G.A. § 36-91-50)
- **Performance bonds** – a bond to make a claim against if the contractor performs the work poorly or improperly and the government must use another contractor to correct.  
  (O.C.G.A. § 36-91-70)
- **Payment bonds** - a bond to ensure that the contractor pays all of their subcontractors and suppliers. They claim against the bond and not the government.  
  (O.C.G.A. § 36-91-90)

**Service Delivery Strategy: O.C.G.A § 36-70-20**

- Must identify services & geographic area of services
- Describe funding for each service
- Requirements to ensure fair rates across service areas
- Dispute resolution process
- Updates to Service Delivery Strategy required in conjunction with updates to comprehensive plan or when service delivery changes
Disposal Generally

- Disposal—O.C.G.A. § 36-37-6 (rules regarding sale of municipal property)
- Generally, must be by sealed bid or auction—O.C.G.A. § 36-37-6(a)
- Exceptions for trading or exchanging real property (swaps), irregular pieces to abutting property owners, property in established municipal industrial parks or municipally designated industrial development areas, sales to other government agency for public purpose, establishing conservation easements & other exceptions (i.e., conveying easements)

Exchanges of Land

- For Road Purposes -
  O.C.G.A. § 32-3-3(b) — city or county may exchange right of way for other grants of property for road purposes so long as what is being received is of equal or greater value than what is being relinquished.
- General Property -
  O.C.G.A. § 36-37-6(c) — authorizes property swaps for property of equal or greater value. Requires advertising the exchange in the legal organ. Public hearing required.
**Acquisition**

- Eminent Domain – Ga. Const. Art. 9, §2, ¶V
- Procedures for transportation takings – O.C.G.A. § 32-3-1 et seq.
- Procedures for other takings - O.C.G.A. § 22-2-1 et seq.

**Types of Deeds**

- Warranty
- Limited Warranty
- Quitclaim
- Right-of Way

**Easements**

- Express
- Implied
- Prescriptive
- Temporary (for construction purposes)
- Permanent (for utilities and road improvement projects)
Annexation

• 100% (O.C.G.A. § 36-36-20) – if 100% of all owners of the land to be annexed request it.
• 60% (O.C.G.A. § 36-36-30) – application by 60% of owners of land and 60% of electors residing in the area to be annexed
• Resolution & Referendum – for urban purposes and requires a successful referendum by those that can vote in the area to be annexed
• Local Act of General Assembly

5-Day Deadlines Regarding Annexation

• Municipality must give notice to the governing authority of the county of the proposed annexation within five business days of accepting an application for annexation. O.C.G.A. § 36-36-6
• County must notify city of any county-owned public facilities within the area to be annexed within five business days of receiving notice of the proposed annexation from the city. O.C.G.A. § 36-36-7

Objections to Annexation O.C.G.A. § 36-36-113

• The county governing authority may by majority vote object to the annexation because of a increase in burden upon the county.

• Notice of the objection must be provided to the municipal governing authority by certified mail or statutory overnight delivery for delivery by thirtieth calendar day following receipt of notice the proposed annexation.
Land Dispute Resolution Process: O.C.G.A. § 36-36-110 et seq.

- County may object based on “material increase in burden” on the county directly related to any one or more of the following:
  - The proposed change in zoning or land use
  - Proposed increase in density
  - Infrastructure demands related to the proposed change in zoning or land use

Lawsuits - An Overview

Common Types of Lawsuits
- Zoning Challenge
- Ordinance Challenge
- Section 1983
- Equal Employment Opportunity Commission (EEOC) Claim
- Wrongful Termination
- Accidents/Injuries
Ante Litem Notices

• Claims against the municipality must be presented in writing within 6 months
• Claims against the county must be presented in writing within one (1) year

General Anatomy of a Case

• Complaint (and service upon the government)
• Answer
• Dispositive Motions (and Responses and Replies)
  • Common Types: Motion to Dismiss or Motion for Judgment on the Pleadings
  • Could be dismissed here!
• Discovery (6 months)
  • Interrogatories
  • Production of Documents
  • Depositions
• More Dispositive Motions (and Responses and Replies)
  • Common Type: Motion for Summary Judgment
  • Could be dismissed here!
• Trial
• Possible Appeal

General Anatomy of a Case

• Most cases do not end up at trial. Many are settled in advance.
• Some cases may elect or be ordered to participate in mediation to settle their disputes.
• It is not uncommon for a lawsuit to take several years to resolve.
What Role Might the Clerk Play?

