

Opinion No. 91-12

November 5, 1991

OPINION OF: TOM UDALL, Attorney General

BY: Elizabeth A. Glenn, Assistant Attorney General

TO: Honorable H. John Underwood, State Representative, Adobe Plaza, Suite 8, 200 Mechem, Ruidoso, New Mexico 88345

QUESTIONS

May county commissioners telephonically authorize county purchases without violating the Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4 (Repl. Pamp. 1990)?

CONCLUSIONS

A county commission may not, consistently with the Open Meetings Act, approve purchases by telephone.

FACTS

The Lincoln County Board of County Commissioners adopted a resolution providing that:

All purchases determined to be an unauthorized purchase shall be considered by the County Commission, which may at its discretion approve an unauthorized purchase for payment only after at least two Commissioners have been notified by the Finance Office. The Finance Office must document the approval with the name, date and time of the approval. Resolution No. 79-41 (Feb. 12, 1991). The commission understood this resolution to permit telephonic approval of purchases.

ANALYSIS

The Open Meetings Act provides that:

All meetings of a quorum of members of any board, commission or other policy-making body of any ... agency or authority of any county .. held for the purpose of formulating public policy, ... discussing public business or for the purpose of taking any action within the authority ... of any board, commission or other policy making body are declared to be public meetings open to the public at all times....

NMSA 1978, § 10-15-1(B)(Repl. Pamp. 1990). The statute also specifically prohibits the formation of public policy or the conduct of business by vote in a closed meeting. Id. § 10-15-1(A). Unless taken at a meeting held according to the requirements of the Open

Meetings Act, an action of a board, commission, committee or other policy-making body is invalid. *Id.* § 10-15-3(A).

In addition, the statutes regulating county governments provide that "[t]he powers of a county as a body politic and corporate shall be exercised by a board of county commissioners." NMSA 1978, § 4-38-1 (Repl. Pamp. 1984). The New Mexico Supreme Court has held that this provision and the Open Meetings Act require a county commission to act as a body at a duly constituted meeting. *Trujillo v. Gonzales*, 106 N.M. 620, 747 P.2d 915 (1987) (oral promise of employment by two of three county commissioners was without statutory authority and did not bind the county). According to the court, "[a]ction of all the members of the council separately is not the action of the council, and an agreement entered into separately by the members of the council outside a regular meeting is not binding." *Id.* at 622, 747 P.2d at 917 (quoting 56 Am. Jur. 2d Municipal Corporations, Counties, and Other Political Subdivisions § 155 (1971)).

When it approves an unauthorized purchase, a county commission is conducting public business and taking official action. See NMSA 1978, §§ 4-38-16 (Repl. Pamp. 1984) (empowering a county board to examine and settle the county's accounts and to allow accounts chargeable against the county). To be valid, this action must be taken by the commissioners acting as a body at a meeting open to the public and according to the requirements of the Open Meetings Act.¹ Thus, the commissioners may not act separately to approve unauthorized purchases by telephone. See AG Op. 59-105 (1959) (final decisions made by telephone are not made at a meeting open to the public as required by predecessor to Open Meetings Act).

ATTORNEY GENERAL

TOM UDALL Attorney General

GENERAL FOOTNOTES

[n1](#) The Open Meetings Act permits a public body to discuss in a closed session purchases in an amount exceeding \$2,500 that can be made only from one source. NMSA 1978, § 10-15-1(E)(4) (Repl. Pamp. 1990). Actual approval of the purchase must be made in an open meeting. ***Id.***