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— NEW YORK STATE —
ASSOCIATION OF COUNTIES

Orientation

Newly Elected & Appointed
County Officials 2022

- Adopting Local Laws:
Responsibilities &
Requirements
- Open Government Laws

MODULE 4 of 5
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Open Government**



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Adopting Local Laws: Legal Responsibilities and Requirements



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Take Aways

This presentation on Local Laws will provide the following information:

- 1) Where the authority comes from to adopt a Local Law.
- 2) Structural components of a Local Law.
- 3) Procedural steps to pass a Local Law.
- 3) Examples of Local Laws.
- 4) Restrictions of Local Laws.

Local Law Defined

- A Local Law is defined under Municipal Home Rule Law Section 2(9) as:

“A law (a) adopted pursuant to this chapter or to other authorization of a state statute or charter by the legislative body of a local government, or (b) proposed by a charter commission or by petition, and ratified by popular vote, as provided in article four of this chapter or as provided in a state statute, charter or local law; but shall not mean or include an ordinance, resolution or other similar act of the legislative body or of any other board or body.”

New York State Constitution:

Grant of Local Government Authority



Local Law

- The power to enact Local Laws is granted by the Constitution.
 - This is superior to other forms of Municipal Legislation such as; ordinance, resolution, rule or regulation which are delegated by State Statute.

Constitutional Framework

- Article IX
 - Section 2: Provides Local Governments...
 - *Article IX, §3(d)(2)* defines local governments to include; counties, cities, towns, villages, but not school districts or other special districts
 - ...with the power to adopt and amend local laws not inconsistent with the provisions of the NYS Constitution or any general law relating to its property, affairs, or government (*Art. IX, §2(c)(i)*)

Constitutional Framework

- A local government may also adopt local laws not inconsistent with the constitution or general laws with respect to subject areas despite whether they relate to local property, affairs or government subject to state restriction in 10 enumerated areas (*Art. IX, §2(c)(ii)*);
- The specific powers related to counties include:
 - Powers, duties, qualifications, number, terms of office, compensation, hours of work, and welfare of local officers and employees.
 - Transaction of local government's business.
 - Management and use of the localities highways, roads, streets, etc.
 - Wages, hours and welfare of employees of local government contractors.
 - Local government police power.

Constitutional Framework

- Other powers include:
 - Ability to provide cooperatively with other municipalities' governmental services and functions.
 - Eminent domain.
 - Power to make a fair return on the value or property used in the operation of certain utility services and the right to use profits therefrom for refunds or any other lawful purpose.
 - The power to apportion costs of governmental services or functions upon portions of local areas as authorized by the legislature.

Constitutional Framework

- These rights, powers, privileges and immunities are to be “liberally construed” (Art. IX, §3) which allows for wide discretion of the local government body.

Constitutional Restrictions to Local Government Authority

- A local government may not enact laws which relate to:
 - Maintenance, support and administration of the public school system.
 - Matters relating to the administration of the Courts.
 - Matters other than property, affairs or government of a local government.

State Statute

- While Constitutional provisions confer substantial rights and powers upon them, local governments exercise perhaps as much or more authority under laws enacted at the discretion of the state. The major local functions or services, as measured by amounts expended or other criteria, include education, public welfare, highway and transportation, police protection, fire protection, water supply, sewerage, and other sanitation, public health and mental health.

Statute of Local Governments

- 7 Powers Granted
 1. Adopt, amend and repeal ordinances, resolutions and rules and regulations in the exercise of their functions.
 2. Acquire real and personal property for its purposes.
 3. Acquire or construct and operation of recreational facilities, including revenue producing recreational facilities.
 4. The power to dispose of its real and personal property when no longer required for its purposes, except in the case of inalienable real or personal property.

Statute of Local Governments

5. Levy, impose, collect and administer rents, charges, rates and fees, penalties and rates of interest and liens on local property in connection therewith.
6. In the case of a city, village or town, with respect to the area thereof outside the village or villages therein, adopt, amend and repeal zoning regulations (counties do not have this authority), and...
7. Perform planning work relating to its jurisdiction.

