

***7 Official Opinions of the Compliance Board 186 (2011)***

**Quasi-Judicial Function – Within the function: hearings by 3-judge panels**

**Public Body – Determined to be a public body: 3-judge panels**

**Meeting – Determined not to be a meeting: Quorum not present or convened – 3 member panel of 9 member body**

**Legislative Function – Within function, discussion of: positions on legislation**

**Closed Session Procedures – Violated by failure to hold vote, make written statement and include summary in minutes in open session**

May 23, 2011

*Complainant:*  
*Mr. Yakov Shafronovich*

*Respondent:*  
*Baltimore City Environmental Control Board*

We have considered and consolidated into one matter the submissions of Mr. Yakov Shafronovich (“Complainant”) and the Baltimore City Environmental Control Board (“ECB”) pertaining to Complainant’s allegations that the ECB has violated, and continues to violate, the Open Meetings Act in a number of ways.

Complainant’s allegations and questions fall into the following categories of issues:

1. Does the Open Meetings Act apply to the hearings conducted for the ECB by its administrative law judges (“ALJs”)?
2. Does the Open Meetings Act apply to the proceedings of the three-member panels convened by the ECB to hear appeals?
3. Does the Open Meetings Act apply to other activities conducted by the ECB, such as advising the City Council or taking positions on legislation pending in the General Assembly, and has the ECB violated the Act with respect to meetings on those matters?

4. Has the ECB violated City laws governing its meetings?

For the reasons stated below, we conclude that the ECB has violated the Act in some, but not all, of the ways alleged by the Complainant.

**I**

**Facts**

Baltimore City’s ECB was created by a city ordinance as an independent agency with “full authority to enforce, in accordance with the provisions of [Subtitle 40], the sanitation, environmental, safety, and other quality-of-life provisions of law listed in §40-14...,including any rules and regulations adopted under them.” Baltimore City Code (“ City Code”) Art. I, §§40-2 and 40-5. The list of provisions in City Code Art. I, §40-14 (e) includes laws pertaining to licensing and regulation of certain dwellings, water and sanitation laws, building and fire codes, nuisance laws, and three provisions of the Zoning Code. The violation of any of these laws may result in an “environmental citation.” City Code Art. I, §40-1(d). In its response to the complaint, the ECB states: “Respondents that are before the ECB receive citations from Animal Control, the Fire Department, Housing, Health Department, Police Department, Department of Public Works, and Zoning.” The ECB also states, “The ECB hearings do not encompass zoning matters covered by Article 66B of the Maryland Code ... The ECB does not enforce or regulate any zoning matters, but rather is limited to those matters listed in Section 40-14(e)....” Instead, the ECB states, “The Board of Municipal Zoning Appeals hears the City’s zoning matters.”

City Code Art. I, § 40-3 sets forth three “[g]eneral Board functions.” First, the ECB “is responsible to provide for hearing officers or panels of [ECB] members to conduct hearings on contested environmental citations.” City Code Art. I, §40-3(a). Second, the ECB “is responsible to provide for an opportunity to appeal to the [ECB] or to a panel of the [ECB] from the decision of a hearing officer.” City Code Art. I, §40-3(b). Third, the ECB, [w]ith the assistance of its Executive Director and staff,” is responsible for collecting environmental fines and accounting functions. City Code Art. I, §40-3(c). While the ECB “must prescribe the “form and wording” of environmental citations, the contents are prescribed by statute. City Code Art. I, §40-7(a), (b).

Under City Code Art. I, §40-2(b), the ECB is to be comprised of 13 members, some by virtue of their positions as designees of departments in the executive branch of the City government; others by mayoral appointment.

Some of the positions are vacant, and the ECB may currently have as few as 9 members.<sup>1</sup>

## II

### Discussion

#### ***A. Whether the Act applies to the hearings conducted for the ECB by its ALJs***

Complainant alleges that the ECB “holds administrative hearings with an administrative judge on citations” without either providing notice to the public or allowing the public to attend. The ECB denies that its hearings are closed to the public and asserts that the Act does not apply to the hearings anyway.

We agree with the result asserted by the ECB: the Act does not apply to these hearings. Addressing a similar claim involving hearings conducted by a sole zoning hearing examiner, we found that while the zoning board in that case was a public body, the examiner was not:

But those who conduct hearings on behalf of the [zoning board] are not themselves a separate “public body.” When a hearing examiner, as distinct from the Board itself, conducts a hearing, no “public body” holds a meeting. Moreover, a single individual, like the hearing examiner who conducted [the hearing in question] is not a “public body.” §10-502(h)(3)(i). Hence,...the Act did not apply.

