

## ***8 Official Opinions of the Compliance Board 76 (2012)***

- ◆ Notice Requirements
    - ◇ Applicability
      - ◆ Notice required for parent body and committee when quorum of parent attends committee meeting
    - ◇ Content
      - ◆ Announcement of tentative date insufficient when public is given no means of confirming it
      - ◆ Failure to provide public notice of method of publication
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        - One-day notice not permissible when public body knows earlier of the need to meet
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June 13, 2012

**Re: Charles County Planning Commission  
(Debra Zimmerman Murphey)**

We have considered the complaint of Debra Zimmerman Murphey (“Complainant”) that the Charles County Planning Commission (“Commission”) violated the Open Meetings Act (“the Act”) when a quorum of its members met in a committee meeting without giving sufficient public notice of a meeting of either the committee or the Commission itself. The Deputy County Attorney, responding on behalf of

the Commission and the committee, states that both entities substantially complied with the Act.

### **Facts**

The Commission is a seven-member public body, and its by-laws provide that a quorum is created by the presence of four members. The Commission provides the public with notice of its regular meetings on its “Planning Commission Public Notices” page on the County’s website and by other methods. The committee in question was created and appointed by the Commission Chair to discuss issues arising from a developer’s proposal that the permissible density in a certain area be increased in exchange for “environmental restoration.” The Chair appointed three Commission members, not including himself, and two others to the committee. He announced his appointment of the committee during the Commission’s October 4, 2010 meeting.

The dates of the committee’s three meetings were not posted on the County’s website. The date of the committee’s first meeting, November 3, 2010, was announced during the Commission’s regular meeting on November 1, 2010 meeting, which was attended only by the commissioners, planning staff, and witnesses in apparently unrelated zoning matters. The location was not mentioned.

It is unclear when the committee decided on the date of the second meeting. At the November 3 meeting, the committee members discussed a “tentative meeting date for November 16<sup>th</sup> at 7PM pending confirmation by the board members.” That date, but neither a time nor a place, was announced during the Commission’s regular meeting on November 15. No other form of notice was provided.

It is also unclear when the committee decided on the date of the third meeting. At the November 16 meeting, which was attended by a reporter, a “tentative meeting date was set for January 4, 2011 at 6:00 p.m. in the Planning Division Conference Room.” The committee’s minutes apparently were not posted. The Commission did not announce the January 4 meeting at its regular meeting in December, 2010. No other form of notice was provided.

The committee’s first two meetings were attended by two of the commissioner members, the other committee members, and various other

people. Three commissioner members attended the January 4 meeting, as did the Commission Chair. The minutes show that the committee discussed the issues it had been appointed to discuss and that the Chair, although not listed as a committee member, offered a motion to “recommend to the full Planning Commission that an [Environmental Recovery Zone] be sponsored by the Planning Commission with its own separate review process.” The motion was “approved” over the opposition of one member, a commissioner.

The land use proposal addressed by the committee came before the Commission several times in 2011. The Commission received the committee’s recommendations in September 2011 and acted on the matter in November 2011.

### **Discussion**

The response “assum[es] for purposes of [the] response” that the committee was a public body subject to the Act.<sup>1</sup> Further, the response does not dispute the fact that the committee’s discussions fell within functions covered by the Act.<sup>2</sup> We may therefore proceed straight to the

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<sup>1</sup> Complainant cites some evidence that the Commission had in fact decided not to treat the committee as a public body subject to the Act, at least for its first two meetings. In light of the County’s willingness to assume that the committee was a public body, we need not analyze whether, for purposes of the definition of “public body” found in State Government Article (“SG”) § 10-502(h)(2)(i), the Chair was an official “subject to the policy direction of the ... chief executive authority of the political subdivision.” Given that the Chair was appointed by the Charles County Commissioners, the County’s assumption here is not unreasonable. Furthermore, although the committee was named the “Environmental Recovery Zone Subcommittee of the Planning Commission,” it was not a true subcommittee eligible for the subcommittee exclusion from the Act because some of the members were not commissioners. *See* State Government Article (“SG”) § 10-502(h)(3)(ix).

<sup>2</sup> The discussions undisputedly involved the committee’s exercise of the advisory function, a function falling within the scope of the Act. SG §§ 10-502 and 10-503 (c). The minutes of the April, 2011 Commission meeting report the “topics and findings” discussed at the January 4, 2011 subcommittee meeting as follows:

#### **A. PORT TOBACCO RIVER ENVIRONMENTAL RECOVERY ZONE**

question of whether the two entities complied with the Act's notice requirements.

