



BOARD OF COMMISSIONERS

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macombcountymi.gov/boardofcommissioners

AUDIT COMMITTEE

THURSDAY, JULY 28, 2011

AGENDA

1. Call to Order
2. Pledge of Allegiance
3. Adoption of Agenda
4. Approval of Minutes dated 02-15-11 (previously distributed)
5. Public Participation (five minutes maximum per speaker, or longer at the discretion of the Chairperson related only to issues contained on the agenda)
6. Review Correspondence from Clark Hill dated July 12, 2011 Regarding Open Meetings Act Compliance (mailed)
7. Approve or Reject Sending a Letter to County Executive Mark Hackel Requiring Compliance of Section 12.1 of the County Charter (mailed)
8. New Business
9. Public Participation (five minutes maximum per speaker or longer at the discretion of the Chairperson)
10. Adjournment

MEMBERS: Frascchetti-Chair, Moceri-Vice-Chair, Brown, DiMaria, Flynn, Gralewski, Sabatini, Sauger, Tocco and Vosburg (ex-officio)

MACOMB COUNTY BOARD OF COMMISSIONERS

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Marvin E. Sauger
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Kathy Tocco - District 11

Joe Sabatini - District 13

RESOLUTION NO. _____ FULL BOARD MEETING DATE: _____

AGENDA ITEM: _____

MACOMB COUNTY, MICHIGAN

RESOLUTION TO Receive and file correspondence from Clark Hill dated July 12, 2011

INTRODUCED BY Roland Frascchetti, Chair, Audit Committee

COMMITTEE/MEETING DATE
Audit Committee 07-28-11

TO: Macomb County Board of Commissioners

FROM: Andrew C. Richner

DATE: July 12, 2011

SUBJECT: Macomb County Water Resource Advisory Council

You have asked the following questions regarding the Macomb County Water Resources Advisory Council ("MCWRAC"):

- (i) Is the MCWRAC subject to the Open Meetings Act, Public Act No. 267 of 1976, as amended (the "OMA")?
- (ii) If the OMA does apply to MCWRAC, is notice required of its meetings?

Following are our responses.

1. Is MCWRAC subject to the OMA?

Under the OMA, a "public body" must comport with the OMA's requirements. Subsection 2(a) of the OMA¹ defines "public body" as:

"any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function; a lessee of such a body performing an essential public purpose and function pursuant to the lease agreement; or the board of a nonprofit corporation formed by a city under section 40 of the home rule city act, 1909 PA 279, MCL 117.40."

The MCWRAC would seem to meet the first part of the definition of a public body because it is a local council, committee or commission.

Even if MCWRAC is considered as meeting the first test as a "council", it must be considered as performing a governmental or proprietary function to be subject to the OMA.² An advisory body can meet this test if it were, in addition to its advisory duties, vested with

¹ MCL 15.262(a).

² *Jackson v. Eastern Michigan University Foundation*, 215 Mich. App. 240 (1996) (because the university foundation was directed to manage the university's endowment fund, which was a governmental function, it was subject to OMA).

authority to make final decisions on a particular matter or policy-making authority.³ It is not clear what governmental or proprietary power has been given to MCWRAC, nor does it appear to have final decision-making power on governmental matters.

Furthermore, the OMA requires that MCWRAC derive its powers from "state constitution, statute, charter, ordinance, resolution, or rule". Under the Michigan Supreme Court's interpretation of this requirement, the OMA would not apply to boards empowered by executive order.⁴ Accordingly, because the MCWRAC was apparently created by the county executive, it likely does not meet this requirement of the OMA and would not be subject to the OMA in the absence of other authority to the contrary.

On the other hand, regardless of whether or not the MCWRAC is a "public body" under the OMA, Section 12.1 of the Macomb County Charter appears to impose the OMA open meeting requirements on all "[c]ounty boards, commissions, and committees."⁵ The Charter does not define what is meant by "[c]ounty boards, commission, and committees", but the respective dictionary definitions of "committee" and "council" are substantially similar. It is clear that MCWRAC is a creature of the County as suggested by its title (*i.e.* *Macomb County Water Resource Advisory Council*) and the fact that the County Executive created it as pronounced in his press releases.

Accordingly, MCWRAC may be considered a County board, commission or committee as contemplated by the Charter. As such, it could be required to hold its meetings in public as provided by the OMA, even if it is not a public body otherwise subject to the OMA as discussed above.

