

Discussion Questions

Question 1. Your zoning board has received an application for a special exception under the zoning ordinance. At the hearing, it becomes clear that a site visit will be necessary in order for the board to make an informed decision. Having received Right-to-Know Law training, you point out that if a majority of the board visits the site, it will need to be treated as a public meeting: notice must be posted, the public must be allowed to attend, and minutes must be kept.

The applicant objects. He says it's fine if the board wants to do a site walk, but he doesn't want the public there, especially his G@#*&! neighbor. The board wants to accommodate the applicant's wishes, but still comply with the law. Which of the following is the best option?

- a) To avoid the public meeting requirements, send two members of the board to do a site walk with the applicant and report back to the board.
- b) Have each board member visit the site individually, as he or she is able.
- c) Tell the applicant he doesn't have a choice. There is going to be a site walk by the full board, and it's going to be treated as a public meeting under the Right-to-Know Law. If he refuses to allow it, his application will be denied.
- d) Have a site walk by the full board and treat it as a full public meeting, but don't let the neighbor attend.

Question 2. Your seven-person planning board has received an informal inquiry from a developer about a proposed strip mall to be constructed on land that is part of one of the last remaining farms in town. No application has been filed yet, but the proposal is already generating controversy.

You receive a lengthy e-mail from an abutter to the property expressing his concerns about the proposed development. You respond with a message assuring him that you plan to vote against the proposal; as far as you are concerned, it will be dead on arrival.

He thanks you for your support and asks that you share his concerns with the rest of the board—which you do by forwarding a copy of his original message (without your reply) to the other members. Soon several of the other members chime in with their comments, pro and con. This continues until the chairman sends an e-mail to all, stating that there should be no further discussion until the board meets in public.

At what point, if at all, did a violation of the Right-to-Know Law first occur?

- a) When you responded to the abutter.
- b) When you forwarded the abutter's comments to the other board members.
- c) When they responded to your message.

Bonus question: Apart from Right-to-Know law issues, is there any other problem with this behavior?

Answer 1. The best option (by far) is (c)—have a site walk by the full board, and comply fully with the Right-to-Know Law. Options (a) and (b) probably do not violate the Right-to-Know Law, because in neither case is there a “meeting”—no quorum of the board has been convened. However, both create other problems.

In option (a), not all members of the board are getting the same information. There is no way that the members who do not attend will be as well informed as the two who do. The information that the two report to the full board will inevitably be affected by their opinions and their less-than-perfect memories.

In option (b), all members have the opportunity to gather the same information, but they do not have the opportunity to discuss it as they are seeing it. Different members will notice different things, and if they are not able to benefit from each other’s questions and comments, the site visit will be less than useful.

Remember that the board is acting in a quasi-judicial capacity, and members are performing a function analogous to that of a jury. It would never be acceptable for a judge to instruct two members of a jury to visit a crime scene or an accident scene and report to the rest of the jury, or to send all of the members individually.

Option (d) is a clear violation of the Right-to-Know Law. When a quorum is convened to discuss matters within the board’s jurisdiction, that is a meeting that must be open to the public—no one may be excluded, not even an obnoxious neighbor.

Option (c) is the only good option. The board needs information that can only be gathered from a site visit, and all members need to have the same information. The site visit is a “meeting” and must be open to the public. If the applicant refuses to allow it, he has prevented the board from obtaining information it needs to make a decision, and the board is justified in denying the application.

Answer 2. The violation occurred when other members replied to your e-mail. This constituted “deliberation” outside a properly held public meeting.

Your response to the abutter was not a violation, because it was simply a communication between one board member and another person. There was no quorum.

Your forwarding of the abutter’s message also was not a meeting, because it was simply a conveyance of information. It did create a governmental record, because now there is an e-mail that has been received by a quorum of the board, so it would have to be disclosed if someone requested it—but there is nothing illegal yet.

When other members began commenting, that created a violation. Because these messages were going to all members, this constituted deliberation among a quorum outside a public meeting.

Bonus answer. Although your communication with the abutter does not violate the Right-to-Know Law, it indicates a problem. You obviously have formed an opinion about the proposed development. Under RSA 673:14, a member is disqualified from acting on an application “if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.” The “juror standard” is set forth in RSA 500-A:12, and prohibits someone from sitting as a juror if, among other things, he “has directly or indirectly given his opinion or has formed an opinion,” or “is prejudiced to any degree regarding the case.”

Your statements to the abutter suggest an opinion that is not likely to be swayed by any evidence or arguments presented at the hearing. You are clearly prejudiced, and unless you can open your mind, you should not be participating in this matter. (Hint: Keeping your prejudice to yourself doesn’t solve the problem.)

This is not a Right-to-Know Law issue, but is just as important!