



OPRA Requests, Planning Board Meetings

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Do all records requests need to be made through OPRA?

No. Residents have a right to access and review the records of their governing bodies. While it has become common for all requests for records to be made under the auspices of the Open Public Records Act (OPRA), it should be clarified that OPRA was never meant to be the sole mechanism through which all requests for records must be made. Instead, OPRA, with its strict response time requirements, is more appropriately viewed as a tool for residents to enforce their right to access records.

Practically speaking, it is much easier to fulfill records requests outside of the OPRA context. This is mainly due to the fact that requests made under OPRA carry the risk of court challenges, a strict time to respond, and the possibility of prevailing attorney fees. These factors cause OPRA requests to be viewed more as an adversarial process, when it shouldn't be.

Without the OPRA sword of Damocles hanging over their heads, record custodians are much more apt to participate in a collaborative effort to ensure residents are getting access to the records they seek. And, the municipal clerk, who is in almost every instance the municipal records custodian, has many other obligations to tend to without needing to worry about responding to OPRA within such a tight timeframe.

There are things your municipality can do in an effort to curtail the number of OPRA requests you receive. For example, some municipalities have created a "records portal" where efforts have been made to host many of the most frequently requested records online. By hosting these documents online, and making the public aware of it, you reduce the need for OPRA requests and remove the need for assistance from municipal employees to gain access. People can review the records at their convenience, at any time, without needing to submit an OPRA request and taking up the limited time of the municipal clerk.

While a records portal may help reduce the number of OPRA requests, it is important to note this does not eliminate a records custodian's duty to respond to valid OPRA requests. If an OPRA request is received, it is not enough for the records custodian to respond by simply directing the requester to record. The record custodian must provide the record to the requestor.

Regardless of the reason, every level of government should endeavor to make their records available and accessible to all.

Can our planning board hold a hearing on a development application without a quorum present?

Yes, your planning board can hold a hearing on an application without a quorum present. However, a planning board cannot vote on an application unless a quorum is present. This was recently examined in an unpublished Appellate Division decision, *Montenero v. Toms River Twp. Planning Board*, A-5767-17T4 (NJ. App. Div. Mar. 9, 2020).

In *Montenero* the court examined a challenge to a 9-member planning board's decision to grant a variance based on the argument that the board's action was invalid because they lacked a quorum during the hearing of the application. In this case, three meetings were held to review an application.

Five Board members were present at the initial hearing on developer's application, during which the developer presented the testimony of its engineer and at the second meeting, during which an opportunity was afforded to cross-examine the engineer. The board member absent during the first meeting appeared at the second meeting, but one member present at the first meeting was absent from the second.

The vote at the second meeting was postponed because the member absent during the first hearing had not listened to the recording of that meeting, a pre-condition to her voting based on N.J.S.A. 40:55D-10.2. All six members were present at the third meeting, voting five to one to approve the subdivision. *Montenero* argued the board lacked a required quorum of five members at the second meeting because the member who was absent at the first hearing had not yet listened to the recording of the first meeting and was thus ineligible to vote. It was contended that the four members eligible to vote did not constitute a quorum rendering that hearing a nullity.

The court disagreed with the challenger, finding that voting is the action that requires a quorum, not the conduct of other business that is recorded for later review. The court noted that the Legislature anticipated that members of planning boards and other municipal agencies would be unable to attend every meeting. With this in mind, they provided a mechanism for absent members to become informed of the business transacted at any missed meeting before voting at a meeting at which a quorum is present.

So, while it is necessary that a quorum be present for the planning board to vote on an application, a quorum is not necessarily required at all hearings. You should review this ruling with your planning board attorney for further guidance. 🦋