Municipal Home Rule Law

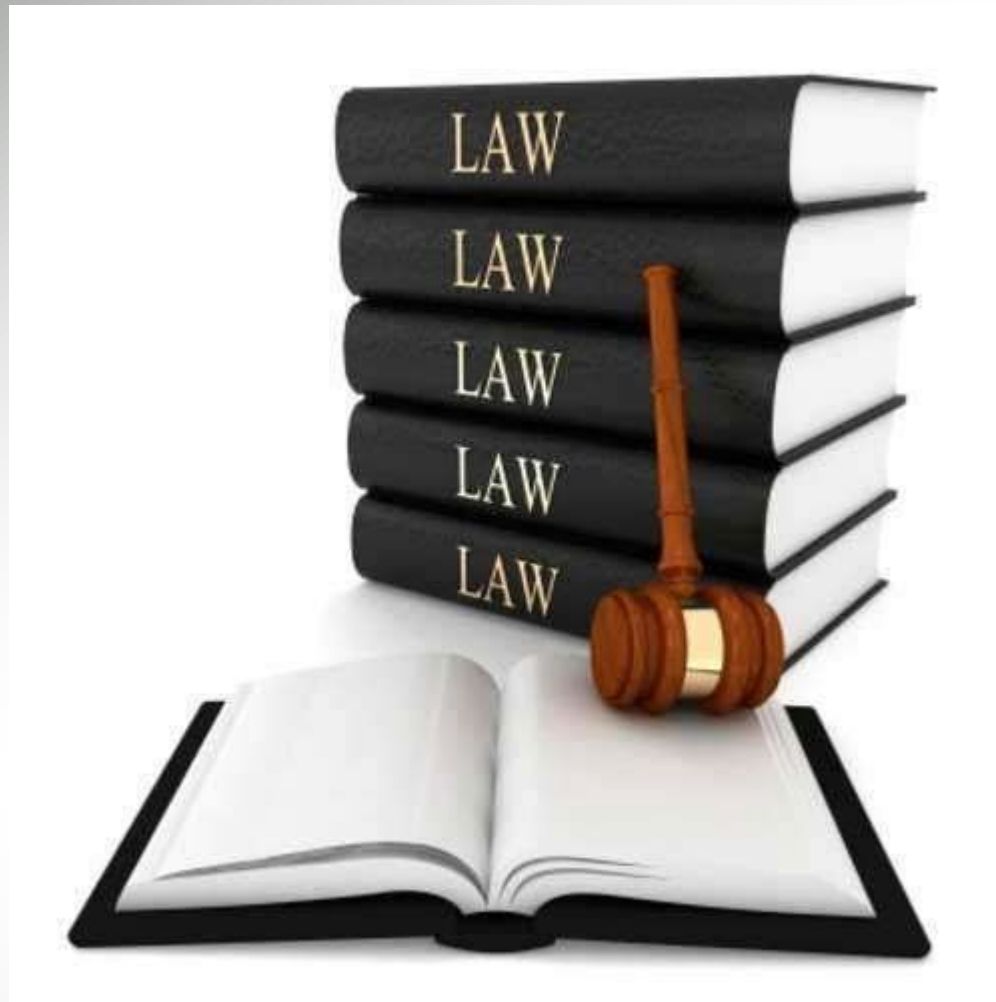
- MHRL§10
 - Repeats for counties, cities, towns and villages, the constitutional grant of power to local governments, adding thereto the power to collect local taxes authorized by the legislature and assessments for local improvements as well as the powers granted to local governments in the statute of local governments.

Combined Effect of Constitutional and Statutory Changes

As to Matters which are neither property, affairs or government nor within the 10 enumerated subjects:

State Power: The Legislature has the power to act either by general or special law and may confer additional powers on local governments in the Statute of Local Governments or otherwise.