1 *OMCB Opinions* 175, 176 (1996). Here, too, we conclude that the ALJs who conduct the hearings for the ECB are neither the ECB itself nor separate public bodies, and, accordingly, that the Act does not apply to those hearings.

#### ***B. Whether the Act applies to the proceedings of the ECB’s 3-member review panels***

Complainant alleges that the ECB violates the Act when three of its members convene to hear appeals filed by people who wish to contest an ALJ’s findings. The City asserts that the panels are conducting quasi-judicial

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<sup>1</sup> City Code, Art. I, §40-2(b) prescribes 13, and the ECB website lists 10. Complainant cites a March 23, 2011 *City Paper* article which reports that only 9 members actually serve.

functions exempt from the Act under SG §10-503 (a)(1). We agree with the City that the Act does not apply to the ECB itself when its panels conduct these hearings, but for a different reason.

The Act applies only to meetings of a quorum of a public body to discuss public business. *See* State Government Article (“SG”), §10-505 (providing, “a public body shall meet in open session”) and SG §10-502(g) (defining “meet” to mean “to convene a quorum of a public body for the consideration or transaction of public business”). The Act is the sole source of our authority, SG §10-502.4, and we therefore may only address allegations involving meetings within its definition of the term. Here, even if the ECB is assumed to be comprised of only 9 members, three members do not constitute a quorum. So, no matter what function these three members perform, their gatherings are not meetings of the ECB itself.

Whether the panels themselves are “public bodies” exercising functions subject to the Act poses a more complicated question. To address whether the panels meet the Act’s definition of a “public body,” we turn to 3 *OMCB Opinions* 260 (2003), a matter involving a county animal control commission. County law authorized the commission chair to convene three-member panels for certain proceedings. We noted that “because the panel is authorized by law, it would appear that even if a panel conducted the meeting in question, the panel itself constitutes a ‘public body’ for purposes of the Act.” *Id.* at 261, n.2. Here, the City Code requires the ECB “to provide for an opportunity to appeal to the [ECB] or to a panel of the [ECB] from the decision of a hearing officer.” City Code, Art. I, §40-3(b); *see also* §40-9 (providing that the ECB, “acting by or through ...panels of the [ECB]” must conduct proceedings and “has full authority to render decisions and orders”). We conclude that the panels are themselves public bodies and are therefore subject to the Act when they are fulfilling functions subject to the Act.

With respect to whether the panels’ functions fall within the Act, we agree with the City that these panels perform a quasi-judicial function; the full ECB, when sitting to hear appeals, would also be performing that function. The Act defines “quasi-judicial function” as a “determination of... a proceeding before an administrative agency for which Title 7, Chapter 200 of the Maryland Rules would govern judicial review.” Those Maryland Rules apply to petitions for judicial review where provided by statute, and City Code, Art. 1, §40-10(a) of the City Code so provides. The fact that the panels perform a quasi-judicial function, however, does not exclude them from the Act entirely. Under the provisions of SG §10-503 (a) and (b) (2) relevant to this matter, the Act applies to a public body performing a quasi-judicial function “when it is meeting to consider... the enforcement of any zoning law or regulation, or any other zoning matter.” As noted above, the ECB is charged with processing

citations issued under three City zoning laws, listed in City Code, Art. I, §40-14(e)(8) as “use permit required,” “Prohibited uses - storage, etc. of vehicles,” and “conditional use - live entertainment,” each with a statutory reference to a Zoning Code section. However, Complainant has not alleged that an ECB panel has actually held a closed meeting to consider appeals of decisions involving one of the three zoning laws.<sup>2</sup> Further, we do not adopt his argument that the other laws enforced by the ECB fall under the category of zoning matters within the Act.<sup>3</sup> Because the Act does not apply to the ECB or its panels when they are performing quasi-judicial functions pertaining to those other laws, no violation of the Act has been alleged.

***C. Whether the Open Meetings Act applies to other activities conducted by the ECB, such as advising the City Council or taking positions on legislation pending in the General Assembly.***

Complainant alleges that he has been unable to obtain copies of public notices and minutes for the ECB’s meetings. In this regard, he states that the ECB “routinely issues advice to the City Council” and thus exercises functions other than the quasi-judicial function. The ECB responds with minutes that show that the ECB discusses various matters, including its position on legislation in meetings. The minutes provided by the ECB contain redactions under headings such as “Appeal Responses,” “New Appeals,” “Human Resources,” “Law Department,” and “Filed in Circuit Court for Baltimore City.” The minutes do not reflect votes by the ECB members to close the meeting to discuss those matters.

