

Consent Item Briefing for PWSRCAC Board of Directors – May 2021

ACTION ITEM

Sponsor: Board Governance Committee
Project number and name or topic: Proposed Amendment to Board Policy 106

1. **Description of agenda item:** The Board Governance Committee (BGC) is recommending amendments to Board Policy 106 pertaining to executive sessions.
2. **Why is this item important to PWSRCAC:** Questions have come up regarding whether official binding actions can be taken in executive session and how an “action” is defined. The BGC thought it was important to address these and related issues and discussed them over the course of four meetings. How PWSRCAC conducts its business is very important and BGC concluded that a legal interpretation and clear, consolidated guidelines would be beneficial. The results of these discussions are included in the proposed policy amendment, the attached Memorandum from attorney Joe Levesque, and the attached set of Executive Session Guidelines and Best Practices prepared by BGC. The Memorandum and Guidelines are submitted as backup to this briefing sheet and will reside in the document management system and/or the committee website so that they can be referred to easily.
3. **Previous actions taken by the Board on this item:**

<u>Meeting</u>	<u>Date</u>	<u>Action</u>
Board	3/20/1992	Policy 106 Approved
4. **Summary of policy, issues, support or opposition:** The proposed amendment to Policy 106 makes it clear that it is the policy of the Board that official votes or final and binding actions should be taken in open sessions, and not in executive session, unless absolutely necessary. It also references the Memorandum from Joe Levesque and the Guidelines prepared by BGC for further reference and guidance. There is no known opposition.
5. **Committee Recommendation:** The Board Governance Committee recommends approval of the proposed amendments to Policy 106
6. **Action Requested of the Board of Directors:** Approve the proposed amendment to Board Policy 106 as recommended by the Board Governance Committee.
7. **Alternatives:** Make no changes to Policy 106
8. **Attachments:**
 - A. Redline version outlining proposed edits to Board Policy 106.
 - B. Joe Levesque Memorandum dated October 12, 2020.
 - C. Board Guidelines Executive Session Best Practices.

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Proposed Amendment to Policy 106

May 2021

POLICY 106: Open Meetings and Executive Sessions: Regular PWSRCAC board meetings shall be conducted in public with prior notice having been given. When the Board determines by a majority vote that a matter is sensitive or confidential, the board may retire to executive session at which time only board members and invitees as the board determines to be necessary are allowed to remain. The decision as to whether a matter is sensitive or confidential is solely the prerogative of the board and includes but is not limited to matters pertaining to a) finances, b) reputation or character of any person or entity, and c) legislative, legal and contractual issues. The reason for the executive session must appear in the record and be announced in open session. **Unless absolutely necessary, the board should avoid taking official votes or actions in executive session that are final and binding on the organization. (For more information and guidance on executive sessions, see attorney Joe Levesque's Memorandum dated October 12, 2020 and the guidelines on executive session best practices.)**

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MEMORANDUM

TO: Donna Schantz, Executive Director

FROM: Joseph N. Levesque, Board Attorney *JNL*

DATE: October 12, 2020

RE: OPEN MEETINGS & PWSRCAC BOARD EXECUTIVE SESSION
Our File No. 474-001

You have requested our legal opinion on whether the Alaska Open Meetings Act, AS 44.62.310-312 (“OMA”), applies to executive sessions of the Prince William Sound Regional Citizens Advisory Council (“PWSRCAC”). Specifically, you have asked us to determine whether PWSRCAC can take Action¹ in executive session.

In Short

It appears quite clear that OMA does not apply to PWSRCAC, and the organization can take Action in executive session if it so chooses, even though the organization has often voluntarily followed OMA in the past.² However, if at any time a government official, in his or her official capacity, is invited into an executive session, then the Board should not take Action during that executive session. In all cases Actions taken by the Board of PWSRCAC must be properly recorded. PLEASE NOTE: In the meeting context, what constitutes an Action may seem counterintuitive. In this context, an Action is only taken when the Board holds a binding vote. A more complete explanation follows.

¹ We have capitalized the word “action” in order to highlight its significance and unique meaning in a meeting context. Action in this sense means an action item that was passed. All such Actions require documentation in the meeting minutes.

² PWSRCAC, in its effort to be transparent has at times followed the spirit of OMA.