Local Law



Local Law Drafting Requirements

- Every Local Law needs four structural components:
 - 1) The title.
 - 2) The enacting clause.
 - 3) The body.
 - 4) The effective date.

Procedural Steps

- Introduction of the Local Law.
- Public Hearing.
- Consideration of County Legislative Body.
- Waiting Time.
- Adoption of Law (Vote).
- Filing of the Local Law.

Procedural Steps

- Introduction.

- After a proposed law has been drafted, the proposed law needs to be introduced in the legislative body.

- Each member of the legislative body must be mailed or handed a hard copy of the proposed law.

- Each legislative body member needs to receive the proposed law no less than 7 calendar days prior to any vote; and if by mail, the mailing date no less than 10 calendar days prior to any vote.

Procedural Steps

- Public Hearing.
 - A public hearing must be held for each proposed local law.
 - If the local law is amended there must be a new public hearing regarding the full new text.
 - The public must be informed at least 5 days prior to the public hearing date.
 - There is an exception for counties who passed a procedural local law allowing for a shorter notice period but in no case may this be less than 3 days.

Procedural Steps

- Consideration by the Legislative Body.
 - The law should be debated by the legislative body in the open meeting prior to any vote taking place.
 - Any defects, substantive or otherwise, should be addressed and the proposed law should be amended accordingly.
 - If the local law is amended the Procedural Steps start over again.

Procedural Steps

- Vote.
 - After or at the end of the hearing the local law can be voted on.
 - Most local laws are passed by the majority vote of the legislative body.

Exceptions:

- 1) County Governments with a County Executive grant them the final authority on the local law, by either signing or vetoing the law.
- 2) Specific subject matter may require a referendum (Ex.- Becoming a charter County) or a supermajority vote (ex-overriding the tax cap).

Filing the Local Law

- In order for the local law to be enacted and officially adopted a few steps must be taken after the vote.
 - 1) A true copy of the Local Law, full text must be published in the official newspaper.
 - 2) You must mail to the Secretary of the State the local law in order for the law to be filed and officially adopted. The filing (adopted) dated is the date the State receives the law.

Restrictions On Local Laws

- Subject Matter.
- Preemption.
- Manner in which Local Laws are passed:
 - 1) Majority Vote,
 - 2) Supermajority Vote, or
 - 3) Referendum.

Referendum

- Mandatory Referendum: requires that the local law is subject to a vote by the electorate of the body whom the law is proposed. Whether the electorate vote in favor or oppose the change, that determination is binding on the municipal body.
 - Specifically Section 23 of the Municipal Home Rule Law provides:
 - **Sub. 2: Except as otherwise provided by or under authority of a state statute, a local law shall be subject to mandatory referendum if it:**
 - c. Changes the veto power of the elective chief executive officer.**
 - d. Changes the law of succession to the office of the chief executive officer of a county elected on a county-wide basis or if there be none the chairman of the board of supervisors, the mayor of a city or village or the supervisor of a town.**
 - e. Abolishes an elective office, or changes the method of nominating, electing or removing an elective officer, or changes the term of an elective office, or reduces the salary of an elective officer during his term of office.**
 - f. Abolishes, transfers or curtails any power of an elective officer.**
 - g. Creates a new elective office.**
 - i. Changes a provision of law relating to public utility franchises.**

Referendum

- Local laws subject to referendum on petition
 - Section 24 Municipal Home Rule law:
 - “...if within forty-five days after its adoption there be filed with the clerk a petition protesting against such local law, signed and authenticated as hereinrequired by qualified electors of such local government, registered to vote therein at the last preceding general election, in number equal to at least ten per centum of the total number of votes cast for governor at the last gubernatorial election in such local government. If such petition be so filed, a proposition for the approval of such local law shall be submitted at the next general election of state or local government officers...”

Preemption

- Issues for evaluation:
 - Is there a general law or constitutional provision on the subject.
 - Whether the local law is inconsistent with the general law or constitutional provision or whether they operate together without conflict.
 - If it is a state law; whether the law is a special law or general law.

