

OVERVIEW OF OPEN MEETINGS OF GOVERNMENTAL BODIES

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OPEN MEETINGS OF GOVERNMENTAL BODIES

Alaska Statute (AS) 44.62.310 is the state's Open Meetings Act (OMA).

Government meetings public. (a) All meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law. Attendance and participation at meetings by members of the public or by members of a governmental body may be by teleconferencing. Agency materials that are to be considered at the meeting shall be made available at teleconference locations if practicable. Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. The vote at a meeting held by teleconference shall be taken by roll call. This section does not apply to any votes required to be taken to organize a governmental body described in this subsection.

(b) If permitted subjects are to be discussed at a meeting in executive session, the meeting must first be convened as a public meeting and the question of holding an executive session to discuss matters that are listed in (c) of this section shall be determined by a majority vote of the governmental body. The motion to convene in executive session must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private. Subjects may not be considered at the executive session except those mentioned in the motion calling for the executive session unless auxiliary to the main question. Action may not be taken at an executive session, except to give direction to an attorney or labor negotiator regarding the handling of a specific legal matter or pending labor negotiations.

(c) The following subjects may be considered in an executive session:

- (1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the public entity;
- (2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

- (3) matters which by law, municipal charter, or ordinance are required to be confidential;
 - (4) matters involving consideration of government records that by law are not subject to public disclosure.
- (d) This section does not apply to:
- (1) a governmental body performing a judicial or quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding;
 - (2) juries;
 - (3) parole or pardon boards;
 - (4) meetings of a hospital medical staff;
 - (5) meetings of the governmental body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline;
 - (6) staff meetings or other gatherings of the employees of a public entity, including meetings of an employee group established by policy of the Board of Regents of the University of Alaska or held while acting in an advisory capacity to the Board of Regents;
 - (7) meetings held for the purpose of participating in or attending a gathering of a national, state, or regional organization of which the public entity, governmental body, or member of the governmental body is a member, but only if no action is taken and no business of the governmental body is conducted at the meetings; or
 - (8) meetings of municipal service area boards established under AS 29.35.450-29.35.490 when meeting solely to act on matters that are administrative or managerial in nature.
- (e) Reasonable public notice shall be given for all meetings required to be open under this section. The notice must include the date, time, and place of the meeting and if, the meeting is by teleconference, the location

of any teleconferencing facilities that will be used. Subject to posting notice of a meeting on the Alaska Online Public Notice System as required by AS 44.62.175(a), the notice may be given using print or broadcast media. The notice shall be posted at the principal office of the public entity or, if the public entity has no principal office, at a place designated by the governmental body. The governmental body shall provide notice in a consistent fashion for all its meetings.

(f) Action taken contrary to this section is voidable. A lawsuit to void an action taken in violation of this section must be filed in superior court within 180 days after the date of the action. A member of a governmental body may not be named in an action to enforce this section in the member's personal capacity. A governmental body that violates or is alleged to have violated this section may cure the violation or alleged violation by holding another meeting in compliance with notice and other requirements of this section and conducting a substantial and public reconsideration of the matters considered at the original meeting. If the court finds that an action is void, the governmental body may discuss and act on the matter at another meeting held in compliance with this section. A court may hold that an action taken at a meeting held in violation of this section is void only if the court finds that, considering all of the circumstances, the public interest in compliance with this section outweighs the harm that would be caused to the public interest and to the public entity by voiding the action. In making this determination, the court shall consider at least the following:

- (1) the expense that may be incurred by the public entity, other governmental bodies, and individuals if the action is voided;
- (2) the disruption that may be caused to the affairs of the public entity, other governmental bodies, and individuals if the action is voided;
- (3) the degree to which the public entity, other governmental bodies, and individuals may be exposed to additional litigation if the action is voided;
- (4) the extent to which the governing body, in meetings held in compliance with this section, has previously considered the subject;