Donna Schantz, Executive Director
October 12, 2020
Page | 2

**CONFIDENTIAL DRAFT
PRIVILEGE APPLIES**

Context

PWSRCAC is a Federally-recognized 501(c)(3) nonprofit organization. Pursuant to its Articles of Incorporation,³ its most recently reviewable IRS Form 990,⁴ its Contract with Alyeska,⁵ and IRS guidance pertaining to Section 501(c)(3) entities,⁶ PWSRCAC is not a governmental entity.⁷ Pursuant to Article 3 of its Articles of Incorporation, PWSRCAC is a corporation that exists “exclusively for charitable, scientific, literary or educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986 as amended... including without limitation the oversight, monitoring, assessing and evaluation of oil spill prevention, safety and response plans, terminal and oil tanker operations and environmental impacts of Alyeska Pipeline Service Company.” (“Alyeska”). PWSRCAC currently receives all of its funding from Alyeska, which is a private company incorporated in Delaware.

The Oil Pollution Act of 1990 (“OPA-90”) delegates certain duties, but no authority to PWSRCAC.⁸ In OPA-90 the text also essentially gives the duties of Corporate Organizer or Incorporator for an organization like PWSRCAC to the Secretary of the Department of Transportation.⁹ If that had happened, an additional analysis might be necessary under federal open meetings law. However, since PWSRCAC already existed when OPA-90 passed,¹⁰ it was not incorporated by the federal government. Instead it simply received delegation of the duties described in OPA-90. Finally, the act requires PWSRCAC to be self-governing.¹¹ All of these are factors indicating that PWSRCAC is not an Alaskan Governmental Entity, and therefore not subject to AS 44.62.310-312. Taken together, we find these facts very convincing that the PWSRCAC Board is in no

³ Articles of Incorporation of Prince William Sound Regional Citizens’ Advisory Council, Inc. Art. 3 Part 1.

⁴ See PWSRCAC 2017 Form 990 Accessed 8/31/20 via https://apps.irs.gov/pub/epostcard/cor/920133631_201806_990_2019060416375067.pdf.

⁵ Feb. 8, 1990 Contract: Between PWSRCAC, Inc. and Alyeska Pipeline Services Co. Sect. 1.2.

⁶ See Organizations closely affiliated with state or Indian Tribal Governments Reference Guide at 2. Accessed 8/31/20 via <https://www.irs.gov/pub/irs-tege/eotopich04.pdf>.

⁷ Please Note: Levesque Law Group does not provide tax advice. This assertion and the accompanying clauses are not intended as such.

⁸ See Section 33 U.S.C. 2732(d)(6)(A-G) and 33 U.S.C. 2732 (g-h).

⁹ 33 U.S.C. 2732(i), 33 U.S.C. 2732(i), and 33 U.S.C. 2732 (l). For such an organization now, it would be the Secretary of the Department of Homeland Security, pursuant to 33 U.S.C. 2732(m)(4).

¹⁰ PWSRCAC was incorporated under Alaskan Law in anticipation of OPA-90.

¹¹ 33 U.S.C. §2732 (d)(4).

Donna Schantz, Executive Director
 October 12, 2020
 Page | 3

CONFIDENTIAL DRAFT
 PRIVILEGE APPLIES

way a “governmental body of a public entity of the state [of Alaska]¹²” and is therefore not subject to OMA.¹³

Legal Standards

In summary, OMA¹⁴ requires: (1) that all meetings of a governmental body of a public entity of the state be open to the public except as otherwise provided by [the act] and that votes of such a public entity be taken in such a manner that the public may know who cast each vote;¹⁵ (2) that the public entity’s governing body may hold executive sessions (aka “closed session”) only after a publicly convened meeting (aka “open session”) where the subject to be discussed is declared, either as an agenda item pre-published or by way of motion;¹⁶ (3) that voters in closed session may only consider that particular topic declared in open session in the motion to enter closed session and that topic’s reasonable auxiliary issues;¹⁷ (4) that only two types of Actions may be taken in closed session by the governing body of an Alaskan public entity, those Actions providing direction to the body’s attorney and those Actions providing direction to the body’s labor negotiator;¹⁸ (5) there are further restrictions on what topics may be discussed in the executive session of a governing body of an Alaskan public entity.¹⁹

However, pursuant to OMA’s own internal definitions, at AS 44.62.310(h)(3), PWSRCAC is not a public entity:

(3) "public entity" means an entity of the state or of a political subdivision of the state including an agency, a board or commission, the University of Alaska, a public authority or corporation, a municipality, a school district, and other governmental units of the state or a political subdivision of the state; it does not include the court system or the legislative branch of state government.²⁰

As a corporation that performs some oversight under federal legislation, essentially as a contractor, PWSRCAC is not a creature of state law. Instead, it had duties delegated to it

¹² AS 44.62.310 (a).

