Coates' Canons Blog: Board Majorities Attending External Events or Meetings: When is Notice Required?

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Three (of five) board members walk into a bar…. Sounds like the beginning of a joke, right? In fact it's the beginning of a frequently asked legal question. Stated more broadly the question is whether the mere presence of a majority of a public body in the same place at the same time always constitutes an official meeting, triggering the public notice and access requirements under the state Open Meetings Law (OML). The easy answer is "no," it doesn't *always* trigger the law, but sometimes it might. As I noted in my blog post here, if members of a public body are not transacting public business, there is no need to provide notice. That's the easy answer. But what if it's a political event or a setting that relates to public business and a majority shows up? When is a majority of the board considered to be "gathered" or "assembled" in a meeting within the meaning of the OML? Public agencies often give notice any time there is a possibility that a majority will be at the same place at the same time. This blog examines when such notice is necessary and when it's not.

The notice and access requirements in the OML apply to "official meetings" of public bodies. (See my blog post here to learn more about public bodies.) The law defines official meeting as follows:

> "Official meeting" means a *meeting, assembly, or gathering together at any time or place* or the simultaneous communication by conference telephone or other electronic means of a majority of the members of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body.

G.S. 143-318.10(d) (emphasis added). Two kinds of gatherings are easy to classify under this definition. One is a meeting of the public body itself, where a majority comes together at the same place at the same time, electronically or in person, and they're transacting public business. The other is a purely social event where, even though a majority of the board is present, the members refrain from talking about or otherwise transacting public business. That is not an official meeting and no notice is necessary. The OML specifically says so:

> [A] social meeting or other informal assembly or gathering together of the members of a public body does not constitute an official meeting unless called or held to evade the spirit and purposes of this Article.

Id. It's harder to assess situations in which a majority of a public body is present at an activity or event that is not organized by the public body itself and that is not clearly or exclusively a social event. Examples of such settings include conferences or training sessions, political events, meetings with state or federal legislators, community meetings organized by staff members of the unit, and meetings of other public bodies. Some of these types of events may occur in a private home or business and may involve a mix of social, political, and public business.

In these situations, it's common for city and county clerks to err on the side of caution and provide notice that a majority of the board will be in attendance, sometimes including a statement in the notice that no action will be taken. Though this practice exhibits an admirable commitment to transparency, it probably doesn't really have much legal effect. In these situations the members are not going to operate as a board, there will be no minutes, and in some cases the venue will not be open to the public at large. Does this mean that members are prohibited from attending, or that if a majority shows up someone will have to leave to avoid violating the law?

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Not necessarily. A key question is whether in these situations the board is "meeting," "assembled," or "gathered" within the meaning of and for the purposes as described in the OML. The statute is explicit about certain types of activities that aren't considered official meetings, such as purely social gatherings and informal assemblies, but there is no further guidance in the statute. Moreover, North Carolina's appellate courts have yet to address the meaning of "assembly" or "gathering." In the absence of statutory guidance, courts look to dictionary definitions as well as to cases from other states.

The Merriam-Webster dictionary definition of "meeting" is "a gathering of people for a particular purpose (such as to talk about business)." "Assemble" is defined as "to meet together in one place." And to "gather" is defined as "to bring (things or people) together into a group" and "to come together in a body." Cases interpreting these terms in the context of open meetings laws have concluded that a meeting or gathering necessarily requires some evidence of a *collective intention to come together as a group*. For example, in holding that the passive receipt of emails does not constitute a meeting, the Washington Supreme Court held that "[i]f communications do not reflect the requisite collective intent to meet, no 'meeting' has occurred and the OPMA does not apply. Thus, within the context of the OPMA…a 'meeting' of a governing body occurs when a majority of its members gathers *with the collective intent of transacting the governing body's business*…" *Citizens All. For Prop. Rights Legal Fund v. San Juan Cty.* 359 P.3d 753, 761 (Wash. 2015) (*emphasis added*). In another case, four members of a school board (a majority) attended an event for local elected officials. They received individual invitations to the event and did not coordinate their attendance. The court held that although a majority attended the event, the evidence did not show that the members had gathered or came together as a group to transact public business. As such, their simultaneous presence at the event did not constitute a "meeting," as defined by the relevant statute. *Slagle v. Ross*, 125 So.3d 117 (Ala. 2012).

