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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

August 19, 2002

The Honorable Harry M. Hallman, Jr.
Mayor, Town of Mount Pleasant
P. O. Box 745
Mount Pleasant, South Carolina 29465

Re: Informal Opinion

Dear Mayor Hallman:

You are seeking an opinion "on the legality of Mount Pleasant non-committee councilmembers attending and participating in committee meetings." Your "concern is that this quorum of councilmembers could, in fact, constitute a council meeting. By way of background, you state that

> Mount Pleasant has adopted a committee system consisting of three to four councilmembers on each committee. Each committee reviews certain issues in advance and reports on the same to full Town Council at our regular monthly meeting. It is my understanding that these committee meetings are not council meetings and as such, are not so advertised and are not subject tot he same rules and statutes.
>
> You present the following questions for our review:
>
> 1. If a quorum of councilmembers attend a committee meeting wherein there is a discussion of Town business by the committee members only (the attending non-committee councilmembers do not participate in the discussion), is this a Council meeting?
>
> 2. If a quorum of councilmembers attend a committee meeting and the non-committee councilmembers fully participate in the discussion of Town business, is this a Council meeting?

You enclose copies of recent memos on this subject from the Mt. Pleasant Town Attorney, Allen Young. Mr. Young reached the following conclusions:

1. Attendance without any participation by non-committee councilmembers at a committee meeting would not by itself appear to constitute a council meeting.

2. Attendance with the same level of participation by non-committee councilmembers at a committee meeting would appear to constitute a council meeting. If so, the meeting would be subject to all of the attending rules, requirements and statutes: notice, agendas, rules of procedure ...

3. With respect to participation, non-committee councilmembers cannot vote. Voting by non-committee councilmembers would clearly constitute a council meeting. Note further that non-committee councilmembers should ideally not express concurrence or dissent on each motion/issue: the same could possible be viewed as voting.

4. With respect to participation, the level of participation (discussion and questions) of non-committee councilmembers should ideally be the same as the public. In other words, committee members should not automatically consult with or offer an opportunity to be heard to the non-committee council members on each issue.

5. With respect to participation, non-committee councilmembers should ideally not be seated with committee members. It would be best if their seating was the same as the public.

Law / Analysis

As I understand it, your questions do not relate to the Freedom of Information Act. See, S.C. Code Ann. Sec. 30-4-10 et seq. As stated in the Memo of Mr. Young, dated November 14, 2000, the State's FOIA deems committees as "public bodies" for purposes of the Act, thereby requiring notice be given of meetings and all requirements of the Act to be met. See, § 30-4-20 ["public body" is defined as "any department of the State, ... any public or governmental body or political subdivision of the State, including counties, municipalities ... including committees, subcommittees, advisory committees and the like ...." As Mr. Young advised, "Mount Pleasant Town Council and all our committees are considered public bodies which are subject to the freedom of information act and requirements thereof." We agree with Mr. Young. This Office has so advised for many years, long before the FOIA was amended expressly to reflect such requirement. See e.g., Op. Atty. Gen, July 28, 1983; Op. Atty. Gen., Op. No. 91-42 (June 28, 1991); Op. Atty. Gen., Op. No. 88-5 (January 14, 1988); Op. Atty. Gen., Op. No. 84-125 (October 26, 1984); Op. Atty. Gen., Op. No. 84-64 (June 1, 1984).

Although your question does not relate to the FOIA as such, I would caution at the outset that, under your factual scenario, the FOIA may well come into play. As this Office has long

recognized, the Freedom of Information Act must be broadly construed to effectuate its remedial purpose of giving the public and the media the opportunity to obtain access to and information concerning the work of public bodies. Therefore, for many years, we have adopted the maxim "when in doubt, disclose." The FOIA, in § 30-4-20(d), defines a "meeting" as simply the "convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power."

To our knowledge, no court in South Carolina has ever addressed the novel question raised here: whether, for purposes of the FOIA, notice of a full council meeting is required if the committee members, in calling a meeting of the committee, are aware that non-committee members may be in attendance and that, by such attendance, a quorum of the full body will be created where council business is discussed. The FOIA, of course, defines a "meeting" as a convening of the public body – in this instance, the committee itself – to "discuss or act upon" matters within that body's subject matter or jurisdiction.

