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## Coates' Canons Blog: Polling the Board

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Consider three scenarios involving polling an elected governing board:

1. The city manager has determined that it is time for new leadership in the HR department. She contacts each of the council members to find out if they approve firing the HR director.
2. The chair of the county commissioners has negotiated a good price on a new contract for EMS services. She contacts each board member to see if they approve the contract.
3. A city council member plans to propose a revision to the zoning ordinance and contacts each of the council members to explain the proposal and get a sense of whether they approve it, or what changes they'd like to see before it is introduced.

Do these actions violate the open meetings law? Is it illegal to poll the board?

Polling raises two potential legal issues. First, polling could violate the open meetings law. If the polling process engages a majority of the public body to gather together simultaneously (in person or electronically), there may be a violation. Second, if polling is used to make a decision or take an action that must be done by the board, that action or decision may prove to be void unless the action is also approved by the board in a properly convened meeting. So you need to know what the polling is for, as well as how it is being done in order to know if it's legal.

Here are four questions that can help you steer clear of unlawful polling:

- 1) What is the purpose of the poll?
- 2) How will the information obtained in the poll be used?
- 3) If the information will be used to make a decision or take action, who has the authority to make that decision or take that action?
- 4) Does the polling process involve a simultaneous (or nearly simultaneous) gathering of a majority of the board?

Let's apply this framework to our three scenarios.

In the first scenario, the manager is polling the board members to see if they support her plan to replace the HR director. The manager will use the information to decide what action, if any, she will take regarding the HR director. In a North Carolina council-manager form of government, authority to fire employees is statutorily delegated to the manager. This means that the "votes" or opinions of the board are purely advisory. There is no problem with the polling, as long as the process does not violate the open meetings law – that is – as long as a majority of the board has not gathered together (in person or electronically) simultaneously to discuss or deliberate in responding to the poll.

In the second scenario the purpose of the poll is to gain approval of a contract. The chair will use the information to determine whether she will execute a contract. Unlike the manager in first scenario, however, the chair does not have statutory authority to approve the contract on behalf of the county. While it's common for chairs and mayors to execute contracts, that action is purely ministerial and is not the same as having the authority to approve them. It's the governing board that generally has the authority to approve contracts. (For more on what things require board action, see my blog [post here](#))



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.) Unless the board has actually delegated to the chair (or to someone else) the authority to approve contracts, the board must approve this contract. And the only way the board can do that is in a properly called meeting, a quorum being present. See *Kistler v. Bd. of Educ. Randolph Cnty.*, 233 N.C. 400, 64 S.E. 2d 403 (1951); *O'Neal v. Wake Cnty.*, 196 N.C. 184, 145 S.E. 28 (1928). In this scenario, the significant legal issue is that the contract will be void if the commissioners have not delegated to the authority to approve it. The poll, like the one in the first scenario, does not violate the open meetings law unless the board members have gathered together simultaneously when they responded to the poll.

In the third scenario, the council member is polling her colleagues on the board in order to develop her proposed legislation and to gauge support for it. As in the first scenario, the information will be used by a person who has authority to act (action in this case being developing and introducing a proposed ordinance). So the information gained from the polling is advisory to the council member and does not, at this stage, involve action that must be taken by the board as a body. And as in the other two scenarios, the poll does not violate the open meetings law unless a majority of members gather together simultaneously in the process of providing their input.

#### The Spirit of the Law?

Some might argue that polling the board violates the spirit of the open meetings law. That argument might be strongest when individuals or small groups provide input into the process of developing policy or informing specific decisions. Isn't that "deliberation" and transaction of public business away from the public eye? It may well be, but our law requires at least a majority of the board to be gathered together simultaneously in order to trigger the right of public access to the process.

#### Gathering Together by Email?

What if the manager, the chair, or the council member in these scenarios polled the board by emailing them all at the same time? Does this actually constitute a meeting? Very likely not. Although North Carolina courts have not addressed this issue, cases from other states have required more than the passive receipt of an email to find that a meeting has occurred. See *Lambert v. McPherson*, 98 So. 3d 30, 34 (Ala. App. 2012) (citing *Wood v. Battle Ground School District*, 27 P.3d 1208, 1217 (Wash. App. 2001)), *Hill v. Fairfax County School Board*, 727 S.E.2d 75, 78-9 (2012). And if the council members, one-by-one, respond to the polling email, this does not involve enough engagement to constitute an official meeting under the open meetings law.

#### Avoiding the Slippery Slope

One final cautionary note: A very common use of polling is for scheduling and other transactional matters. The clerk may send an email to find out if there will be a quorum at a special meeting, or to determine when to schedule a meeting. Even if there is some near real time back and forth about the scheduling among a majority of the board, it's unlikely that a court would find this to be a violation of the law. It might be tempting, however, to use the scheduling email to also get consensus on other matters, such as what should be on the agenda, or whether everyone approves of a final draft of a proposed policy to be discussed at the meeting. It's difficult to define or describe the point at which a scheduling or transactional email poll becomes a policy discussion. Board members and staff should be careful to avoid using email to do the substantive work of the board, especially if the process engages a majority of the board in the discussion.

## Links

- [canons.sog.unc.edu/?p=5260](https://canons.sog.unc.edu/?p=5260)