*A. Whether the Commission violated the Act when a quorum of its members attended the committee's January 4, 2011 meeting*

When a quorum of a public body convenes and discusses public business within one of the functions covered by the Act, that gathering is deemed a meeting of the public body, even when the quorum was created accidentally or the discussions occurred in a meeting not called by the public body itself. *See, e.g., 3 OMCB Opinions 30, 33-34 (2000)* (concluding that the Act applied to an informal briefing when a quorum was created by the unexpected arrival of an additional member); *see also 6 OMCB Opinions 155, 158 (2009)* (concluding that a public body "met" under the Act when a quorum of its members attended a subcommittee meeting). The January 4, 2011 committee meeting was attended by a quorum of the Commission's members and thus was an unannounced meeting of the Commission itself. We therefore find that the Commission violated the Act by meeting to discuss public business without first giving the public any advance notice of a Commission meeting, let alone the "reasonable advance notice" required by SG § 10-506(a).

The notice provisions of the Act are not merely technical; a meeting held without notice to the public is a secret meeting. Here, the public was entitled to observe every stage of the Commission's deliberations on whether it favored the developer's proposed project and on the mechanism by which that project might be approved. *See New Carrollton v. Rogers*, 287 Md. 56, 72-73 (1980) (explaining that the Act applies to the

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[Planning staff] presented a slide show outlining topics and findings discussed by the Subcommittee for the above private proposal. He reminded the members that this would need a Comprehensive Plan Amendment followed by a Zoning Text Amendment. The Amendment includes a mechanism for significant environmental improvement in exchange for higher density. The second part of the proposal is general criteria that stipulated as policy and [staff] outlined what that criteria was. The third part of the process requires that it be zoned as a mixed use project with some flexibility included. The Subcommittee felt that a significant public outreach would be needed to be done by the applicant for a development proposal. If this goes forward, it is being initiated by the Planning Commission only.

“deliberative and decision-making process in its entirety, since every step of the process . . . constitutes the consideration of public business”). The fact, as related by the County Attorney, that the Commission later gave the public an opportunity for comment before it finally decided the matter in November 2011 does not change the fact that a quorum of its members had already discussed the matter and even held a preliminary vote on it in a meeting that at most was only announced as a meeting of a committee.

*B. Whether the committee complied with the statutory requirement that it provide “reasonable advance notice” of its three meetings*

To constitute “reasonable advance notice,” the notice given by a public body must satisfy SG § 10-506 as to content, timing, and method. Much depends on context. A deficiency in one regard may sometimes be ameliorated by the public body’s extra efforts in another, as when a public body takes extra measures to publish a last-minute notice of an urgently-called meeting. We thus look at each element in the context of the others.

As to content, the Act requires that notice include the “date, time, and place” of a meeting. SG § 10-506(b)(2). We do not think that an oral mention of a “tentative date” meets that requirement when the public is given no means of determining the actual date. Under these circumstances, the notices of the “tentative” November 16 and January 4 dates were defective. Further, the oral announcements of the November 3 and November 16 meetings variously omitted the time and place.

As for timeliness, we have stated that “the touchstone of ‘reasonableness’ is whether a public body gives notice of a future meeting as soon as is practicable after it has fixed the date, time, and place of the meeting.” 5 *OMCB Opinions* 83, 84 (2006). A public body has not provided “reasonable advance notice” if it knew the deadline by which it needed to meet on a certain matter and delayed setting the date. 5 *OMCB Opinions* 139, 143 (2007). Put another way, when “a meeting is scheduled on short notice, as sometimes will be required by unexpected developments, the person responsible for scheduling [it] must provide the best public notice under the circumstances.” 1 *OMCB Opinions* 38, 39 (1993). For example, notice of a meeting one day in advance is insufficient when a public body could have anticipated the need for the meeting earlier. See 5 *OMCB Opinions* at 143. We further note that, since our formulation of these principles in the early 1990s, the ability of many public bodies to post their meetings on a website or deliver notices by e-mail enables them to provide very good public notice on very short notice.

Here, the Chair’s appointment of the committee in early October, 2010, the committee’s discussion on November 3, 2010 that it wished to “reach consensus” on the private developer’s proposal “within 1-2 months,” and the committee’s presentation of its recommendations at a public Commission meeting almost a year later do not suggest such exigent circumstances that the committee could not have provided public notice of the November 3, 2010 meeting earlier than November 1. We also note that the minutes state that “several presentations were made,” including a review of the history of the project proposal by the developer’s representative, information presented by its attorney, comments by representatives of the Port Tobacco River Conservancy, and presentations by three staff members. We also question whether the committee could not have given public notice of the actual November 16, 2010 meeting date earlier than the day before. We do not draw inferences when competing ones are conceivable, and so we draw no conclusion on whether this advisory committee was prevented by “unexpected developments” from providing reasonable advance notice. However, we do note the absence of efforts taken to mitigate the short notice, especially for the first meeting, by using methods such as posting the dates on the Commission’s website, delivering written notice to the media, or posting a notice at the Commission’s office. That brings us to the adequacy of the methods used.