Preemption

- Inconsistency:
 - When the state and local law give conflicting commands such that both cannot be followed.
 - When a local law attempts to legalize something that the state law prohibits.
 - When the State prohibits any local legislation with respect to a particular subject and a local government passes a law on that subject.

Preemption

- Inconsistency cont.
 - Areas of ambiguity:
 - state regulation of an area without explicitly barring additional local regulation and a local government enacts further regulation of the same activity or behavior.
 - Generally: “local laws which do not prohibit what the State law permits not allow what the state law forbids are not inconsistent...However, where the extension of the principle that the State law by means of the local law results in a situation where what would be permissible under state law becomes a violation of the local law, the latter law is unauthorized.” See Wholesale Laundry Board of Trade Inc. v. City of New York, 17 A.D.2d 327, 329-330 (1963)
 - However, Courts have been inconsistent in applying this rule. See Generally, New York State Clubs Ass’n v. City of New York, 69 N.Y.2d 211 (1987), Council for Owner Occupied Housing, Inc. v. Koch, 61 N.Y.2d 942 (1983)

Preemption

- State Occupation of the Field.
 - Where the State has determined that policy-making in a particular field is exclusive to the state.
 - Courts will look at legislative intent
 - Evaluation of legislative policy, scope of the regulatory scheme and the nature of the subject matter.

Local Laws and Your County Attorney

- Whenever a local law is under consideration, the municipal attorney should be consulted to determine whether the county has the authority to pass the law in question and to determine whether the local law is consistent with local government authority and state law.
- A municipal attorney should check to see whether a local law would be subject to a mandatory referendum or referendum on petition.



**Committee on
Open Government**

The New York State Open Meetings Law

January 27, 2022

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Public Officers Law
Article 7
§§100-11

OML HAS BEEN AMENDED FIVE TIMES SINCE SEPTEMBER 2021.

- Chapter 417 of the Laws of 2021 Relating to Remote Meetings EXPIRED January 15, 2022.
- Chapter 481 of the Laws of 2021 Relating to Records Scheduled to be Discussed at an Open Meeting.
- Chapter 587 of the Laws of 2021 Relating to the Posting of Meeting Minutes.
- Chapter 676 of the Laws of 2021 Relating to the Definition of “Public Body.”
- Chapter 1 of the Laws of 2022, amending and extending Chapter 417 of the Laws of 2021, Relating to Holding Remote Meetings through the expiration of EO 11.

Public Bodies

“any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation . . . , or committee or subcommittee or other similar body consisting of members of such public body or an entity created or appointed to perform a necessary function in the decision-making process. A necessary function in the decision-making process shall not include the provision of recommendations or guidance which is purely advisory and which does not require further action by the state or agency or department thereof or public corporation”

Public Bodies

- Two or more people
- Quorum necessary to conduct business
- Authority to act collectively
- Committees and subcommittees

NEW AS OF December 2021:

- Subcommittees or other entities created to perform a “necessary function in the decision-making process” that is not “recommendations or guidance that is purely advisory and which does not require further action . . .”

Legislative Intent

When the Open Meetings Law was passed in 1976, the declared legislative intent stated:

- It is essential that public business be performed in an open and public manner and that the citizens be “fully aware of and able to observe the performance of public officials.”
- Citizens have the right “to attend and listen to the deliberations and decisions that go into the making of public policy.”
- **HOWEVER...**

Chapter 417 of the Laws of 2021

- On January 14, 2022, Governor Kathy Hochul signed into Law Chapter 1 of the Laws of 2022 which amends and extends Chapter 417 of the Laws of 2021, which in part authorizes most public bodies “to meet and take such action authorized by law without permitting in public in-person access to meetings . . . by conference call or similar service, provided that the public has the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed.”
- The language of the Law substantially mirrors Executive Order 202.1 issued in March 2020. Guidance relating to that order can be found on the Committee website under Open Meetings Law Advisory Opinions, key phrase “Declared Disaster Emergency.” (OML AO 5630A, OML AO 5631A, OML AO 5632A)
- Chapter 417, as amended by Chapter 1, will be deemed repealed upon the expiration of Executive Order 11 (currently in effect through February 14, 2022).
- Chapter 417 is **permissive** – it allows for remote meetings but does not require them.

