Opinion No. 90-29

December 20, 1990

OPINION OF: HAL STRATTON, Attorney General

BY: Jonathan L. Barela, Assistant Attorney General

TO: The Honorable Don Silva, State Representative, 8328 Cherry Hills Drive, N.E., Albuquerque, New Mexico 87111

QUESTIONS

What constitutes "reasonable notice" under the provisions of the New Mexico Open Meetings Act?

CONCLUSIONS

See Analysis.

ANALYSIS

When a quorum of any public policy-making body meets and discusses public business, the New Mexico Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4 ("Act") requires the meeting to be open. Additionally, the Act requires that these policy-making entities to provide "reasonable notice to the public" of their meetings. NMSA 1978, § 10-15-1(C) (Supp. 1989). "Reasonable notice" is not defined in the statute and the New Mexico courts have not determined what that term means. With no clear guidelines, varying interpretations of "reasonable notice" have been used, some of which in our view violate the spirit and letter of the law.

Some believe that violating the notice provision of the Act results in a harmless, inconsequential, or technical error. However, most courts have ruled that providing adequate and timely notice of upcoming meetings is an integral part of the open meetings laws and is of paramount importance in ensuring that the public is extended the opportunity to attend those meetings. It was held that compliance with prescribed notice requirements is a prerequisite to any valid action by a government entity, and failure to give proper notice constitutes a jurisdictional defect rendering action of that entity null and void. Hanover Hall v. Planning Bd. of Stamford, 2 Conn. App. 49, 475 A.2d 1114 (1984). See also Anderson v. Judd, 158 Colo. 46, 404 P.2d 553 (1965) (sufficient or proper notice cannot be considered unsubstantial or innocuous).

Thus, we consider violation of the Act's notice provisions to be substantial because of the law's stated policy that

in recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.

NMSA 1978, § 10-15-1(A). Without sufficient notice, the Act's policy goals and intent cannot be achieved.

Moreover, reasonable notice contains two fundamental elements, one which relates to the notice's substance, the other to procedure. With respect to the substantive aspect of "reasonable notice," it is well settled that such notice must adequately and accurately inform the public of the proposed meeting's time, place and date. Cooper v. Western Ariz. College Dist. and Governing Bd., 125 Ariz. 463, 610 P.2d 465 (App. 1980). See also Ahnert v. Sunnyside Unified School Dist. No. 12, 126 Ariz. 473, 616 P.2d 933 (App. 1980) (school board's announcement that a meeting would be reconvened "if necessary" did not give sufficient public notice as to the time and place of reconvening so as to comply with the Open Meetings Act); Haworth Bd. of Educ. of Indep. School Dist. No. I-6 v. Havens, 637 P.2d 902 (Okla. App. 1981) (notice of school board meeting which was deceptively vague and ambiguous was likely to mislead the average reader and was in violation of the Open Meetings Act); Board of Trustees of Houston Indep. School Dist. v. Cox Enter. Inc., 679 So.2d 86 error granted, aff'd in part, rev'd in part 706 S.W.2d 956 (Tex. Ct. App. 1984) (if an open meeting is convened in a place other than the place named in the notice or in a separate place where a quorum is present, a violation of the Open Meetings Act occurs).

Procedurally, it is acceptable to post notice in a prominent location like city hall or in the county courthouse. Such a posting must be done in a way that the public has access to the notice. For example, construing the statutory requirement that public bodies give "full and timely notice to the public" in advance of open meetings, the Colorado Court of Appeals ruled that "at the very minimum full and timely notice to the public requires that notice of the meeting be **posted** within a reasonable time prior to the meeting in an area which is open to public view." **Hyde v. Banking Bd.**, 552 P.2d 32, 33 (Colo. App. 1976) (emphasis added). Likewise, interpreting the Arizona Open Meetings law, the state appellate court said that the statute required "posting at a designated place of the continuation of a recessed meeting for such a period of time in advance of the meeting as the trier of fact determines is reasonable and practicable under the circumstances." Cooper v. Western Arizona College, 610 P.2d at 470. See also Colonial Arms Apartments v. The Village of Mount Kisco, 471 N.Y.S.2d 982, 122 Misc.2d 1662, rev'd on other grounds, 480 N.Y.S.2d 895, 104 A.D.2d 964, appeal, (19__) dismissed, 477 N.E.2d 1093, 64 N.Y.S.2d 948, (public notice of meeting timely published as well as posted in several public places was sufficient).

However, where notice has been posted in a prominent location but the public is denied access, such notice is defective and therefore not reasonable. For instance, although notices of a special city council meeting to be held on a Monday at 7:00 a.m. were posted in places required by the statute on the preceding Saturday, they were not

"effective public notices because of the public's lack of access to them and thus fail to satisfy the open meetings law's notice requirements." Carefree Improvement Ass'n v. Scottsdale, 133 Ariz. 106, 649 P.2d 985 (App. 1982).

Furthermore, notice must be posted in a timely manner prior to the anticipated meeting. Unlike many jurisdictions which prescribe by statute minimum advance notice requirements, New Mexico statutes and case law are silent on the issue. Nevertheless, one must take into consideration all relevant factors including the nature of the items to be discussed, the public's rights which may be affected by the meeting, and whether the public gathering is to be a hearing which will necessarily require some preparation by the participants or will simply be a meeting that will not require public input. The foregoing principles were enunciated in Tunley v. Municipality of Anchorage School District, 631 P.2d 67 (Alaska 1980). In that case, parents protested certain school closures after receiving five days notice regarding such proposed action. The action was to take place at a regularly scheduled board meeting. However, the Alaska Supreme Court ruled:

Five days is not sufficient time for appropriate preparation of opposition concerning an issue of this complexity and importance. Further, such short notice lessens the likelihood of a fair hearing before the school board and of the school board reaching a reasoned decision. For these reasons we conclude that the five-day notice given did not satisfy the purposes of the charter.