In any case, given that the public meeting and notice requirements under the OMA are fairly minimal and given the nature of the activities and members of the MCWRAC, we would generally advise complying with the OMA meeting and notice requirements. There is little harm in doing so. It seems the matters being discussed would be of public interest and there would seemingly be little, if any, adverse results from holding open meetings and providing notice as required by the OMA.

³ OAG No. 6652 (July 25, 1990). *See also* OAG No. 5256 (January 23, 1978) (watershed councils are "public bodies" because, in addition to their advisory duties, they are legally capable of rendering a final decision as the expenditure of public money in carrying out their other functions); OAG No. 6487 (January 14, 1988) (Senate Fiscal Agency is a "public body" because it is vested with final decision-making authority with regard to personnel matters within the Agency and because it determines the policies and procedures for the operation of the Agency).

⁴ *House Speaker v. Governor*, 443 Mich. 560 (1993) (governor established executive advisory board was exempt from OMA). *See also Herald Co. v. City of Bay City*, 463 Mich. 111, 129 (committee as creation of city manager did not derive its power from state constitution, statute, charter, ordinance, resolution, or rule"); OAG No. 6053 (April 13, 1982); and OAG No. 5505 (July 3, 1979) (promotion and tenure committee and budget committee of Wayne State University are advisory and are not subject to OMA).

⁵ Section 12.1 provides in whole that "[m]eetings of the Commission and all other County boards, commissions, and committees shall be public as provided by law." We note the phrasing of Section 12.2 requires County records to be public "to the extent provided by law." In other words, it could be argued that all meetings of County bodies must be public except to the extent the OMA would allow closed sessions while County documents are to be public only if required by law.

2. Notice

The OMA requires that public bodies post a notice indicating the date, time and place at least 18 hours prior to any special meetings of the body. It also requires a notice at least 10 days prior to the first meeting of the public body of all regular meetings. So, assuming that MCWRAC is subject to the OMA by virtue of Section 12.1, a notice of MCWRAC's June 29 meeting should have been posted.

CONCLUSION

While it might not be subject to the OMA in the absence of other authority, the Charter arguably requires that MCWRAC, as a County board, commission or committee, comply with the OMA. Therefore, it would be subject to notice and public meeting requirements of the OMA.

cc: Scott Smith

Macomb County
Water Resource Advisory Council to the County Executive



AGENDA

Inaugural - Meeting

June 29, 2011, 9:00 a.m. – 11:00 a.m.

Metro Beach Metropark – Welsh Activity Center

- I. Introduction of Appointees.
Allow each appointee to introduce themselves and what assets they bring to the Advisory Council.
- II. Overview of Program.
Presentation on Blue Water Initiative – Hackel and Santoro
- III. Update on Drinking Water Monitoring Program – Gold
- IV. Update on PCB Issues and Superfund site in St. Clair Shores (Gold / PWO staff member)
- V. Large Woody Debris Management Program – Vaara
- VI. Lake St. Clair Tourism Initiative – Simmons / Remias
- VII. WRDA Funding and the SIP Process - Mangus
- VIII. Announcements and Other Items.
- IX. Dates for the Council:
 - Wednesday, July 20, 2011 – Clinton Friendship Cruise – LSC

* MeWRAC Meeting, Wednesday, Sept 28, 2011. (Locale = TBD) *



Macomb County Executive Mark A. Hackel

Mark F. Deldin
Deputy County Executive

*Audit Committee
7-28-11*

Distributed

To: Kathy Vosburg, Board Chair
Members of the Board of Commission

From: Mark A. Hackel, County Executive

Date: July 27, 2011

Re: Water Resources Advisory Council & Legal Opinion
Regarding the Open Meetings Act

I understand there are concerns regarding the application of the Open Meetings Act (OMA) to the Water Resources Advisory Council (WRAC) that I created. Please note this is an "advisory council" to my office and as such is not subject to the OMA. I am attaching a copy of an opinion from Corporation Counsel that supports the position. This opinion was shared with both my office and the Board Office about two weeks ago.

I hope this information is helpful to you. Please feel free to contact me if you have further questions or concerns.

MAH/pjl

MEMORANDUM

TO: Mark A. Hackel
County Executive

FROM: George E. Brumbaugh, Jr.
Corporation Counsel

DATE: July 25, 2011

RE: Water Resource Advisory Council

You have asked this office to prepare a written legal opinion as to whether the Macomb County Water Resource Advisory Council is subject to the Open Meetings Act and whether Section 12.1 of the County Charter requires compliance with the Open Meetings Act.