- (5) the amount of time that has passed since the action was taken;
 - (6) the degree to which the public entity, other governmental bodies, or individuals have come to rely on the action;
 - (7) whether and to what extent the governmental body has, before or after the lawsuit was filed to void the action, engaged in or attempted to engage in the public reconsideration of matters originally considered in violation of this section;
 - (8) the degree to which violations of this section were willful, flagrant, or obvious;
 - (9) the degree to which the governing body failed to adhere to the policy under AS 44.62.312(a).
- (g) Subsection (f) of this section does not apply to a governmental body that has only authority to advise or make recommendations to a public entity and has no authority to establish policies or make decisions for the public entity.
- (h) In this section,
- (1) "governmental body" means an assembly, council, board, commission, committee, or other similar body of a public entity with the authority to establish policies or make decisions for the public entity or with the authority to advise or make recommendations to the public entity; "governmental body" includes the members of a subcommittee or other subordinate unit of a governmental body if the subordinate unit consists of two or more members;
 - (2) "meeting" means a gathering of members of a governmental body when
 - (A) more than three members or a majority of the members, whichever is less, are present, a matter upon which the governmental body is empowered to act is considered by the members collectively, and the governmental body has the authority to establish policies or make decisions for a public entity; or

(B) more than three members or a majority of the members, whichever is less, are present, the gathering is prearranged for the purpose of considering a matter upon which the governmental body is empowered to act, and the governmental body has only authority to advise or make recommendations for a public entity but has no authority to establish policies or make decisions for the public entity;

(3) "public entity" means an entity of the state or of a political subdivision of the state including an agency, a board or commission, the University of Alaska, a public authority or corporation, a municipality, a school district, and other governmental units of the state or a political subdivision of the state; it does not include the court system or the legislative branch of state government.

General Requirement for Open Meetings. The OMA requires that all meetings of a governmental body of a public entity of the state are open to the public except as provided by the OMA or by another provision of law. Under subsection (a) of the OMA as it reads today: All meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law.

The OMA authorizes teleconferencing by members of the governmental body or members of the public. If using teleconferencing, the agency must make the materials that are to be considered at the meeting available to the public at the teleconferencing locations (if practicable). Voice votes are authorized under the OMA; but the vote must be conducted so that the public knows the vote of each person entitled to vote. If a vote is taken at a teleconference it must be by roll call vote. Importantly, the OMA does not apply to any votes required to be taken to organize a governmental body described in this subsection. An example of an organizational meeting is the first meeting after an election where the governing body elects a vice-mayor.

Executive Session. Subsection (b) of the OMA addresses the requirements of executive sessions. If the governmental body wants to discuss permitted subjects at a meeting in an executive session, the body must first convene the meeting as a public meeting and then entertain a motion to hold an executive session to discuss a matter listed in subsection (c) of the OMA.

Whether to hold the discussion in executive session must be determined by a majority vote of the body. The motion to enter into an executive session must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private. This can be tricky since many governmental bodies will simply make a motion to go into an executive session and list the statutorily-authorized reasons to do so without specifically describing the nature or the reason to go into the executive session. It is therefore important that a debate on the subject ensue so the public is aware of the reason for entering executive session. Upon a challenge of the executive session, a court can be presented with the transcript establishing the subject matter grounds for the executive session.

Notice of the subject of the executive session is necessary. For example, an executive session to discuss pending or potential litigation requires a motion announcing the purpose of the meeting is to discuss litigation involving the *Smith v. Jones* case. You might add the attorney will be providing privileged information or work product involving the strengths or weaknesses of the case. Bear in mind that when discussing litigation in executive session to the extent that a court has ruled on the case and issued a decision, the results of that decision are public. However it may be appropriate to convene an executive session to discuss the strengths and weaknesses of an appeal even if the court has ruled on the case.

Issues involving personnel and that can harm the reputation or character of a person (AS 44.62.310(c)(2)) present particularly tricky notice problems. If the person's name is listed in the agenda, that identification may defeat the purpose of addressing the subject in private. Typically, an agenda stating that the body anticipates holding an executive session for such purposes does not necessarily need to list the name of the person subject to the discussion. The body should always, however, notify that person and inform them that they may elect to have the discussion conducted in public.