- Receipt of the ante litem notice
- Receipt of other litigation documents
  - Be sure to keep your attorney informed!
- Document certification
- Document production
- Witness
- Discussion of litigation in executive session

You May One Day Be A Witness

- Keep your cool
- Don’t argue with the attorney
- Only answer the question asked
- Let the attorney completely ask the question before answering
- Ask for clarification if needed
- Answer every question honestly
- Give facts, not your opinion
- It is proper to refresh your memory from previous testimony
- Speak up and speak with confidence and conviction
- Courtesy and good manners will help

CITY/COUNTY ATTORNEY ROLE & RESPONSIBILITIES
The Attorney-Client Relationship

- Understand the Government Attorney’s Role
- Understand why the Attorney is necessary
- How does the Attorney-client relationship work?

What Does The Government Attorney Actually Do?

Government Attorneys are often described in enabling legislation as appointed officials

Sample Provisions Relating to Government Attorneys

Athens-Clarke County
Sec. 4-103
- The Mayor shall make nonbinding recommendations to the Commission for the “attorney” of the unified government (referred to at times in this Charter as the “attorney”). The attorney shall be appointed by a majority vote of the entire Commission ... and at any time may be removed by a majority vote of the entire Commission
- The attorney shall be an active member of the State Bar of Georgia in good standing and shall satisfy any other qualifications established by ordinance
- The attorney shall be legal counsel to the unified government and shall perform such other duties as may be required by this Charter or by ordinance
- The compensation of the attorney shall be as prescribed by a duly adopted ordinance
Purpose of the Government Attorney

• Charged with giving competent legal advice to the government
• Charged with helping the government enforce the laws of the government (ordinances and enabling legislation)
• The Government Attorney defends the actions of the government when sued

Government Attorney Overview

• Advising NO (even when the client wants YES)
• Devil’s Advocate
• Challenges Group Think
• Reminds governing body of rules
• Provides objective, non-political view

Your Relationship With The Government Attorney

• Role of Government Attorney is preventative, offensive and defensive
  - Counselor
  - Advisor
  - Subject matter expert
  - Advocate
• These roles help governments operate under the rule of law
“Government Attorney 101”

- A government attorney’s job is, at its most basic, to provide an accurate understanding of the applicable law and then allow the governing body to act within the parameters of the law. I will even go so far as to suggest that in certain situations my job is to make express recommendations. (i.e., should we settle a case, bring a lawsuit, file a counterclaim, etc.). There are even times when I should advise the governing authority that “to do “X” is plainly illegal. Do not do it.”

“Government Attorney 101”: CONT’D

- That being said, I am mindful of the power of this position and I am further aware that the attorney’s opinion can be very influential—and, can in fact be used as a bludgeon against other board/council members. I appreciate the deference and the confidence, but with that comes a corresponding obligation to not abuse or take advantage of the deference you provide. I have certainly seen past occasions (in other jurisdictions, of course!) where a board/council member is having difficulty building consensus, and will endeavor to say “well, legal requires that we do this!”

- Needless to say, that places the other board/council members in the awkward position of either:
  1. voting along with that commissioner (based upon the “legal” card having been played) or
  2. appearing to publicly thumb their noses at the opinion of their own lawyer. It is an awkward and oftentimes unfair position for everyone.

“Government Attorney 101”: CONT’D

- The county attorney’s job is not to make policy; it is to empower the governing agency to make policy.

- On the other hand, if I see the agency doing something patently illegal – you should expect that I will stop it.

- Finally, while I wish the law was always (always) black and white, oftentimes it is not. Many legal issues have answers only in the margins. The “answer” to a legal question—may not be an answer at all; it may be a professional opinion backed up by extensive well-crafted research, an understanding of the facts, logical analysis, legal supposition based on experience, and (dare I say it) gut instinct.
“Government Attorney 101”: CONT’D

• Reminder: The Government Attorney represents the local government.
  • The Government Attorney may represent you for actions taken in your capacity as a government employee
  • The Government Attorney does NOT represent you for personal matters unrelated to government employment

Outside Counsel

• In certain contexts, your local government may retain outside counsel
  — Conflicts
    — Specialties (SDS litigation, SPLOST, workers compensation, property matters, insurance defense, bond transactions)
  • Individual officers or employees may need or choose to retain outside counsel
    — Ethics complaints, litigation, etc.
  • Be sure you know and understand the scope of representation