¹³ AS 44.62.310-312.

¹⁴ AS 44.62.310(a) *et seq.*

¹⁵ AS 44.62.310(a).

¹⁶ AS 44.62.310(b).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ AS 44.62.310(c).

²⁰ 44.62.310(h)(3).

Donna Schantz, Executive Director
 October 12, 2020
 Page | 4

**CONFIDENTIAL DRAFT
 PRIVILEGE APPLIES**

from the U.S. Congress pursuant to OPA-90.²¹ If it were a governmental entity, it would be a federal entity, not subject to state regulation, under the long-established principles of Federalism.²² However, PWSRCAC is not a governmental entity at all; it is a private non-profit organization with a federally delegated advisory function.

Non-Profit Organizations are regulated by the Alaska Nonprofit Corporation Act, AS 10.20. Pursuant to AS 10.20.920(3) Bylaws are “the code or codes of rules adopted for the regulation or management of the affairs of the corporation irrespective of the name or names by which the rules are designated.”²³ It is very strongly implied in Alaskan law that these are binding on corporations.²⁴ Article 3.3 of the PWSRCAC Articles of Incorporation further makes the corporation’s bylaws binding on it. There does not appear to be any place in the Bylaws or the Articles of Incorporation where the PWSRCAC takes on restrictions limiting its ability to hold closed Board meeting, beyond those existing in law.

Pursuant to its Bylaws²⁵ PWSRCAC follows Robert’s Rules of Order. Robert’s Rules of Order define an executive session as a meeting or portion of a meeting whose proceedings are secret. Only members of the governing body are entitled to attend, but they may invite others to stay at the pleasure of the Board. A motion is required to go into executive session, and a majority must approve the motion. Those present must maintain the confidentiality of the discussion, and anyone who violates that confidentiality is subject to disciplinary Action.

Also pursuant to Robert’s Rules of Order, an organization takes Action through an official vote.²⁶ Under Alaskan Law, unlike governmental bodies, non-profits are not prohibited from taking Action in Executive Session.²⁷

²¹ 33 USC § 2732.

²² See McCulloch v. Maryland, 17 U.S. 316 (1819).

²³ AS 10.20.920(3).

²⁴ See Afognak Native Corp. v. Olsen, 648 P.2d 991, 992 (Alaska 1982); Matanuska Elec. Ass’n, Inc. v. Waterman, 87 P.3d 820, 823 (Alaska 2004) and AS 10.20.056.

²⁵ Subsection 5.9 “Rules of Procedure” of the PWSRCAC Bylaws: Updated Sept. 20, 2019, reads: “The rules of procedure at meetings of the Board and committees of the Board shall be rules contained in Robert’s Rules of Order on Parliamentary Procedure, newly revised, so far as applicable and when not inconsistent with these Bylaws, the Articles of Incorporation or any resolution of the Board.”

²⁶ Robert’s Rules of Order N.R. (11th ed.) p. 4 li. 1.

²⁷ Compare AS 10.20 to AS 44.62.310-312.

AS 10.20.116 reads:

Sec. 10.20.116. Place and notice of directors' meetings.

(a) Regular or special meetings of the board of directors may be held either inside or outside the state.

(b) Regular meetings of the board of directors may be held with or without notice as prescribed in the bylaws. Special meetings of the board of directors shall be held after the notice which shall be prescribed in the bylaws. Attendance of a director at a meeting constitutes a waiver of notice of the meeting, except when a director attends a meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called or convened. The business to be transacted or the purpose of a regular or special meeting of the board of directors need not be specified in the notice of the meeting unless required by the bylaws.