Also, in the motion to convene into an executive session, the maker of the motion should identify who should attend the executive session. It's up to the governmental body to determine who it wants at the executive session (such as the manager, the attorney, or a consultant that may be giving specific advice on a financial matter the immediate knowledge of which could impact the finances of the municipality).

Subjects may not be considered in the session except those mentioned in the motion unless auxiliary to the main question. The governing body may not take action at an executive session except to give direction to an attorney or labor negotiator regarding the handling of a specific legal matter or pending labor negotiations. The underlying rationale of the legislature in carving out this exception is to allow the

governing body to give the attorney directions with regard to confidential matters associated with the conduct of a case. A similar approach is found regarding pending labor negotiations.

AS 44.62.310(c) sets out the subjects that may be considered in executive session. They are:

- (1) matters, the immediate knowledge of which would clearly have an adverse effect upon the finances of the public entity;

When entering into an executive session please be aware that a governing body may not enter the session just to discuss finances. It must be a matter where the immediate knowledge of which would clearly have an adverse effect upon the finances of the public entity. This is not just a budgetary short fall or routine financial issues; but, instead may be some critical problem such as a default on bonds, preliminary discussions concerning a serious accounting error, or official misconduct.

- (2) subjects that tend to prejudice the reputation and character of any person, provided the person may request a public discussion;

The next exception deals with personnel matters and is designed to protect individuals from the prejudice that may result to their reputation and character if confidential personal matters about them such as medical issues or mental conditions are revealed. The person of course must be notified and may always request a public discussion. Note, too, that it is the body that decides who should attend the executive session. If the person wants an attorney present, but the body does not want the attorney present at the executive session, the person subject to the executive session may need to choose between a public meeting with counsel present or a private session.

- (3) matters which by law, municipal charter, or ordinance are required to be confidential;

Caution should be exercised when dealing with this exception because the matter that by law, charter, or ordinance authorized for discussion in executive session must be required to be confidential. This means that there must be a statutory exception or an ordinance that requires the matter to remain confidential.

- (4) matters involving consideration of government records that by law are not subject to public disclosure.

This exception is self-explanatory and would relate to those records that are not public records.

Exceptions to the OMA. The OMA does not apply to six categories of activities. Subsection (d)(1) where a governmental body is performing a judicial or a quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding is excepted. A governmental body means an assembly, council, board, commission, committee or other similar body of a public entity. Any board or commission engaged in a judicial or quasi-judicial function is exempt from the OMA when deliberating on a matter. Another important exception is listed in subsection (d)(6) providing an exception for gatherings of the employees of a public entity. The legislature exempted municipal employees so that they may conduct municipal affairs expeditiously without having to notice a public meeting every time employees meet to discuss a matter. If public notice of these employee meetings was required, chaos would result and the mission of the government would be seriously undermined. The public's interest would not be promoted.

AS 44.62.310(4)(d)(7) is the so-called Alaska Municipal League or National Association of Counties exception. If the provisions of this exception are met it's appropriate to attend such meetings without running afoul of the OMA.

Notice of Meetings. AS 44.62.310(e) requires reasonable public notice be given for all meetings required to be open. The question of what's reasonable notice has been left open by the legislature. Depending on the circumstances, the OMA imposes a few requirements about notice content and where it should be posted/published. The notice must include the date, time, and place of the meeting and if the meeting is by teleconference, the location of any teleconferencing facilities to be used. Notice can either be by broadcast media or in the paper. However, AS 29.71.800(18) states "published" means appearing at least once in a newspaper of general circulation distributed in the municipality or, if there is no newspaper of general circulation distributed in the municipality, "posting in three public places for at least five days." Notice must also be posted at the principle office of the public entity or if it has no principle office, at a place designated by the governmental body. Regardless of what method or methods of notice is/are used, consistency is key: notice of the governing body must be consistent for all of its meetings so that the public is aware of a familiar methodology for the posting and issuance of notice.

Reasonable notice also requires consideration of whether the matters to be discussed by the body must be listed specifically on the public notice. This also depends upon the circumstances. If the matter to be discussed at the public meeting is

a complex or a controversial issue, then it is appropriate to specifically list the matter on the posted notice.

