- ✦ Meeting
  - ✧ Generally: walking quorum exception to quorum requirement
  - ✧ Determined not to be a meeting: quorum not present or convened

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May 4, 2012

Re: Calvert County Board of Appeals (Ronald J. Ross, M.D., Complainant)

We have considered the complaint of Ronald J. Ross, M.D. ("Complainant") that the Calvert County Board of Appeals ("County Board") may have met in an unannounced closed session and thereby violated the Open Meetings Act ("the Act").

As we have had a number of complaints in recent months involving a public body's adoption of an apparently fully-hatched motion without public deliberation, we will discuss the practice, and the risks it may pose to a public body, in some depth.

Facts and allegations

The facts as presented to us are as follows. On January 5, 2012, the County Board met to consider a land use matter remanded to it by the circuit court. The County Board heard argument on the record from the earlier case and briefs submitted by the applicant and Dr. Ross, the protestant. One member moved to "consider everything we have heard today, and re-review [the] briefs, and take [the matter] under advisement, and make the decision at our next meeting . . .." The members then adopted a motion "to defer action so that we may have . . . an initial opportunity to review the presentation today and the briefs until our February meeting."

The County Board's chair opened the February meeting by identifying the matter in question. He then stated, "And at this time I believe that . . . Mr. Ward . . . has a motion for us to consider." As transcribed, Mr. Ward's

motion was over two pages long. It contained numerous citations to earlier events in the case, each with a precise date, and other details suggesting that it had been carefully prepared in advance. The motion was immediately seconded and adopted without discussion, and the chair thanked the County Board's substitute counsel "for his help with this." The record provided to us reveals no public deliberations by the County Board.

The Complainant, inferring that the County Board might have conducted its deliberations in a closed session, filed a complaint with us and asked us to "investigate" whether such a session occurred. We do not have investigatory powers. We sent the complaint to the County Board in accordance with State Government Article ("SG") § 10-502.5.

The County Board's substitute counsel responded on the County Board's behalf. He states:

> Between January 5 and the impending February 2, 2012 hearing, I advised and encouraged each Board member to independently review the entire record without caucusing in any manner. As counsel, I remained available to address procedural issues and confirm remand questions (which I did) defined by [the circuit court]. At no time during this interim period did the Board members meet collectively or in any manner to substantively discuss their final decision.
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> Subsequently, the Board convened (as promised) on February 2, 2012, at which time a final decision was rendered in a public forum. Normal Board protocol was followed with a Motion made by one Board member which incorporated various findings and conclusions. This Motion was thereafter seconded ... ; no discussion was deemed necessary; and the aforementioned motion was approved by a unanimous vote. A written order was filed . . .. This same procedure has been followed during each of the board's monthly hearings . . . since the Board of Appeals' inception.

Substitute counsel states that the County Board had followed the same procedure in 2011, in an earlier proceeding involving the same matter, without objection, and that "all parties were present on February 2, 2012 . . ., yet no objections were noted by any such parties to any Board improprieties."

Finally, substitute counsel reports that an associate counsel in the Calvert County Attorney's Office contacted him and inquired how the County Board reached its decision. He further reports that a Board member was told, "on

behalf of the Calvert County Commissioners" that the Commissioners "were forwarding a letter . . . inquiring as to the Board's protocol in rendering its February 2, 2012 decision." Finding these communications "highly inappropriate and alarming," and alleging "an effort to intimidate Board members," substitute counsel asks us, "in conjunction with the Maryland State Ethics Commission, [to] initiate an investigation regarding these improper communications . . .." We do not have investigatory powers, and our complaint process is not a conduit for reports intended for other recipients.[1] We proceed to the crux of the matter, namely whether the County Board violated the Act by adopting Mr. Ward's motion without public deliberation.