Invited Government Official Exception

Due to the nature of its work, PWSRCAC may occasionally invite one or more seated government officials in their official capacity to attend a Board meeting. In such circumstances, we believe OMA²⁸ would apply to the meeting generally. Since executive session attendance is by invitation only,²⁹ if an executive session occurs at the same meeting, OMA should only apply to that executive session if someone OMA applies to is invited to attend the executive session.

E.G.: if the Mayor of Valdez is present at a Board meeting, the minutes and proceedings of that Board meeting should be treated like they are subject to OMA. If the Board holds an executive session during that Board meeting and invites the Mayor of Valdez, who actually attends the executive session then OMA will apply. In addition to record keeping requirements, application of OMA also means the Board may not take Action within the executive session. However, if at the same meeting, the Mayor of Valdez is not invited into an executive session and properly leaves the room during the executive session, the Board may act as if OMA does not apply to that executive session and could even take Action. It seems probable PWSRCAC could host a Board meeting where all three of these situations present themselves, and where the two contemplated types of

²⁸ AS 44.62.310-312.

²⁹ Roberts Rules of Order N.R. (9th ed.) p. 95 li. 31 *et. seq.*

Donna Schantz, Executive Director
October 12, 2020
Page | 6

CONFIDENTIAL DRAFT
PRIVILEGE APPLIES

executive session happen back to back. If such a situation arises, it will be very important to close each executive session and reenter open session, so that there can be proper notation in the meeting minutes that the one executive session ended, before motion to enter the second executive session was made. If this step, creating separation and a unique identity for each executive session, is not taken it seems likely that OMA could be applied to everything done in both executive sessions. If that were to happen the risks include invalidation of Actions taken and breach of confidentiality.

Best Practices if PWSRCAC Acts in Executive Session

At times it will be necessary to use executive session and there appears to be no reason PWSRCAC should not also use executive session when convenient. When the organization goes into executive session, however, there are some best practices it should abide by, as follows.

Minutes of an executive session, if required, may only be reviewed and adopted in executive session. Many of the activities PWSRCAC traditionally undertakes in executive session, such as conducting straw poles³⁰ and having private conversations, do not need to be taken down in minutes. Because of its practices, executive session minutes have not been necessary for PWSRCAC and may never actually become so. What's more important is to make sure that every executive session starts in open session with a motion to enter executive session for a particular reason. That motion must be seconded and approved by a majority vote. When the reason an executive session was called is complete, the Board should then return to open session.

The reason for executive session, the motion to enter executive session, the approval of that motion, any invited guests, and the time the Board returned to open session should all be recorded in the minutes of the meeting, without compromising the confidentiality of the discussion. Unless others are invited to the executive session by the Board, only Board members should remain in the room when an executive session convenes.

E.G.: Board Member 1 moved to enter executive session to discuss Staff Position Compensation for Position B. Board Member 2 seconded. Majority approved by voice

³⁰ It should be noted that straw polls are frowned upon by Robert's Rules as out of Order. See Robert's Rules of Order N.R. (11th ed.) p. 429 which reads: "A motion to take an informal straw poll to 'test the water' is not in order because it neither adopts nor rejects a measure and hence is meaningless and dilatory." However, since straw polls have been functionally part of PWSRCAC's executive session practice since time immemorial and seem to have great utility to the organization as they are currently being used, we recommend against abandoning them.

Donna Schantz, Executive Director
 October 12, 2020
 Page | 7

**CONFIDENTIAL DRAFT
 PRIVILEGE APPLIES**

vote. Executive session began 10:43 a.m. Sept. 30, 2020. Open session resumed at Noon, Sept. 30, 2020. All Board members present participated except for Board member 3, who recused herself. The Board Attorney was invited and participated in this session.

Finally, whenever an Action is taken, it should be recorded in the minutes of the particular session in which it was taken. This should be kept with any related documents in an appropriate place. If the Action is taken in executive session, the confidentiality of the documents and the minutes must be preserved and should be marked confidential. Remember, pursuant to Robert's Rules of Order,³¹ the minutes of an executive session can only be reviewed in executive session.³²

Our Recommendation re Executive Session

PWSRCAC has run its Board meetings as it currently does for most of its existence. By current practice, Board members are only present in executive sessions to discuss and build consensus.³³ By tradition, nothing that can be defined as a Board Action has ever been taken in executive session. Even though the legal standards, above, show that there is room for PWSRCAC to do more than it traditionally would in executive session, we strongly recommend against changing the current practice.