Remedies. AS 44.62.310(f) unlike the earlier versions of the OMA provides that action taken in violation of the OMA is voidable. A complaint to void an action taken in violation of the OMA must be filed in the superior court within 180 days after the date of the governmental body action. A member of a governmental body may not be named in his or her personal capacity in the complaint. However, a violation of the OMA may provide grounds for a recall petition against an elected official for failure to perform prescribed duties of office.

The governmental body may cure the alleged violation by holding another meeting in compliance with notice and other requirements which is a *substantial and public reconsideration* of the matters considered at the original meeting. If the action is voided by a court, the governmental body may discuss and act on the matter at another meeting held in compliance with this section.

A court may hold that an action taken in violation of the OMA is void. The court must determine that the governmental body has authority to establish policies or make decisions for the public entity as subsection (g) of the OMA states that the remedies in subsection (f) does not apply to a governmental body that has only the authority to advise or make recommendations. The OMA also sets out a balancing test that the court must apply before it can void an action taken in violation of the OMA. The court will void the action only if the court finds that considering all of the circumstances the public interest in OMA compliance out-weighs the harm that would be caused on public interest and to the public entity by voiding the action. In conducting this balancing exercise, a court will look to nine factors as follows:

(1) the expense that may be incurred by the public entity, other governmental bodies, and individuals if the action is voided;

(2) the disruption that may be caused to the affairs of the public entity, other governmental bodies, and individuals if the action is voided;

(3) the degree to which the public entity, other governmental bodies, and individuals may be exposed to additional litigation if the action is voided;

(4) the extent to which the governing body, in meetings held in compliance with this section, has previously considered the subject;

- (5) the amount of time that has passed since the action was taken;
- (6) the degree to which the public entity, other governmental bodies, or individuals have come to rely on the action;
- (7) whether and to what extent the governmental body has, before or after the lawsuit was filed to void the action, engaged in or attempted to engage in the public reconsideration of matters originally considered in violation of this section;
- (8) the degree to which violations of this section were willful, flagrant, or obvious;
- (9) the degree to which the governing body failed to adhere to the policy under AS 44.62.312(a).

AS 44.62.310(g) provides that subsection (f) does not apply to a governmental body that has only authority to advise or make recommendations to a public entity and has no authority to establish policies or make decisions for the public entity.

Definitions. AS 44.62.310(h) sets forth the applicable definitions for the OMA. These definitions can be highly technical and do not always mesh with what might be one's common understanding of the terms, so it is important to read and understand the definitions as they apply to open meetings act questions. Subsection (h)(1) defines the "governmental body" to which the OMA applies as follows:

- (1) "governmental body" means an assembly, council, board, commission, committee, or other similar body of a public entity with the authority to establish policies or make decisions for the public entity or with the authority to advise or make recommendations to the public entity; "governmental body" includes the members of a subcommittee or other subordinate unit of a governmental body if the subordinate unit consists of two or more members.

One of the operative factors in determining whether a governmental body (like a council, assembly, board, commission, or committee) would be subject to the requirements of the OMA including subsection (f) on the voidability of actions taken is whether or not the governing body can establish policies or make decisions for the public entity or is an entity with authority to advise or make recommendations to the public entity. The statute makes it clear that a body to which the OMA applies includes

members of a subcommittee or other subordinate unit of a governmental body if the subordinate unit consists of two or more members.

The definition of a "meeting" depends upon whether the governmental body has policy and decision-making authority or if it is advisory only. With respect to policy/decision-making bodies, a "meeting" is a gathering of three members *or* a majority of the members of the body, whichever is less, and they collectively consider the matter upon which the governmental body is empowered to act. For a body that has only authority to advise or make recommendations for a public entity (no policy or decision-making authority), a "meeting" is a gathering of more than three members or a majority of the members, whichever is less, and the *gathering is prearranged* for the purpose of considering such a matter upon which the body is empowered to act.

These definitions have not always kept up with modern business practices and realities. They do not provide much guidance for public officials, for example, in the use of e-mail or telephone communication. Serial communications (typically, telephone polling and e-mails) may be deemed as an attempt to circumvent the OMA and could be determined to be a meeting in violation of the OMA if not properly noticed. According to the Alaska Supreme Court, if the matter being discussed is a substantive matter, the matter should be addressed in an open meeting. On the other hand, if the matter being discussed is deemed to be merely a procedural or an administrative matter, it may be addressed through telephone polling or by e-mail.