Attorney-Client Privilege

• The attorney-client privilege is sacrosanct and is “the oldest of the privileges for confidential communications known to the common law
• Privilege attaches where:
  — There is an attorney-client relationship;
  — The communications in question relate to the matters on which legal advice was sought;
  — The communications have been maintained in confidence;
  — No exceptions to privilege are applicable.
**Attorney-Client Privilege**

- Waiver of the privilege may occur in a variety of circumstances, but typically occurs when privileged communications are disclosed to third parties.
- Keep communications with your government attorney confidential.
- While arguably only a formal waiver by the board or council may waive the privilege, err on the side of caution - **Do not** discuss confidential communications with non-county or non-city personnel.

**OPEN MEETINGS ACT: A RECAP**

**Public Policy of the Open Meetings Act**

- The Open Meetings or “Sunshine” Act was enacted to ensure that the proceedings of all public agencies are conducted in an open and public manner, so that the people may be informed about the actions of their governments and retain control of them.
Function of the Act

• The Act provides a framework for managing business by public agencies through posting agendas, keeping minutes, and dealing with personnel issues.
• The Act provides a mechanism for an aggrieved citizen who believes a governmental agency has committed a violation of the Act.

Who Must be Granted Access?

• The Public – At All Times.
• Any radio or television station may broadcast an open meeting, as can a private citizen. The public body may reasonably control the placement and use of cameras so as not to unduly interfere with the meeting.
• Each governing body may adopt reasonable rules for attendance of the public at its meetings.

Who Must Comply with the Open Meetings Act?

What organizations are covered?
• All organizations created under statute or by resolution of a local board, council, commission, or other governmental unit exercising policy-making authority.
• Every county, municipal corporation, school district, or other political subdivision of this state.
• Every department, agency, board, bureau, office, commission, authority, or similar body of each such county, municipal corporation or other political subdivision of the state.
What is a “Meeting”? 

- Gathering of a quorum of the Members of the governing body of an agency at which any official business, policy or public matter of the agency is formulated, presented, discussed, or voted upon.

- The gathering of a quorum of any committee of the members of the governing body of an agency or a quorum of any committee created by the governing body at which any official business, policy, or public matter of the committee is formulated, presented, discussed or voted upon.

- The statutory inclusion of a quorum of any committee created by the governing authority constituting a meeting irrespective of whether the committee has members of the governing body on it, is a significant change in the law.

What is NOT a Meeting 

The gathering of a quorum of the governing body or a committee for the purpose of:

- Making inspections of physical facilities or property under the jurisdiction of the agency – where no other business is discussed or official action is taken;

- Attending a statewide, multi-jurisdictional or regional meeting to participate in seminars or courses of training on agency matters – where no official action is taken;

- Meeting with officials of the legislative or executive branches of the state or federal government at state or federal offices and at which no official action is to be taken by the members;

What is NOT a Meeting (cont.)

- Traveling to any of the above assemblies so long as no official business, policy, or public matter is formulated, presented, discussed or voted upon by the quorum;

- Attending a social, ceremonial, civic or religious event – no municipal business;

- Incidental conversations unrelated to the business of the agency.

- E-mail communications among members of an agency provided, however, that such communications shall be subject to disclosure pursuant to the Open Records Act;

- Staff meetings held for investigative purposes under duties imposed by law.
What is NOT a Meeting (cont.)

- Gatherings involving an agency & one or more neutral parties in mediation of a dispute between the agency & any other party. In such a gathering, the neutral party may caucus jointly or independently with the parties to the mediation to facilitate a resolution of the conflict, & any such caucus shall not be subject to open meetings requirements.
- **Caveat:** Any decision or resolution agreed to by an agency at any such caucus shall not become effective until ratified in a public meeting & the terms of any such decision or resolution are disclosed to the public.

But Wait!

The exclusions/exemptions discussed above shall not apply if it is shown that the primary purpose of the gathering or gatherings is to evade or avoid the requirements for conducting a meeting while discussing or conducting official business.

What Meetings Must be Open? (and, is there an exception to this rule)

- Meetings of the governing bodies and committees of all public agencies must be open to the public, unless a specific statutory exception applies. These statutory exceptions authorize the governing body or committee to enter into an "executive session".
- In the rewrite, executive session is now defined as "a portion of a meeting lawfully closed to the public."
Participation in Meetings

- Historically, the Open Meetings Act prohibited meetings via teleconference, except for certain statewide agencies. Under the rewrite, an agency may conduct a teleconference meeting under the following circumstances:
  - For emergency conditions involving public safety or the preservation of property;
  - The public notice requirements must be met;
  - The public must have simultaneous access to the teleconference meeting.