However, the FOIA also expressly states that "[n]o chance meeting ... shall be used in circumvention of the spirit of" the Act in order to "act upon a matter over which the public body has supervision, control, jurisdiction or advisory power." See, § 30-4-70(c). Certainly, the appearance at a committee meeting by non-committee members could be analogized to so-called "chance meetings." There are endless scenarios imaginable with respect to such chance meetings and no opinion can deal with each and every one separately. However, many years ago, in Op. Atty. Gen., Op. No. 83-55 (August 8, 1983), we concluded that so-called "chance meetings" could not be used to circumvent the FOIA. Of course, we cast no aspersions upon or make any reference whatever to the Mt. Pleasant Town Council or any particular factual circumstance. Nevertheless, before addressing your specific questions in any detail, it might be helpful to quote from that earlier opinion with respect to the guidelines which a public body might employ in order to comply with FOIA in circumstances involving so-called "informal" or "chance" meetings:

> [i]t should be emphasized again that the purpose of the gathering must be "to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory powers." The fact that a casual comment regarding public business might be made at a purely social function [or chance meeting] would obviously not trigger the applicability of the Act. By the same token however, § 30-4-70 (5) (c) prohibits use of the social gathering [or chance meeting] as a guise to discuss or conduct public business outside the ambit of the Act. Each case must, of course, be analyzed on its own set of facts; but, as the Court stated in Town of Palm Beach v. Gradison, 296 So.2d, supra at 477, "When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State."

Thus, with respect to the requirement of the FOIA, I would advise that the various committees of the Mt. Pleasant Town Council err on the side of caution to insure that not only the FOIA's letter, but

its spirit, is complied with. If a situation is contemplated where a committee of a public body may involve non-committee members who are present at the committee meeting in a discussion of council business, then the provisions of the FOIA must be met as if a full Board meeting were being called.

In terms of other provisions such as the applicability of various Town ordinances and rules of operation to meetings of the Town Council, my research indicates a split in the authorities. I will attempt to outline these authorities for you as follows.

First, I would note that our Supreme Court has commented on several occasions with respect to the need for a quorum as well as other parliamentary requirements. In Garris v. Gov. Bd. of the SC Reinsurance Facility, 333 S.C. 432, 511 S.E.2d 48 (1999), the Court noted that

> [i]n the absence of any statutory or other controlling provision, the common-law rule that a majority of a whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum. Prosser v. Seaboard Airline R. Co., 216 S.C. 33, 44, 56 S.E.2d 591, 595 (1949); Gaskin v. Jones, 198 S.C. 508, 513, 18 S.E.2d 454, 456 (1942). A member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter.

333 S.C. at 453. Gaskins v. Jones, supra notes that

> [t]he members who are present at a meeting cannot by mere refusal to vote defeat the action of the majority of those voting .... The last mentioned rule is accurately stated as follows in Dillon on Municipal Corporations, 5th Edition, Section 527: "But the courts have steadfastly adhered to the rule that when members are present at a meeting, a mere refusal on the part of some members cannot defeat the action of the majority of those actually voting. As long as the members are present in the council chamber and have an opportunity to act and vote with the others, it is their duty to act, and they will be regarded as present for the purpose of making a quorum and rendering legal the action of the council. (emphasis added).

And in the Prosser case, supra, the Court observed that "[i]t is undisputed that a quorum was at all times present during the hearing ...." 56 S.E.2d at 595. Based upon these authorities it appears that in order to constitute a quorum, there must be sufficient members "present" who are legally entitled to vote.

A number of authorities in other jurisdictions have considered the question as to whether, standing alone, the physical of a presence sufficient number of members of a full body or board to constitute a quorum is sufficient to transform a committee or subcommittee meeting into a meeting

of the full body. These authorities divide, reaching various conclusions. Some authorities conclude that the members present who are not part of the committee or body conducting the meeting must actually participate in the meeting in order to be counted for purposes of a quorum of the full board. Other authorities conclude that the physical presence of the non-committee members transforms the meeting into a meeting of the full body.