A "public entity" means an entity of the state or of a political subdivision of the state including an agency, a board or commission, the University of Alaska, a public authority or corporation, a municipality, a school district, and other governmental units of the state or a political subdivision of the state. The Alaska Court System and the legislative branch of state government are not included in this definition.

Policy Favoring Open Meetings. Another important statute concerning the Open Meetings Act is AS 44.62.312 which establishes the state policy regarding meetings. It provides as follows:

- (a) It is the policy of the state that:
 - (1) the governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business;
 - (2) it is the intent of the law that actions of those units be taken openly and that their deliberations be conducted openly;

(3) the people of this state do not yield their sovereignty to the agencies that serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) the people's right to remain informed shall be protected so that they may retain control over the instruments they have created;

(6) the use of teleconferencing under this chapter is for the convenience of the parties, the public, and the governmental units conducting the meetings.

(b) AS 44.62.310(c) and (d) shall be construed narrowly in order to effectuate the policy stated in (a) of this section and to avoid exemptions from open meeting requirements and unnecessary executive sessions.

The provisions of the statute setting forth the state policy regarding meetings is self-explanatory and may generally be summarized as a liberal preference for open meetings and open government. These are strong policies that lean in favor of openness. Courts frequently cite to these policies when interpreting the OMA. Exceptions to the OMA are narrowly construed based on the clear legislative direction to do so contained in the statute.

SELECTED COMPENDIUM OF ALASKA SUPREME COURT CASES ON THE OPEN MEETINGS ACT

Over the years the Alaska Supreme Court has been called upon to interpret the state Open Meetings Act in various contexts. Set forth below is a selected compendium of Alaska Supreme Court cases interpreting the act. When considering the Alaska cases on this subject it is important to recognize that in 1994 the Open Meetings Act was amended and is substantially different than from the earlier act. Nevertheless, earlier cases may provide guidance to the court when interpreting the amended act.

1. *In Alaska Community Colleges Federation of Teachers Local 2404 v. University of Alaska et al.*, 677 P.2d 886, (Alaska 1984), the court held that based on the provisions of AS 14.14.160(a) the Open Meetings Act clearly applied to the University Board of Regents. In that case the court remanded the question of whether

the Open Meetings Act was violated and what remedy would be available after the governing body had reconsidered its decision.

2. *Brookwood Area Homeowners Association Inc., et al. v. the Municipality of Anchorage*, 702 P.2d 1317 (Alaska 1985), involved the Supreme Court's clear pronouncement that the Open Meetings Act is very important in Alaska. In *Brookwood*, members of the Anchorage Assembly met to receive information on a rezoning from a developer. Later the Assembly acted upon the rezone. Disgruntled homeowners filed suit claiming that the earlier unnoticed meeting constituted a meeting of the Assembly in violation of the Open Meetings Act. The Supreme Court agreed reviewing case law from other jurisdictions. The court in reaching its decision that the Anchorage Assembly members had been at a meeting found that

Modern public meetings statutes reject the argument that only the moment of ultimate decision must be subject to public scrutiny, and requirement that preliminary deliberations be open as well.

Id. at 428 n. 6. Although not cited in *Geistauts*, AS 44.62.312(a)(2) does specifically require that government deliberation as well as government action be conducted openly.

In *Sacramento Newspaper Guild*, 69 Cal. Rptr. 480, the county board of supervisors met at a luncheon gathering to discuss a social workers' strike against the county. Newspaper reporters were denied admission to the discussion. The appellate court held that the luncheon discussion was a meeting under the *Brown Act*, California's open meetings act. The *Brown Act* provides that government deliberations as well as action must occur openly and publicly. Cal. Gov't. Code § 54950 (West 1983). The court reasoned that "deliberation connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision." *Id.* at 485. Therefore, a deliberative gathering of the county supervisors was a meeting, even if confined to investigation and discussion. The court explained its rationale in the following manner:

An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the

ultimate step of official action, can an open meeting regulation frustrate these evasive devices. . . . Construed in the light of Brown Act's objectives, the term "meeting" extends to informal sessions or conferences of the board members designed for the discussion of public business. *Id.* at 487 (emphasis added, footnotes omitted).