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<sup>2</sup> Complainant alleges that a housing inspector attended the hearing of his matter by a hearing examiner and that he had been issued citations for trash on the grass and hedges outside his home. His matter thus did not involve one of the three zoning laws enforced by the ECB, and we do not know if he appealed it.

<sup>3</sup> Complainant bases his argument that all nuisance laws are zoning laws on Art. 66B, §2.03. That section, which pertains to zoning regulations in Baltimore City, requires Baltimore’s zoning regulations to “be designed to” accomplish eight broad purposes, including “Control congestion in the streets,” “Secure the public safety,” “Promote health and the general welfare.” Art. 66 B §2.03(b). The fact that Baltimore’s zoning regulations, like many others, *see, e.g.*, Art. 66B, §4.03 (concerning regulations adopted by other local legislative bodies), must further these purposes does not mean that every law which also addresses these purposes is a zoning regulation. For instance, traffic, food safety, and criminal laws also address them. Such a broad reading of the term “zoning” in the Act would render the quasi-judicial exception meaningless. However, we agree with Complainant that the quasi-judicial consideration of some licensing matters may be subject to the Act. To be subject to the Act, however, those matters must involve “granting” the license or permit. SG §10-503(b)(1).

The ECB states: “The ECB admits that it has not kept the notices and written statements for closing its board meetings as required by the Open Meetings Act.” The ECB further states: “The ECB is modifying its procedures to be sure that it keeps the notices of the meetings of the ECB board (not the hearings conducted by the hearing examiners...), the minutes, and the written statements for closing board meetings, when such meetings are closed.”

The ECB’s submissions demonstrate that the ECB has indeed violated the Act, not only because it “has not kept” the notices and written statements for closing its Board meetings, but also because it appears that the ECB did not generate those statements in the first place. Indeed, it appears from the materials provided to us that the ECB did not follow any of the Act’s procedures for closing its meetings. The redactions in the minutes suggest that the ECB considered its discussion of those matters “closed.” However, the minutes do not reflect that the presiding officer completed a written statement containing the information required by SG §10-508(d)(2), especially a citation to the statutory exception relied on for closing the session; that the presiding officer did not record any vote on closing the session, as required by SG §10-508(d)(2); and that the ECB did not include in its minutes of the next public session a summary of the actions taken in the closed session, as required by SG §10-509 (c)(2). We also question whether the ECB gave public notice of its meetings.

In this regard, we have read the February 25, 2011 e-mail that Complainant received from a City community liaison who, after reporting that she had “check[ed] with” ECB’s Executive Director, explained:

The Environmental Control Board has a quasi-judicial function and is exempt from “The Public Meeting Act.” Therefore their Board meetings are not open to the public as they are generally deliberating on appeals after a board panel presents their analysis to the full board.

If the ECB indeed has proceeded as though the Act does not apply to its performance of advisory and other non-quasi-judicial functions, it has likely violated the Act in many respects for as many years as it has operated under that belief.

The Complainant’s narrative and exhibits detail his efforts, apparently lasting from August 2010 through February 2011, to inspect the ECB’s minutes. His submissions lead us to make two more observations. First, the Act requires public bodies to make those documents available for inspection during business hours. SG §10-509(d); *see also 7 OMCB Opinions 36, 40-41 (2010)* (explaining closed-session procedures). The Act does not require the

public body to provide copies by mail or e-mail, but a requester should not have to make a written request to inspect the documents. *7 OMCB Opinions* 64, 66-67 (2010). Further, the Act does not permit public bodies to redact minutes of public meetings. *Id.* If ECB members wish to discuss matters falling within one of the statutory exceptions to the open meetings requirement, they must do so in a properly-closed session devoted solely to those matters. SG §10-508(b). And, certainly, a citizen who visits a public body’s office should be provided with notice of the public body’s next meeting or directed to the place where that notice is posted. *See* SG §10-506.

**D. Whether the ECB has violated City laws governing its meetings**

Complainant alleges that the ECB has also violated the City’s laws pertaining to open meetings and that those laws are “more stringent” laws, which, under SG §10-504, control. The Act does not provide us with the authority to address allegations of violations of other laws, and we therefore do not address the Complainant’s allegations of violations of City law.

**III**

**Conclusion**

We find that the ECB has violated the Open Meetings Act by failing to close its Board meetings in accordance with the Act. We find that the Act does not apply to hearings before an ECB hearing examiner because that person is not a “public body” under the Act. We find that the ECB is performing a quasi-judicial function, not subject to the Act, when it or one of its panels considers matters other than those either listed in the City’s Zoning Code or the grant of a license or permit.

We commend the ECB for its decision to modify its procedures.

OPEN MEETINGS COMPLIANCE BOARD

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