Definition of “Meeting”

“[T]he official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body.” POL § 102(1).

Chapter 417 as amended by Chapter 1 authorizes public bodies “to meet and take such action authorized by law without permitting in public in-person access to meetings and authorize such meetings to be held remotely by conference call or similar service”

Meetings (continued)

- There is no authority for a public body to take action outside of a meeting.
- While Chapter 417 is in effect, a public body may meet using teleconference and videoconference; however, “meetings” by e-mail are still prohibited. A public body may not vote or take action by e-mail.

Definition of “Quorum”

“Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, **gathered together in the presence of each other or through the use of videoconferencing** . . . shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words ‘whole number’ shall be construed to mean the total number which . . . body . . . would have were there no vacancies and were none of the persons or officers disqualified from acting.”

Quorum While Chapter 417 is in Effect

While Chapter 417 is in effect, members of a public body who participate “remotely by conference call or similar service” count toward a quorum, can fully participate, and can vote (including in executive session).

There need not be a majority of the total membership of the board in any one physical location for a quorum to exist. For example, when the 11-member Committee on Open Government meets, four members could be present in Albany, three in Buffalo, and three in New York City. In the alternative, all 11 members could participate by “conference call or similar service” from their own private locations and still be counted toward the quorum.

Use of Videoconferencing

Prior to the passage of Chapter 417, when a member chose to participate by videoconference, the OML required that the public be provided “an opportunity to attend, listen and observe at any site at which a member participates.” POL § 103(c); *see also* § 104(4) (requires notice of the private location of each member so that public may attend with member).

Chapter 417 authorizes public bodies to meet and take action without permitting in public in-person access to meetings. The bottom line is that currently, public bodies are not required to comply with §§ 103(c) and 104(4) of the Law.

Use of Videoconferencing Prior to Chapter 417 (as amended)

Before modification of the OML to permit remote meetings, notice of the meeting was required to include the locations of the meeting, including the location(s) of the member(s) who planned to attend by videoconferencing, even if it was a “private” location:

If videoconferencing is used to conduct a meeting, public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting and *state that the public has the right to attend the meeting at any of the locations*. POL § 104(4) (emphasis added).

During Chapter 417 as amended, if a public body chooses to prohibit in-person attendance, the notice **need not** include the locations from which members are attending and **need not** include the statement that “the public has the right to attend the meeting at any of the locations.”

Meeting Location Requirements

If a public body chooses to allow in-person attendance at its meetings, it must comply with the following provisions of the OML:

- “Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in facilities that permit barrier-free physical access to the physically handicapped, as defined in subdivision five of section fifty of the public buildings law.” POL § 103(b).
- “Public bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings.” POL § 103(d).

Are you having a Meeting?

- Is there a quorum present?
- To discuss public business?
- If yes, you are having a meeting, regardless of intent, or lack thereof, to take action, or characterization of gathering (such as by calling it a “work session”).

No Legal Distinction

- Workshop or work session, Agenda Session
- Regular meeting
- Informal gathering
- Pre-board meeting

Other Gatherings

- Site visit
- “Retreat” or educational seminar
- Attendance at committee meeting
- Social Get Together

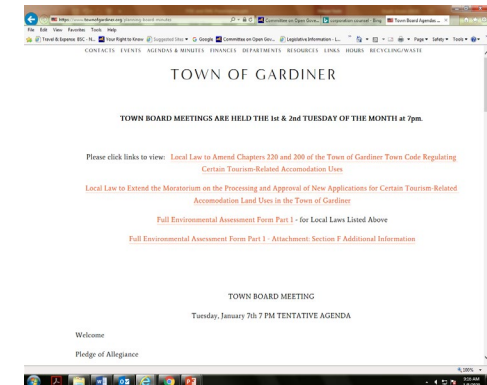


Telephone Calls, Emails

- Remembering definition of “meeting”:
 - Requires physical presence; or
 - Videoconferencing permitted.
 - While Chapter 417 is in effect, teleconferencing is also permitted.
- *Cannot* conduct a meeting or vote by e-mail.
- Does not mean that members of the public body cannot *share information* by e-mail.