3. In *Abood v. League of Women Voters of Alaska*, 743 P.2d 333 (Alaska 1987), the court held that the state legislature did not violate the Open Meetings Act and its uniform rules by holding closed committee meetings and caucuses since that was a non-justiciable political question and that there was no implied right under the Alaska Constitution for the public and the press to attend meetings of legislative committees and caucuses.

4. In *Municipality of Anchorage v. Anchorage Daily News*, 794 P.2d 584 (Alaska 1990), the court citing the *City of Kenai* case reaffirmed that the secrecy provisions of the Open Meetings Act have not been judicially incorporated into the public records act. Here the court held that on balance the public official's performance is weighed against the privacy interest in preventing the information in the report from being publicly disclosed. The performance evaluation of the Anchorage head librarian did not deal with personal, intimate, or otherwise private life of the public official and was disclosed.

5. In *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992), the court concluded that the state reapportionment board had violated the OMA. In that case, the members of a board held a series of telephone calls about nominees for appointment to an advisory committee. The Supreme Court upheld the trial court's finding that several one-on-one conversations by the board members, coupled with a lack of substantive discussion in a public meeting was sufficient to find that the business was being conducted outside scheduled meetings in violation of the OMA. Nonetheless, the court did not grant relief based upon those violations. See also, *In re 2001 Redistricting Cases*, Superior Court Case No 3AN-01-8914 CI (Alaska Super. Ct. February 1, 2002)), where a superior court held that e-mail communications among three members of a five member board violated the OMA when discussing important board business of choosing the locations of holding constitutionally-required public hearings on proposed redistricting plans. The Alaska Supreme Court, upon review of this case, left open the issue of serial e-mails and whether they constitute an improper "meeting." *In re 2001 Redistricting Cases*, 44 P.3d 141 (Alaska 2002).

6. In *Cool Homes, Inc. v. Fairbanks North Star Borough*, 860 P.2d 1248 (Alaska 1993), the court held that the board of equalization did not violate the OMA by conferring in private with its attorney before hearing a case. The court reached this conclusion because the board members had been threatened with personal liability in reference to ongoing litigation. By calling the executive session, the board was merely following through on a judge's admonition to the borough's legal counsel and the board as a body was entitled to legal advice as to how it and its members could avoid legal liability (although general legal advice if given in executive session may be a problem).

7. In *Kila, Inc. v. State Department of Administration*, 876 P.2d 1102 (Alaska 1994), the court rejected a contention that the state violated the OMA when its Department of Administration did not allow a bidder to attend and participate in meetings concerning the disposition of the bidder's contract, of another entity's contract modification request, and of the contract dispute. The court rejected Kila's claim, finding that Kila, the bidder, presented no evidence that the informal meetings held by the department were held by governmental units whose actions come within the ambit of AS 44.62.310.

8. *Fuller v. Homer*, 75 P.3d 1059 (Alaska 2003), is a case providing an excellent discourse on the deliberative process privilege and public records in Alaska. It reaffirms the importance of the Open Meetings Act requiring all government agencies covered by the statute to act openly and their deliberations to be conducted openly.

9. In *Griswold v. City of Homer*, 55 P.3d 64 (Alaska 2002), the appellant argued that neither the parties nor the public were provided the opportunity to speak at the board meeting, basing this claim on AS 29.20.020(a) providing that municipal bodies shall provide reasonable opportunity for the public to be heard at regular and special meetings. The court rejected this argument holding that AS 44.62.310, the Open Meetings Act, specifically provides an exemption for governmental bodies "performing a judicial or quasi-judicial function when holding a meeting solely to make a decision in an adjudicatory proceeding." The court rejected the notion that a board conducting its review in private must still afford the opportunity to speak to the public at closed proceedings. The court noted this result was incongruous and would eviscerate the board's exemption from the Open Meetings Act.