A public body, after giving notice to the public of the method to be used, may use one of the listed methods or “any other reasonable method.” SG § 10-506(c). Further, notices must be “in writing,” “whenever reasonable.” SG § 10-506 (b).<sup>3</sup> Here, the methods varied. A member of

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<sup>3</sup> SG § 10-506, “Notice of meetings,” provides, in full:

- (a) Before meeting in a closed or open session, a public body shall give reasonable advance notice of the session.
- (b) Whenever reasonable, a notice under this section shall:
  - (1) be in writing;
  - (2) include the date, time, and place of the session; and
  - (3) if appropriate, include a statement that a part or all of a meeting may be conducted in closed session.
- (c) A public body may give the notice under this section as follows:
  - (1) if the public body is a unit of the State government, by publication in the Maryland Register;

the public would only have learned about the November 3 meeting if he or she had attended the Commission's November 1 meeting. However, the public had been given no notice that the committee's meetings would be only be announced orally at Commission meetings and thus through a different method than that used by the Commission itself. We find that the method used for the November 3 meeting was neither a method specified in the Act nor "any other reasonable method." SG § 10-506(c)(4). Similarly, a member of the public apparently would only have learned of the November 16 meeting if that member had attended the virtually unannounced November 3 meeting or had attended the Commission's November 15 meeting. Again, we find that the notice was insufficient.

The method used for the January 4 meeting – the announcement of the "tentative date" of the meeting during the November 13 meeting in the presence of one reporter – might present a closer question had the date been announced definitively. SG § 10-506(c)(3) permits notice by "delivery to the news media who regularly report on sessions of the public body or the activities of the government of which the public body is a part . . . ."

In 1993, we found that a public body had sufficiently given notice when it announced its next meeting date at a meeting attended by "two newspapers" and the complainant in that matter, "as well as other citizens of [the town]." 1 *OMCB Opinions* 33 (1993). We stated that the "presence of the press . . . meant that . . . the announcement was in substantial compliance" with SG § 10-506(c)(3). We further remarked that "it might be the better practice in such a situation to follow up its oral announcement

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(2) by delivery to representatives of the news media who regularly report on sessions of the public body or the activities of the government of which the public body is a part;

(3) if the public body previously has given public notice that this method will be used:

(i) by posting or depositing the notice at a convenient public location at or near the place of the session; or

(ii) by posting the notice on an Internet website ordinarily used by the public body to provide information to the public; or

(4) by any other reasonable method.

(d) A public body shall keep a copy of a notice provided under this section for at least 1 year after the date of the session.

with a posting . . . .” *Id.* at 34. We take this occasion to make clear that while that public body’s announcement substantially, albeit barely, sufficed in that time and that place, the Act states the requirement that the notice be written “whenever reasonable” and requires the public body to “keep a copy of the notice for at least 1 year after the date of the session.” SG § 10-506 (b)(1) and (d). An oral “delivery” of a notice to representatives of the news media should thus be the exception, as when the public body must meet on very short notice and telephones the media representatives who usually cover its activities. *See, e.g.* 1 *OMCB Opinions* 184, 185 (1996). Here, we question why it would not have been “reasonable” for the committee to generate the required written notice by posting the January 4 meeting on the Commission’s website or delivering it to the appropriate media by e-mail. In any event, we find that the committee’s oral announcement of a tentative date for an upcoming meeting was insufficient: a public body cannot reasonably expect the media to either publish or rely on “tentative dates.”

### **Conclusion**

We find that both the Commission and the committee violated the Act by failing to provide notice of meetings at which their members discussed public business. As evidenced by the complaint here, a public body’s failure to employ its usual method of giving notice, particularly when that method is seemingly easy and efficient, gives the public the impression that the public body wishes to conduct its discussions out of the public eye. That impression is not dispelled when the notice is oral, incomplete, and given only at the last minute. We urge the Commission to use its usual methods of giving notice, including its Public Notices page on the County website, for posting the notices of its committees and also to post its committee meetings as a meeting of the Commission itself when a quorum of its members might attend.

*Open Meetings Compliance Board*

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