631 P.2d at 81. The charter referred to by the Alaska Supreme Court mandated that the public be given "maximum reasonable public notice" of all meetings affording the public a "reasonable opportunity to be heard." Anchorage Alaska Mun. Charter § 17.05.

With respect to special meetings, a Florida case addressed whether a two-day notice of a special meeting was sufficient. In Yarbrough v. Young, 462 So.2d 515 (Fla. Dist. Ct. App. 1985), the Florida Appellate Court ruled that it was acceptable to post notice of a meeting two days prior to a special meeting. In that case, the Perry City Council, in addition to posting notice, contacted a local radio station to announce the meeting and the Mayor announced the council's intention to hold a special meeting at a regular council meeting held three days before the proposed special meeting. However, it was held that notice posted less than three and one-half hours prior to a special school board meeting was insufficient where the school board considered and voted on a controversial appointment. White v. Battaglia, 434 N.Y.S.2d 537, 79 A.D.2d 880 (App. Div. 1980).

Additionally, in many states, statutes prescribe the adequate notice standard that applies to public bodies. For instance, in New Jersey, state law requires that notice be posted at least 48 hours prior to any regular, special, or rescheduled meeting. N.J. Stat. Ann. § 10:4-8 (West 1976 & Supp. 1990). California requires its government entities to post notice an agenda 72 hours prior to any regularly scheduled meeting and notice shall be posted in an area freely accessible to the public at least 24 hours prior to a special meeting. Cal. Gov't Code §§ 54954.2, 54956 (West 1983 & Supp. 1990). Finally,

Texas mandates that, depending on the public entity, notice shall be published 72 hours to 7 days prior to any meeting except those involving emergencies, in which case two hours notice is sufficient. Tex. Rev. Civ. Stat. Ann. arts. 62, 52-17 (Vernon 1991).

In light of the foregoing common law and statutes, we recommend that public policy-making bodies in New Mexico post notice at least 10 days prior to regular meetings, three days prior to special meetings and as practicable for emergency meetings. We caution, however, that emergency meetings called with little or no notice must involve issues which, if not addressed immediately by a policy-making body, will threaten the health, safety or property of its citizens. The Washington Supreme Court succinctly stated the general rule when it held that a school district unlawfully called an emergency meeting to address a teacher's strike. The court declared:

In order to dispense with the notice required by [statute], therefore, an emergency must exist which involves or threatens physical damage. The circumstances must be unexpected and must call so urgently for action that even the 1-day delay the notice entails would substantially increase a likelihood of such injuries. The situation facing the Mead School District Board when it called to meet on April 29, 1974 was not this kind of emergency.

Mead School Dist. No. 354 v. Mead Educ. Ass'n, 85 Wash. 2d 140, 142, 530 P.2d 302, 305 (1975). The court implied that emergencies only involve disasters such as fires, floods or earthquakes.

Courts in other jurisdictions have likewise taken a narrow view of what constitutes emergency meetings. See Oregon Ass'n of Classified Employees v. Salem-Keizer School Dist., 95 Or. 28, 767 P.2d 1365 (1988) (meeting to approve collective bargaining agreement was not an emergency; "actual emergency" within the meaning of Public Meetings Law must be dictated by event and cannot be predicated solely on convenience or inconvenience); Carefree v. Scottsdale, supra (circumstances surrounding the city council's decision to hold a special meeting to consider an annexation ordinance would not be fairly characterized as an "actual emergency" within the meeting of the Open Meetings Law); Diehl v. City of Helena, 593 P.2d 458 (1979) (unless an urgency exists it is the duty of the city commission to follow the statutory procedure of first providing a public hearing with notice to the parties in interest and its citizens); Town of Lebanon v. Wayland, 467 A.2d 1267, 39 Conn. Supp. 56 (1980) (meeting hastily noticed to discuss an increase in selectmen salary and consideration of liability insurance was not an emergency; a broad interpretation of what constitutes an "emergency" special meeting with its lack of even the minimal 24 hours notice requirement would circumvent the purpose of the Connecticut Freedom of Information Act and right of the public to free and open government).

Finally, it must be noted that this analysis focuses solely on the reasonable notice as it applies to the general public. If a government entity is to consider action that directly affects the property rights of an individual, another statute or common-law principle may apply. For example, the Uniform Licensing Act, NMSA 1978, § 61-1-1 to -33, (ULA)

requires actual notice be given to an individual who may lose a license, pursuant to the hearing requirements contained in the law. In that case, a public policy-making body which convenes a hearing on a licensing matter and which is subject to the provisions of the ULA, must follow the ULA's specific notice tenets. In these cases, mere posting of such notice is insufficient as it affects the individual licensee. See NMSA 1978, § 61-1-5. There are other statutes that prescribe more specific notice procedures than the Open Meetings Act. Thus, government bodies are urged to be sensitive to the unique issues affecting individual property rights which may arise during the hearing process, or similar kind of meeting.

We conclude, therefore, that the reasonable notice standard contained in the New Mexico Open Meetings Act involves an analysis of its substance and procedure. While no hard and fast rule can be applied to what constitutes "reasonable notice" under the New Mexico law, we believe that the foregoing suggestions and analysis are an accurate description of what the New Mexico courts would implement in interpreting that phrase.

ATTORNEY GENERAL

HAL STRATTON Attorney General