Discussion

The Act generally requires a public body "to meet in open session." SG § 10-505. "Meet," under the Act, "means to convene a quorum of a public body for the consideration or transaction of public business." SG § 10-502(g).[2] Accordingly, when we consider a complaint, one of our threshold inquiries is whether the gathering in question was attended by a quorum of the public body's members. In 2011, for example, we considered allegations that the Carroll County Commissioners had "met" before arriving at a public meeting with what appeared to be a fully-formed consensus. As explained by their counsel, they had arrived at that consensus not through simultaneous deliberations, but instead through sequential and one-on-one communications variously conducted in person, by e-mail, and by telephone. 7 *OMCB Opinions* 193 (2011). We emphasized, as we had in a 1999 opinion involving

[1] With regard to counsel's surprise that he and a County Board member were asked about how the County Board had reached its decision, our counsel, when fielding questions from members the public about various public bodies' closed meetings, routinely suggests that they contact the members of, or counsel for, the public body to learn what occurred so that they can then evaluate whether to file a complaint. This approach often obviates unnecessary complaints, and we hope public bodies will view their constituents' inquiries in that light.

[2] The Act does not apply when a quorum of a public body meets to perform certain functions, such as a quasi-judicial function. SG § 10-503(a). Here, the County Board was performing a function subject to the Act. *See* SG § 10-503(b) (Act expressly applies to consideration of licensing, permitting, and certain land-use matters).

sequential telephone calls,[3] that "this way of proceeding deprives the public of an opportunity to observe the real decision-making process, for a subsequent open meeting to 'ratify' the decision ... is a mere formality." *Id.* at 194. Nonetheless, we found that the Commissioners had not convened as a quorum and thus had not violated the Act by communicating separately.

We are reluctant, however, to give the impression that the quorum requirement provides public bodies with an absolute defense to an alleged Open Meetings Act violation. In fact, a public body risks violating the Act by manipulating a quorum so as to avoid the Act's mandates. The Court of Appeals addressed such a violation in *Community and Labor United for Baltimore Charter Committee ("C.L.U.B.") v. Baltimore City Board of Elections*, 377 Md. 183 (2003). There, the City Council President closed a meeting without a vote after she ascertained that a quorum of the councilmembers was not present. *Id.* at 190-91. The Court held that the Council had violated the Act, and, further, that it had done so willfully. *Id.* at 196-97. The *C.L.U.B.* Court thus concluded that a public body, acting wilfully to evade the Act, may be subject to the Act even in the absence of an actual quorum. [4]

Courts elsewhere have given the term "walking forum" to a public body's use of the quorum requirement to avoid deliberating in public. *See, e.g., Asgeirsson v. Abbott*, 773 F. Supp. 2d 684, 706-707(W.D. Tex. 2011) (walking quorums "occur when members of a governmental body gather in numbers that do not physically constitute a quorum at any one time but who, through successive gatherings, secretly discuss a public matter with a quorum of that body") (citations and some internal punctuation omitted); *Mabry v. Union Parish Sch. Bd.*, 974 So. 2d 787, 789 (La.App. 2 Cir. 2008) (a "walking quorum" is "a meeting of a public body where different members leave the

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[3] 2 *OMCB Opinions* 49, 50 (1999).

[4] *C.L.U.B.* implicitly qualifies the Court's earlier dicta in *City of College Park v. Cotter*, 309 Md. 573 (1987). There, the Court of Appeals applied a municipal open meeting ordinance which was stricter than the Act in that it did not permit the council to close a session to confer with its attorney. Id. at 592-94. Applying the similarly-worded definition of the term "meeting" in that ordinance, the Court stated in a footnote that "nothing prevents the City Attorney from meeting in closed session with less than a quorum of the Council members." *Id.* at 595 n. 32. Such a meeting, if designed to circumvent the Act, would likely be subject to challenge under *C.L.U.B.*

meeting and different members enter the meeting so that while an actual quorum is never physically present an actual quorum during the course of the meeting participates in the discussion"); *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 471-478 (W.D. Tex. 2001) (reviewing cases on public bodies' use of a quorum requirement to avoid public deliberations).

Courts also have not confined the "walking quorum" concept to the cycling of members in and out of a particular meeting in a particular room. *See State ex. rel. Cincinnati Post v. City of Cincinnati,* 76 Ohio St. 3d 540, 668 N.E.2d 903 (Ohio 1996) (in addressing meetings held on three different days, stating, "The Ohio Sunshine Law cannot be circumvented by scheduling back-to-back meetings which, taken together, are attended by a majority of a public body."). In these cases, as in *C.L.U.B.,* the key question was whether the public body intended to evade the applicable open meetings statute.