May a Member Participate Via Teleconference or Other Electronic Method Where a Quorum of the Agency is Physically Assembled?

- Under the new law, the answer is clearly yes.
- Only may do so if (1) away from the jurisdiction, or (2) necessary for health reasons.
- May only do so twice a year, absent an emergency condition or the member has a written opinion by a health care professional that reasons of health prevent the member’s physical attendance.

Caution: Situations to Watch!

- Seminars, Work Sessions and Retreats
- Pre-Meeting Meetings
- Breaks during Regular Meetings
- 2 x 2 Meetings
Making the Public AWARE

• For Regular meetings – the following is required:
The agency shall prescribe the time, place and dates of regular meetings of the agency. Such information shall be available to the general public and a notice containing such information shall be posted at least one week in advance and maintained in a conspicuous place available to the public at the regular place of an agency or committee meeting as well as on the agency’s website, if any.

Making the Public AWARE (cont.)

• For OTHER than Regular meetings:
Written or oral notice shall be given at least 24 hours in advance of the meeting to the legal organ in which notices of sheriff’s sales are published in the county where regular meetings are held – or a paper that has the equivalent circulation of the legal organ. If the legal organ publishes less than 4 times per week, then sufficient notice shall be posting of written notice at least 24 hours at the place of regular meeting and, upon written request from the media, notice by telephone, email, facsimile, or to the media at least 24 hours in advance.

Making the Public AWARE (cont.)

For OTHER than Regular meetings with LESS THAN 24 hours advance notice:
• The touchstone here is “reasonable notice.”
• Notice must be reasonable under the circumstances, to include (1) notice to the county legal organ or its equivalent, (2) recording in the minutes the need for such an emergency meeting, (3) providing telephonic, facsimile or email notification to other media outlets that have a place of business in the County and that have requested such notice.
What is Required for an Agenda?

• Must produce Written Agenda prior to any meeting,
• The Public Body or committee must provide for all matters expected to be considered,
• Agenda shall be available upon request, and
• Posted at the meeting site, as far in advance of the meeting as reasonably possible, but not more than two weeks (14 days) prior.
• Failure to include an item does not stop its consideration by the Public Body.

Requirement for Minutes

• Public agencies must keep written minutes of all meetings, and must make them available to the public.
• These minutes must include all measures proposed and the results of all votes taken.
• Voting by secret or written ballot is prohibited.

Minutes – Technical Requirements

• A SUMMARY of the subjects acted on and those members present at a meeting shall be written and made available within two (2) business days of adjournment; and
• The minutes shall be promptly recorded and be open to public inspection once approved, but not later than the following regular meeting.
• The minutes shall, at a minimum, include:
  ▫ Names of the members present;
  ▫ A description of each motion or other proposal made, and a record of all votes;
  ▫ The identity of the person making and seconding the motion or other proposal [new requirement]; and
  ▫ A record of all votes. However, if unanimous, the law assumes that we know who was at the meeting. However, if the vote is split, identify who was for and against.
Minutes in Executive Session

- Traditionally, minutes were not required for executive session, except in the context of land acquisition.
- New rules require minutes of executive session, which must include:
  - a specification and brief description of each issue discussed
  - the legislation is not specific regarding votes – but the preferred rule is to record motions and votes the same as in open session
  - if attorney-client privileged, record fact that a privileged discussion occurred & its subject, but the substance of the discussion need not be recorded.
- Executive session minutes shall not be open to the public, but are to be preserved in case of a court challenge.

Voting

- All votes at any meeting shall be taken in public; however, votes regarding settlement, negotiations to purchase land, options to purchase land, and appraisals may be taken in executive session, but no settlement, lease, disposal or acquisition shall become binding until voted on in public.

Exceptions to the Open Meetings Act

- A governing body of a public agency may hold an executive session (closed meeting) during a regular, special or emergency meeting, when the specific reason for such closure is entered upon the official minutes. To close a meeting, there must be a vote by a majority of a quorum to close the meeting and the minutes shall reflect:
  - The names of the members present; and
  - The names of the members that voted to close the meeting; and
  - The reason for the closure.
Executive Session Affidavit

- When an executive session occurs: the person presiding over such meeting – or the membership of the entire agency if the agency’s policies so provide – shall execute and file a notarized affidavit affirming that the subject matter of the meeting was authorized by pertinent law.
- If a discussion occurs in executive session on a topic not authorized by the law, the presiding officer shall declare the discussion out of order and the discussion shall cease. If the discussion continues, the meeting shall be adjourned.