Two things should be noted here: (1) if, after seeking input from the Board, the Executive Director takes some action while the Board is still in executive session there has been no Board Action.³⁴ The Board providing input, which by PWSRCAC is always given without a true vote in executive session, is considered part of the consensus building and discussion process. (2) Even under OMA, there is a special exemption which allows governmental bodies to handle matters which must remain confidential in executive session.³⁵ The Alaska Supreme Court, in *Cool Homes, Inc. v. Fairbanks North Star Borough*³⁶ explicitly extended this exemption to giving direction to a legislative body's attorney. We understand that, in PWSRCAC's case, such direction is often given without the need for a formal vote of the Board and would therefore not require minutes to be taken. Furthermore, as previously discussed in this memo, OMA does not actually apply

³¹ Robert's Rules of Order N.R. (11th ed.) p.96 Li.9.

³² Please Note: There is an exception for executive sessions called solely to confirm the minutes of a past executive session. Pursuant to Roberts Rules of Order § 9 "When the minutes of an executive session must be considered for approval at an executive session held solely for that purpose, the brief minutes of the latter meeting are, or are assumed to be, approved by that meeting."

³³ A straw poll is not a binding vote and does not count as an Action. When an action is not taken there is no need for a record.

³⁴ While this circumstance is possible, it seems unlikely.

³⁵ See AS 44.62.310(c)(3).

³⁶ See Cool Homes, Inc. v. Fairbanks North Star Borough, 860 P.2d 128 (Alaska 1993).

Donna Schantz, Executive Director
October 12, 2020
Page | 8

CONFIDENTIAL DRAFT
PRIVILEGE APPLIES

to PWSRCAC, because it is not a governmental entity. PWSRCAC has voluntarily followed parts of OMA, as a matter of practice and to fulfil its longstanding goal of transparency, but is not bound by OMA. For these reasons, we are of the opinion that PWSRCAC may also freely direct its legal counsel in executive session without needing to take minutes of that session, so long as some notation, like the following, is entered on the general meeting minutes.

E.G. RCA Ruling on Order 6: With regards to the amicus brief, the Board provided direction to the PWSRCAC Executive Director and Legal Counsel on how to move forward on this issue at their discretion.³⁷

If, for some unforeseen reason, an official vote is necessary for something the Board does in executive session, the executive session can be ended and a vote can be taken in open session. We believe this would be wiser than taking a binding vote in executive session.

The nature of any human enterprise is that secrets will get out. Therefore, it is better to not create any. PWSRCAC's current executive session practices do not create any secrets that could harm the organization or individual members of its Board. Without being on record, Board members are able to speak freely and frankly while making up their minds with little fear that a fleeting comment may be recorded and later used against them or PWSRCAC. This freedom can be critical to seeking advice from and directing an attorney. With the protective rule, the minutes of an executive session would be technically private and reviewable only while the Board is in executive session. However, as soon as a physical or digital record of something exists it may be misplaced, accidentally transmitted or intentionally leaked. Such a record may also be susceptible to review through the regular audit process that PWSRCAC goes through or by court order. Any of these could be dangerous to individual Board members or the organization as a whole, if Alyeska, another company, or some individual is offended by the content of the escaped document.

For the above reasons, we strongly recommend continuing to limit executive session only to discussion, consensus building and advising PWSRCAC.

³⁷ Minutes of Fall 2020, PWSRCAC Board Meeting.

BOARD GUIDELINES
EXECUTIVE SESSION BEST PRACTICES
Prepared by the Board Governance Committee
May 2021

Recommendation

The PWSRCAC attorney and the Board Governance Committee recommend that the Board continue to operate as it has in the past by substantially following the rules of the Open Meetings Act with respect to executive sessions and specifically, by not taking official votes, or final, binding actions in executive session. The PWSRCAC Bylaws, the Board approved policies, and the most recent edition of Robert's Rules provide the applicable standards and guidance.