This Board is not in a position to infer that a public body has acted with the intent to evade the Act. As we have noted above, we lack investigative powers; we also were not set up as a fact-finding body. *See* 1 *OMCB Opinions* 56, 58 (1994) (stating the Board's inability to resolve disputes of fact). Therefore, in addressing complaints alleging that a public body has deliberated on a matter in secret, we have not speculated on the matter of intent, and we have consistently applied the Act only to gatherings at which a quorum of the members was present at one time. *See, e.g.*, 6 *OMCB Opinions* 32 (2008) (stating that it would be "most unlikely" that e-mail correspondence on public business would constitute a "meeting" under the Act); 4 *OMCB Opinions* 51, 54 (2004) (stating that Act did not prohibit members from "conducting business ... by means of one-to-one serial conversations outside the course of a meeting"). Here, likewise, we draw no factual inferences, and we conclude that the separate conferences held by the County Board's substitute attorney with the individual County Board members did not constitute a "meeting" subject to the Act.

Nonetheless, when the members of a public body reach a decision on a matter through a means other than a public discussion and then announce that decision at a public meeting, they give every appearance of having deliberated in secret - the very ill that the Act was enacted to prevent. *See New Carrollton v. Rogers*, 287 Md. 56, 72 (1980) (stating the purpose of the Act) [5]; 8 *OMCB*

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[5] In explaining the goals of Maryland's open meetings law, the Court stated:

> It is . . . the deliberative and decision-making process in its

(continued...)

Opinions 38, 40 (2012) (stating the predictability of the public's suspicion that a fully-formed consensus was reached in secret).[6] We emphasize here that the quorum requirement will not invariably insulate the public body from that suspicion. Nor, when a complainant has sought a judicial remedy, will the quorum requirement necessarily insulate the public body from the risk that a fact-finder will infer that the public body willfully sought to exclude the public from its decision-making process. The fact that we cannot investigate and find facts pertaining to a public body's alleged use of a walking quorum should thus not be construed as a safe harbor for that practice. And, with respect to the County Board's statement that Complainant did not raise an Open Meeting Act question at an earlier meeting, we note generally that neither a person's

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[5](...continued)
entirety which must be conducted in meetings open to the public since every step of the process, including the final decision itself, constitutes the consideration or transaction of public business. In this regard, the Supreme Court of Florida, in *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (1974), construing that state's open meeting law, observed: "One purpose of the government in the sunshine law was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a nonpublic premeeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices . . .."

New Carrollton v. Rogers, 287 Md. 56, 72 (1980). *See also City of Balt. Dev. Corp. v. Carmel Realty Assocs*., 395 Md. 299, 331 (2006) (the Court "construe[s] the [Act] so as to frustrate all evasive devices relating to any public matter upon which foreseeable public action will be taken");

[6]There, the Calvert County Board of License Commissioners held two closed sessions and then adopted a detailed motion in a public session. We stated:

> We caution – as we have before – that when a public body ... decides [a] matter, without discussion, on the basis of a lengthy motion, the public body should not be startled when a member of the public infers that every aspect of the matter was discussed and decided in secret.

8 *OMCB Opinions* 38, 40 (2012).

right to submit a complaint to us under SG § 10-502.5 nor the availability of a judicial remedy under SG § 10-510(b) is conditioned on the person's assertion of an objection at the meeting at which the public body acts on a consensus reached behind closed doors.

By enacting SG § 10-503(b)(1), the General Assembly emphasized that the provisions of the Open Meetings Act apply "when a public body is meeting to consider . . . a special exception, variance, . . . or any other zoning matter." While the facts as presented to us do not disclose either the convening of an actual quorum or any intention by the County Board to deliberate on this particular matter in secret, we urge the County Board to revisit its procedure of pre-preparing a statement of findings and conclusions for adoption without public discussion.

Conclusion

For the reasons stated above, we conclude that the Act did not apply to the County Board members' separate communications with the County Board's substitute counsel. We encourage public bodies to avoid giving the impression that they have decided the business of the public behind closed doors and to be alert to the "walking quorum" exception to the quorum requirement.

Open Meetings Compliance Board

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