What about the situation where a majority of a public body attends a meeting of another public body? For example, a majority of the city council might attend a meeting of the county commissioners, or of its own planning board. The analysis here will likely depend upon the question of whether attendance is a group decision or whether individuals separately and independently decide to attend. A Wisconsin case has held that regular attendance by a majority of the body can trigger the notice requirements, even if the group simply attends and observes. In *State ex rel. Badke v. Village Bd. of Village of Greendale,* 494 N.W 2d 408 (Wis. 1993), a majority of the village board regularly attended meetings of the village plan commission, including several meetings regarding a proposed housing project. They listened to the discussion, but did not participate or engage in discussion among themselves. Nonetheless, the court noted that the plan commission was considering a matter over which the village board would exercise final control. The court concluded that notice was required based on the following rationale:

> The Village Board members present could have, and in all likelihood did, reach some conclusions about the Sileno project based upon information, data and material that was presented at the Plan Commission meetings. However, because no notice was given of their attendance, the public may not have been aware of the perceived importance of these meetings to the Village Board and therefore failed to attend. Thus, the public was not made aware that information was being presented that could form the rationale behind the Village Board's action. The open meeting law is intended to allow the public access to the fullest information possible concerning the workings of government and the decision-making process. The public can hardly have access to this information if not made aware of its existence. Thus, *even if the Village Board members did not interact at the Plan Commission meetings*, their presence at the meetings allowed them to gather information that influenced a decision about a matter over which they had decision-making authority. The public had a right to be made aware of the existence of this information as well. This is sufficient to trigger the open meeting law.

Id. at 415 (emphasis added). A key finding in this case was that attendance at these meetings was not a chance event. Instead it was a regular practice of the board members to attend these meetings. The evidence showed that "[t]heir attendance *as a group* did not occur on a sporadic basis, was not haphazard, irregular, nor spontaneous." *Id at 417 (emphasis added).* As already noted, the North Carolina statute appears to require some level of intent to gather as a group. So if a majority of council members separately and independently show up at a planning board meeting, I think notice *would not* be required under our statute, so long as they don't gather together or interact as a group while at the meeting, and provided that it does not become a regular practice.

The case of *Bd. of Cty. Comm'rs, Costilla Cty. v. Costilla Cty. Conservancy Dist.,* 88 P.3d 1188 (Colo. 2004), involved a meeting at the "Hideaway" restaurant that was organized by several state agencies and a mining company for the purpose of reporting on the company's efforts to take corrective action to remedy environmental violations for which it was

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responsible. An employee of the company invited all three of the Costilla County commissioners to attend the meeting, and two of them (a majority of the board) attended. Local officials from other jurisdictions attended along with several invited citizens. The conservation district sued the county alleging that the county commissioners violated the open meetings law by failing to provide notice that a quorum would be meeting at the Hideaway. The trial court held that no notice was required because there was no indication that the law was intended to apply to meetings held by other agencies. The court of appeals reversed, holding that nothing in the statute specifically limits its applications to meetings called by the public body, and that the presence of the quorum at the meeting triggered the notice requirement. The supreme court reached a different result, holding that "the OML applies only to meetings that are *part of the policy-making process*." It found that in this case, "the record reveals that the Hideaway meeting was not convened for the purpose of discussing or furthering public policy, and therefore it was not part of the policy-making process." *Id. at 1192.* The court went on to explain that "for a meeting to be subject to the requirements of the OML, there must be a demonstrated link between the meeting and the policy-making powers of the government entity holding or attending the meeting. Such a link exists, for example, when the meeting is convened to discuss or undertake one of the actions enumerated in the remedy provision of the OML such as a rule, regulation, ordinance, or formal action."