10. In *Re 2001 Redistricting Cases*, 44 P.3d 141 (Alaska 2002), the court, without holding, assumed that the trial court was correct in finding that some of the board members e-mail exchanges violated the Open Meetings Act but that no remedy was appropriate based upon the balancing test set forth in AS 44.62.310(f). The court found that requiring compliance did not outweigh the harm that would be caused to the

public interest by voiding the entire redistricting plan. Thus the refusal to grant the remedy under the OMA was appropriate.

11. In *Walleri v. City of Fairbanks*, 964 P.2d 463 (Alaska 1998), a tax payer brought suit against the city challenging the validity of the city's contract for the sale of municipal utilities to a third party. With respect to the OMA component of the tax payer's claim, the Supreme Court held that Fairbanks City Charter Section 2.8 concerning open meetings was preempted by the state Open Meetings Act. The court found:

The superior court is correct. Alaska Statute 29.10.200 lists provisions that "apply to home rule municipalities as prohibitions on acting otherwise than as provided. These provisions supercede existing and prohibit future home rule enactments that provide otherwise." (Emphasis added.) No one contends that Fairbanks is not a home rule municipality. Alaska Statute 29.20.020 is one of the provisions mentioned in AS 29.10.200. Alaska Statute 29.20.020 provides in part that the "[m]eetings of all municipal bodies shall be public as provided in AS 44.62.310." Alaska Statute 44.62.310(a) provides in part that "[a]ll meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law." Alaska Statute 44.62.310(c) lists the subjects that may be considered in executive session. This list is broader than the exception provided in section 2.8 of the Fairbanks City Charter – the Fairbanks City Charter provides "otherwise." It is thus preempted, by the terms of AS 29.10.200. Walleri's argument entirely ignores the effect of the explicit language of AS 29.10.200, and so is not well taken.

12. In *Ramsey v. City of Sand Point*, 936 P.2d 126 (Alaska 1997), a terminated police chief sued the City of Sand Point alleging, among other things, that the City violated the OMA because it conducted an executive session without proper notice. The court rejected this argument. The Court found that the City provided proper notice and that the council's discussion of the chief's employment in executive session was proper under AS 44.62.310(c)(2) (reputation/character). It is also important to note that the court found that the chief waived his right to request a discussion in public by failing to appear at the meeting. In addressing the notice required to be provided to an individual who will be discussed in executive session, the Supreme Court found that "any inadequacy of notice to Ramsey [the chief] was harmless, as his testimony made clear, he chose not to exercise his right to a public discussion of the issues relating to

his employment." Also note that the Chief's actual notice of the session cured any defect in the formal notice given under the OMA.

13. A violation of the Open Meetings Act may formulate grounds for recall as established in the case of *Meiners v. Bering Strait School Board*, 687 P.2d 287 (Alaska 1984), and as discussed in *Von Stauffenberg v. Committee for Honest and Ethical School Board*, 903 P.2d 1055 (Alaska 1995). These two contrasting cases reach the conclusion in *Meiners* that there was sufficient grounds for a recall based upon the allegations contained in the application for recall petitions including OMA violations. In contrast, *Von Stauffenberg* rejected the recall attempt finding that there was no illegality in a governing body going into executive session to discuss personnel matters.

These cases underscore the necessity of diligence in the dealings of government officials, particularly elected officials, in meeting the requirements of the OMA. The courts take OMA violations seriously and are not hesitant to find them when the circumstances permit. A violation may formulate the foundation for a recall attempt causing serious disruption to government activities and a potential loss of an elected official's position.

14. In *Revelle v. Marston*, 898 P.2d 917 (Alaska 1995), the head librarian, who was discharged apparently in violation of the Open Meetings Act by the mayor's reliance upon a board evaluation, could not recover back pay and benefits, at least under the circumstances of this particular case. Note that this case was determined under the OMA prior to the 1994 OMA amendments.