Closed Meetings “Executive Session” Topics

Litigation Matters
- When consulting with legal counsel regarding pending or potential litigation, settlement, claims, administrative proceedings, or other judicial action brought or to be brought by or against any agency or any officer or employee or in which the agency or any officer or employee may be directly involved.
- Cannot close a meeting for advice/consultation on whether to close a meeting.
- To discuss settlement of any matter which may be properly discussed in executive session, but a vote in executive session to settle shall not be binding until a subsequent vote is taken in open session.

Closed Meetings “Executive Session” Topics (cont.)

Land Acquisition Matters
- Meetings when any agency is discussing or voting to:
  - Authorize negotiations to purchase, dispose of, or lease property;
  - Authorize the ordering of an appraisal related to the acquisition or disposal of real estate;
  - Enter into a contract to purchase, dispose of, or lease property subject to approval in a subsequent public vote;
  - Enter into an option to purchase, dispose of, or lease real estate subject to approval in a public vote
Caveat: No vote in executive session to acquire, dispose of, or lease real estate shall be binding on an agency until a subsequent vote is taken in open session. The mere authorization of negotiations & to secure appraisals have no requirement.
Closed Meetings “Executive Session” Topics (cont.)

Personnel matters – meetings when discussing or deliberating upon the:
- Appointment;
- Employment;
- Compensation;
- Hiring;
- Disciplinary action;
- Dismissal or periodic evaluation or rating of a public officer or employee; or
- Interviewing applicants for the position of executive head of an agency.

Votes on any matter involving personnel issues must be taken in open session and otherwise will not be binding.

Closed Meetings “Executive Session” Topics (cont.)

- Portions of meetings during which that portion of a record made exempt from public inspection or disclosure pursuant to the Open Records Act is to be considered by an agency and there are no reasonable means by which the agency can consider the record without disclosing the exempt portions if the meeting were not closed.

Enforcement

- The Superior Court has jurisdiction over Open Meetings Act complaints.
- The Attorney General may bring a civil or criminal complaint to enforce compliance, as may any citizen, firm, corporation or other entity.
- Unless action taken with substantial justification, the agency shall be responsible for prevailing party attorney fees and litigation costs.
- Any person knowingly and willfully conducting or participating in a meeting in violation of the Open Meetings Act shall be guilty of a misdemeanor and face up to a $1,000 fine per violation.
- A civil penalty of up to $1,000 per violation may be assessed when the violation was negligent.
- A civil or criminal penalty of up to $2,500 per offense will be imposed for additional violations within a 12 month period after the date that the first penalty was imposed.
Who can be Sued?

- The Public Entity and members of the governing body
- Anyone conducting or participating in the meeting
- Any action contesting a resolution, rule, regulation, ordinance, or other formal action of an agency based on an alleged violation of this provision shall be commenced within 90 days of the date such contested action was taken; or, if the meeting was held in a manner not permitted by law, within 90 days from the date the party alleging the violation knew or should have known about the alleged violation so long as such date is not more than six months after the date the contested action was taken.

What Legal Remedies may be Available?

- Injunctive Relief
- Mandamus
- Civil Penalties (Attorney Fees)
- Criminal Penalties
- Invalidation of Official Action
- Forfeiture of Office
- Contempt of Court

Defenses to the Lawsuit

- Substantial Compliance
- Advice of Counsel
- Nonparticipation in the Violation
- Good Faith (defense in criminal action)
- Harmless or De Minimus Violation
Practice Pointers

- Become familiar with the Act’s requirements – Address questions about the law to legal counsel.
- Assure yourself that the public body follows the Act’s requirements for notifying the public and press and for making and preserving records.
- Presume that meetings will be open, unless there is a clear showing of need for a closed meeting specifically authorized by the Act.
- When voting to close a meeting:
  - Specify which exemption is being used to close the meeting;
  - Have this noted in the minutes; and
  - Stick to the topic.
- Take final action in public.

Questions?

Connect With Us!

facebook.com/VinsonInstitute
LinkedIn: CVIOG_USA
Carl Vinson Institute of Government
www.cviog.uga.edu