The court's focus on the purpose of the commissioners' attendance is instructive, although I'm not sure the result in this case would be the same under the North Carolina OML. The purposes that trigger our statute include deliberation (which can involve simply attending a meeting to obtain information about public business), and the catchall "otherwise transacting the public business within the jurisdiction, *real or apparent*, of the public body." *G.S. 143-318.10(d) (emphasis added).* It seems likely that the members who attended the meeting at the Hideaway did so because of their concern for and representation of the general interests of the county. (Indeed, as it turned out, the mining company later applied for permits to operate in the county.) Under the North Carolina standard, it would not be difficult to conclude that such attendance might fall within the broad concept of transacting public business.

The purpose of an event, the motivation for attendance, and the members' behavior at the event are all factors that can be relevant to the question of whether an official meeting occurs at an external event. Consider, for example, a situation where a majority of a public body attends an event in a private home. Such a situation was at issue in *Colombo v. Buford,* 935 S.W.2d 690, (Mo. Ct. App. 1996). In that case school board members were invited to the home of a school district patron, and a majority attended. The applicable open meetings law excluded informal gatherings for social purposes. The court noted that "a 'social' gathering by nature is one where persons gather in pleasant companionship with friends and associates…" and "[t]he plain and ordinary meaning of 'informal' as derived from the dictionary is "not formal; conducted or carried out without formal, regularly prescribed or ceremonious procedure; unofficial." And finally, "[t]he definition of 'unofficial' is 'not belonging to, emanating from, or sanctioned or acknowledged by a governing body' (citations omitted)." *Id. at 696.* The court concluded that the event was an informal gathering for social purposes based on the following facts:

> The school district patron invited the respondents and some of their friends to a gathering at his home 'to get together in a casual, social setting, to get away from those other kinds of things and just enjoy each other for a change.' Respondents were present with other people from the community. The gathering was totally unstructured. There was no agenda, no one gaveled the occasion to order, people did not take turns talking to the entire group of guests, and none of the other trappings of an official meeting were present. There were discussions regarding 'general educational philosophy,' but no vote was taken or any policy established. There was testimony that the board members frequently have contact with persons who express their opinion about school policies to them, so that this evening was not unusual.

Id. One might assume that gatherings at private homes would be presumed to be social events. Nothing in the law supports such an assumption. North Carolina's law exempts social gatherings so long as no public business is transacted.

So what are we to glean from these decisions? Since we have no North Carolina cases involving this issue, I think the best we can do is identify the factors to consider in determining when the presence of a majority of a public body at external events triggers the OML. Based on the specific wording of our statute, I think the following factors should be considered:

What is the purpose and nature of the event? If it is a social event or activity that does not involve matters within the scope or jurisdiction of the public body, then attendance will not constitute an official meeting so long as a the members attending refrain from gathering as a group to discuss public business.

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Was attendance planned or prearranged by the public body? If there was no coordination and members indepdendently made the decision to attend, their simultaneous presence does not, by itself constitute an official meeting under the OML.

Did did the members transact business at the event? Even if the event is a social one, and even if the members independently made the decision to attend, they can still run afoul of the law if a majority of them gathers together at the event and transacts public business. Note that in some instances, even the silent observation of a meeting or presentation conducted by others may constitute the transaction of public business.

Conclusion: Heed this advice

1. There is **no need to provide notice** of the fact that a majority of a public body will or may attend an event that is purely social and does not involve the transaction of public business. *Members of the public body should be reminded that if a group comprising a majority engage in conversation or deliberation about public business at such an event they will be violating the OML.*

2. There is **no need to provide** notice of the fact that a majority of a public body will or may be present at an event – even one that is not purely social – if the attendance of the members is not preplanned by the public body, and a majority of members does not interact or engage in the transaction of public business at the event.

3. If the public body (or a majority of the public body) plans as a group to attend an event that relates to public business, even if the purpose is only to observe, **notice should be provided**. Although we don't know whether our courts would adopt the reasoning in the *Badke* or *Costilla County* cases described above, a reasonable interpretation of the words in the statute suggests that where a majority of a public body intentionally gathers together for a meeting involving public business, notice should be provided.

Links

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