As we had earlier indicated to you both verbally and in writing, the Open Meetings Act is not applicable to the Water Resource Advisory Council nor does Section 12.1 of the Charter require that meetings held by that Advisory Council comply with the Open Meetings Act. The following is a more detailed explanation of this conclusion.

The Macomb County Water Resource Advisory Council was created as an advisory council by you as Macomb County Executive to examine water quality, access to streams, rivers and lakes within the County and how to attract recreational and other uses of our waterways.

The first issue to determine is whether you as the County Executive are subject to the Open Meetings Act. In the Michigan Supreme Court decision of *Herald Company v City of Bay City, et al*, 463 Mich 111 (2000), the court held that "an individual executive acting in his executive capacity is not a public body for purposes of the OMA." (OMA means Open Meetings Act). In the *Herald Company* case, the issue was whether or not a committee that was formed by the city manager was subject to the requirements

of the Open Meetings Act. The Supreme Court concluded that if the city manager were subject to the Open Meetings Act, the committee he created might also be subject to the Open Meetings Act. Since the city manager was not subject to the Open Meetings Act, the committee that he created is not a public body for purposes of the Open Meetings Act and the committee's actions did not violate the statute when they failed to comply with the Open Meetings Act requirements.

This is the exact situation which we have with regard to the Water Resource Advisory Council. It is a council that was created by you. Since you are not subject to the Open Meetings Act, the Council is not subject to the Open Meetings Act.

The next question is whether Section 12.1 of the Charter requires that the Advisory Council be required to comply with the requirements of the Open Meetings Act. Again, the answer is no. Section 12.1 of the Charter says "Meetings of the Commission and all other County boards, commissions, and committees shall be public as provided by law." It is clear that the meaning of that section is that if a board, commission or committee is subject to the Open Meetings Act, then they shall abide by it. Since the Advisory Council is not subject to the Open Meetings Act, it is not required by the Charter to abide by it.

Also, the drafters of the Charter very carefully used the words "boards, commissions and committees" in Section 12.1. They did not include in Section 12.1 any reference to advisory bodies nor did it include the word councils. If it had intended to include such entities, it would have done so. In interpreting a statute or in this case, a charter, the principles of statutory construction must be looked at. One of those principles is "*expression unius est exclusio alterius*". This is a Latin phrase meaning the express mention of one thing excludes all others. Thus, where there is a list of items, if the specific item is not on the list, it is assumed not to be covered by the statute or charter. In this case, there is no listing of advisory bodies nor is there any listing specifically using the term council. To imply otherwise is to add words to the Charter.

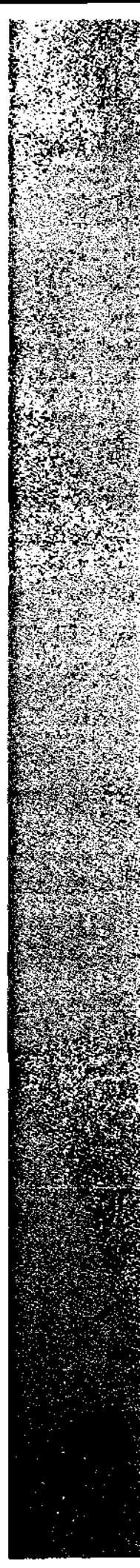
We believe that it is clear that 1) the Open Meetings Act is not applicable to the Advisory Council and 2) that Section 12.1 of the Charter does not impose a requirement that advisory councils created by the Executive are subject to Open Meetings Act because of the wording in Section 12.1.

We advised the Board Office of this opinion some weeks ago when it was raised in an inquiry that we received. I personally advised Board representative Ms. Dib that the Advisory Council was not subject to the Open Meetings Act. I likewise advised your office of this opinion.

If you have any further questions, please feel free to contact my office.

GEB/mla

RECYCLABLE PAPER



RESOLUTION NO. _____ FULL BOARD MEETING DATE: _____

AGENDA ITEM: _____

MACOMB COUNTY, MICHIGAN

RESOLUTION TO Approve or reject sending a letter to County Executive Mark Hackel requiring all public meetings of committees created by the Office of the County Executive are to be held publicly as per Section 12.1 of the County Charter

INTRODUCED BY Roland Frascchetti, Chair, Audit Committee

COMMITTEE/MEETING DATE
Audit Committee 07-28-11