Reasons for the Recommendation

- Transparency is one of PWSRCAC's key values and it has served the organization well. The confidence and respect that this organization has built among regulators, industry, and legislators could be placed at risk if the organization conducts business behind closed doors. This could result in mistrust and suspicion.
- Although actions taken in executive session are intended to be confidential, secrets have a way of leaking out. The current practice of not taking formal, binding action in executive session avoids creating secrets that if revealed, could harm the organization or individual Board members.
- Formal votes, final, and binding actions taken in executive session must be recorded in minutes that are to remain confidential. Physical or digital records may be misplaced, accidentally transmitted, or intentionally leaked. Leaked records could lead to harm for the organization in a wide variety of ways.
- Confidential records may be susceptible to review through the normal financial audit process. They may also be revealed through Alyeska or Coast Guard audits, or by court order. The review of confidential records may depend on a number of factors including the specific protocols in place, the scope of the audit, the content of the confidential document, and applicable contract terms. Even if a court order were required, it is possible that confidential documents could easily be incidentally discovered through an audit process.
- The Coast Guard reviews PWSRCAC procedures and operations annually in order to certify the organization and ensure compliance with OPA 90. Among the categories reviewed is our relationships and interactions with partners, the public, and member organizations. Conducting business behind closed doors may create the

perception that PWSRCAC is deficient in those areas and potentially jeopardize certification.

Executive Session Best Practices

- Robert's Rules of Order defines an executive session as a meeting or a portion of a meeting whose proceedings are secret. Executive sessions are used when sensitive matters, the knowledge of which might harm the organization or individuals, are the subject matter. Executive sessions are used when it is desirable for Board members to be able to speak freely, candidly, and confidentially. Board Policy 106 states that the decision as to whether a matter is sensitive or confidential is solely the prerogative of the Board and includes but is not limited to matters pertaining to a) finances, b) reputation or character of any person or entity, and c) legislative, legal and contractual issues.
- Only members of the governing body are entitled to participate in an executive session, but others may be invited at the pleasure of the Board.
- Those present in an executive session must maintain the confidentiality of the discussion. Anyone who violates that confidentiality is subject to disciplinary action.
- Every executive session must start in open session. There must be a motion to enter executive session. A reason for the executive session must be given and included as part of the motion. The motion must be seconded and approved by majority vote of the body.
- When executive session is complete, the Board should then return to regular session.
- The reason for executive session, the motion to enter into executive session, the approval of the motion, any invited guests, and the time the Board returned to open session should all be recorded in the minutes of the meeting, without compromising the confidentiality of the discussion.
- When the Board returns to open session, a designated member should make a statement regarding the general topics discussed in executive session. For example, the Board provided direction to the attorney on how to proceed. A notation about this statement should be placed in the general meeting minutes.
- Non-profits must take action through an official vote. Robert's Rules provides that whenever an action is taken, it should be recorded in the minutes of the particular session in which the action was taken. If an action is taken in executive session, there must be a record of the discussion and action. The minutes should be marked confidential and kept in an appropriate and secure location.
- Minutes of an executive session, if an "action" is taken, may only be reviewed and adopted in executive session and must remain confidential.

- If an executive session is called exclusively to adopt minutes of a prior executive session, no minutes need be taken of that second executive session because the adopted minutes provide a sufficient record.
- If a seated federal, state, or municipal government official, or anyone subject to the OMA is invited to an executive session, the OMA rules apply to that executive session. Therefore, no “action” can or should be taken during that executive session.
- There may be occasions when there are two or more executive sessions scheduled for different topics. To the extent reasonable and feasible, it is recommended that executive sessions be limited to one topic. If one executive session is subject to the OMA and the other is not, it is best to close one session when complete, reenter open session, and then adopt a motion to go into the second executive session. This ensures that there can be proper notation in the minutes that one executive session ended, and the person subject to the OMA departed, before the other began. Clear separation can prevent the OMA from being applicable to both executive sessions and possibly risk invalidation of actions taken and confidentiality.
- If the Board wishes to avoid taking action in executive session and an official vote is necessary for something the Board determines to do in executive session, the executive session can be ended and the vote taken during the regular session and on the record. In order to be consistent with Board Policy 108, the Board should first adopt by majority vote, a motion to place the item on the current agenda as new business, or the agenda of a future meeting (if the item is not already on the agenda). This is the recommended course of action and is a better option than taking a final, binding vote in executive session.

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