Notice

- ✦ Time and place (or instructions for virtual attendance)
- ✦ Prior to every meeting
- ✦ To the media
- ✦ Designated location
- ✦ On the website



Notice

- At least 72 hours prior to a meeting that is scheduled at least one week in advance.
- For meetings on short notice, notice must be given to the extent practicable at a reasonable time prior to the meeting.
- The courts have suggested that the propriety of scheduling a meeting less than a week in advance (and providing less than 72 hours notice) is dependent upon the actual need to do so. Use sparingly.

Minutes

- Must include: Motions/Proposals/Resolutions/Votes.
- Executive Sessions: Only necessary if actions taken.
- Must be *posted on website if you operate one* within:
 - Two weeks for open session; or
 - One week for executive session.
- Does not matter whether records are unapproved or in draft form.
- May post transcript or recording of meeting in lieu of minutes (new since November 8, 2021).

Recording

- Any meeting of a public body that is open to the public shall be open to being photographed, broadcast, webcast, or otherwise recorded and/or transmitted by audio or video means.
- Agency is not obligated to record (but must record if taking advantage of Chapter 417).
- Agency may establish reasonable rules to limit disruption/interference (model rules available on COOG website).

Executive Session

- Part of an open meeting (not prior to or separate from).
- Must make and vote upon motion in open session.
- **Motion should be specific!**



Executive Session: Limited Reasons

- a. matters which will *imperil the public safety* if disclosed;
- b. any matter which may *disclose the identity of a law enforcement agent or informer*;
- c. information *relating to current or future investigation or prosecution of a criminal offense* which would imperil effective law enforcement if disclosed;
- d. discussions regarding *proposed, pending or current litigation*;
- e. *collective negotiations* pursuant to article fourteen of the civil service law;
- f. the medical, financial, credit or employment history of *a particular person or corporation*, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of *a particular person or corporation*;
- g. the *preparation, grading or administration of examinations*; and
- h. the *proposed acquisition, sale or lease of real property* or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof.

“PERSONNEL”

Don't Use this Word in Your Motion!

f. “the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation”

Public Participation

- Not required
- Can establish reasonable rules
- Implement fairly and consistently
- Hearings are not the same as meetings



RECORDS SCHEDULED TO BE DISCUSSED

- Proposed resolutions, laws, rules, regulations, policies or any amendment thereto.
- Records, or portions thereof, that are public under FOIL.
- Shall be made available upon request **within 24 hours of the meeting** (24-hour requirement new as of October 19, 2021).
- Shall be made available **online 24 hours prior to the meeting** if the agency maintains a regularly and routinely updated website and utilizes a high-speed internet connection.
- Agency may, but is not required to, spend additional moneys to implement this section.

Exemptions

- If an exemption applies, the Open Meetings Law does not – as if the OML does not exist.
- Section 108 Exemptions:
 - **judicial or quasi-judicial proceedings**, except proceedings of the public service commission and zoning boards of appeals;
 - **deliberations of political committees, conferences and caucuses**; or
 - **any matter made confidential by federal or state law** (*e.g.*, discussions relating to students made confidential by FERPA; meetings with agency attorney covered by attorney-client privilege).

Non-Compliance and Enforcement

- Enforcement is through the initiation of a CPLR Article 78 proceeding
- Court has authority to:
 - award costs and attorney's fees;
 - Invalidate action;
 - require training.



Questions?

- **ANYONE** is welcome to contact our office by phone or by email with questions (government employees, members of the public, media representatives, etc.)
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THANK YOU TO OUR EXCELSIOR PARTNERS!



P E R M A