15. *Mullins v. Local Boundary Com'n*, 226 P.3d 1012 (Alaska 2010), concerned the attempted formation of the Deltana Borough and the LBC's decision to approve a petition for incorporation of the new borough. Mullins alleged that the Local Boundary Commission (LBC) violated the OMA by using information gathered during a private tour of the proposed borough in making its decision to recommend incorporation of the borough. Mullins unsuccessfully sought to stay the election on the formation of the borough; but, ultimately, the voters rejected the incorporation of the borough and the trial court dismissed Mullins' claims as moot. Mullins nevertheless appealed several issues related to the LBC's public process with respect to its decision to recommend formation of the borough. The Supreme Court held that Mullins could not claim the relief she sought because the LBC's decision allegedly made in violation of the OMA was voided by subsequent events (the election results). The court added, however, that where a decision is still in effect when an OMA claim is brought, the holding in *ACCFT* (paragraph 1, above) requires that a court review the alleged OMA violation even if a curative meeting was held. But, where the decision was no longer in effect, a court

should conduct a standard mootness analysis to determine whether it should address the claim.

16. In *Gold Country Estates Preservation Group v. Fairbanks North Star Borough*, 270 P.3d 787 (Alaska 2012), the plaintiffs argued that the Borough's Platting Board violated the OMA when it held a site visit to a parcel subject to an application for re-plat. Gold Country argued that the site visit was improperly noticed and improperly convened. Although the Planning Commission later convened a *de novo* review of the application, Gold Country contended that the Commission's fresh or new review did not cure the alleged OMA violation. In contrast, the Borough contended that the site visit was not a "meeting" as defined under the OMA because the Platting Board could not perform any act that would legally bind the municipality on the site visit. In so holding, the court distinguished the facts in *Gold Country* from those in *Brookwood* -- the Platting Board in *Gold Country* did not directly interact with the applicant and, unlike in *Brookwood*, the Board's visit was publicly announced in the newspaper and on the Borough's website. (Note: *Brookwood* was a pre-1994 case decided before those amendments took place. The OMA applied in *Brookwood* did not include a definition of a "meeting.")

The Supreme Court disagreed with the Borough. The court held that the site visit was a "meeting" within the meaning of the OMA. In doing so, the court analyzed the participation of the Platting Board members at the site visit. Although the Board members did not directly interact with the applicant at the site visit, it held that the information-gathering and discussion at the site constituted collective consideration of a matter upon which the governmental body was empowered to act. This was a key step in the deliberative and decision-making process by which the Platting Board later reversed its initial vote and decided to affirm the application at issue. It rejected as irrelevant to the definition of a meeting that the Board members were not able to perform any act during the site visit that would legally bind the Borough. The definition of "meeting" required only that the members of the body consider a matter upon which the body is empowered to act, even if such action is ultimately taken at a later meeting or hearing.

The court disagreed with Gold Country, however, on Gold Country's contention that the Borough did not adequately notice the site visit and on other OMA-related allegations. The court focused on the language of the OMA that "reasonable notice" was required for all meetings to be open under the OMA. With respect to the notice, the Borough did not send out "dear property owner" letters or broadcast a public service announcement about the site visit. The court held that the OMA does not require public meetings to be noticed with individual letters mailed to each potentially affected property

owner. It requires only that the government provide "reasonable public notice" with the date, time and place of the meeting, that the notice may be given using print/broadcast media, and that the notice must be posted at the principal office of the entity. The court rejected Gold Country's contention that "dear property owner" letters were required under state statute (AS 29.40.130) or because of past practice of the Borough in sending out such letters.

In a separate portion of the opinion, the court also noted that while it found no error in the lower court's ruling that acceptable notice was given of the site visit meeting, nothing in its opinion should be read to undermine the importance of the legislative goals expressed in the OMA. The court went on to encourage government bodies to provide notice of hearings and meetings through a variety of the means authorized in the OMA. Finally, although not an OMA issue specifically, the Supreme Court was troubled by the fact that the public was denied the opportunity to respond to conclusions and observations drawn by Planning Board members at the site visit; but, it held that the potential due process violation could be cured by a subsequent hearing where due process was provided. Because the Planning Commission heard testimony after the site visit, that meeting complied with due process and gave Gold Country an adequate opportunity to be heard.