In Ryant v. Cleveland Township, 239 Mich. App. 430, 608 N.W.2d 101 (2000), the issue involved meetings of the Cleveland Township Planning Commission. A quorum of the township board was present at the planning commission meetings in question. The township's supervisor, in the presence of the township board, addressed the planning commission regarding a zoning issue. In holding that there had been no "meeting" of the town board, the Court summarized as follows:

> [w]e concluded that the trial court erred in finding that the township supervisor's comments before the planning commission rose to the level of "deliberating toward or rendering a decision on" the proposed zoning amendment. The record does not show that any of the other township board members present exchanged any affirmative or opposing views, debated the proposed amendment, or engaged in any discussion regarding the statements made by the township supervisor. Except for Kalena, who was a township board member of the planning commission and had every right to comment at the properly noticed public commission meetings, the other township board members present were there essentially as "observers." ... As long as the township board members did not engage in deliberations or render decisions, the subject meetings did not need to be noticed as meetings of the township board .... There is no evidence that the proposed zoning amendment, a matter of public policy, was discussed by the members with each other at the subject meetings ....

608 N.W.2d at 104 (emphasis added).

Stevens v. Bd. of Co. Commrs., 710 P.2d 698 (Kan. 1985) is also instructive. There, during a recess of a meeting of county commissioners, certain members remained in the chambers and informally discussed county business. The claim was that this constituted a separate "meeting" of the commissioners. Rejecting this argument, the Kansas Court of Appeals stated:

> [w]hether or not such a gathering is "prearranged" is a question of fact to be determined from the totality of the circumstances surrounding the gathering in question. In the present case, the record indicates that the recess was declared spontaneously because of a lack of business and was not preplanned in any way. There is nothing in the record to indicate that the Commissioners expressly or implicitly understood that they would meet during the recess, or that the Commissioners customarily discussed county business during such a recess, or that as a matter of custom or habit, the Commissioners knew prior to recess that a quorum of the Board would be available to discuss county business during the recess.

710 P.2d at 700.

Attorney General's opinions in other jurisdictions also reach similar results. In La. Op. No. 99-215, 1999 WL 684215 (August 11, 1999), the Louisiana Attorney General concluded that a council member who is not a member of a particular council committee does not in itself trigger the holding of a council meeting. "The mere appearance and observation of the committee meeting by the councilman at issue is not automatically suspect," the Louisiana Attorney General concluded. "His attendance is not in his capacity as a councilman but as a public viewer." The Louisiana Attorney General cautioned, however, that "the committee should restrict its discussions and deliberations only to those matters over which it has jurisdiction. Discussing items outside its authority may give it a taint of a full council meeting."

Other Attorney General's opinions are in accord. See, Minn. Op. Atty. Gen. 63A-5, 1996 WL 492291 (August 28, 1996). In that opinion, the Minnesota Attorney General equated the attending council member at a committee meeting as a member of the public. Thus, while the mere presence of the council member would not transform the committee meeting into one of the full council, such would not be the case if the attending council member participated in discussions and deliberations. The opinion emphasized that,

> [t]he foregoing reasoning would not apply, however, in circumstances where the additional Council members participate in discussion or deliberations of a committee which is officially comprised of less than a quorum of the Council. In such a case, the additional members' involvement would go beyond mere receipt of the same information as members of the public who might choose to attend. Discussions and deliberations among a quorum or more of the Council would lead to the formulation of a consensus or preliminary decision by the Council itself. Such a process should take place in a properly called and noticed Council meeting rather than in a meeting represented as a committee meeting only. (emphasis added).

See also, 1982 Iowa Op. Atty. Gen. 423, Op. No. 82-5-15, 1982 WL 42732 (May 25, 1982) [if attendance of non-committee member creates a quorum of full council and the committee plus the non-committee member deliberate on a matter within the scope of the city council's policy – making duties, a meeting of council has occurred].

There also exists authority which concludes that the physical presence of a quorum itself where a non-committee member is in attendance at a committee meeting creates a "meeting" of the full body. In Ansonia Library Bd. of Directors v. Freedom of Information Commission, 42 Conn. Supp. 84, 600 A.2d 1058 (1991), two members of the six person library board were asked to serve as a nominating committee to select board members to fill the positions of president and vice president which were vacant as a result of prior resignations. After a meeting of the nominating committee, a third member of the library board was called into a nearby room and asked whether she would fill one of the positions. The door of the room was open and another member of the library

board walked in. That member was asked if she wished to remain as secretary of the library board. While the Court resolved the case on the basis that the FOIA required all committees to be subject to the FOIA, and thus the meeting of the nominating committee itself was subject to the Act, the Court in dicta observed that "[t]he four members were arguably a quorum when one member of the library board entered the room where three other members were discussing matters pertaining to the board's affairs." 600 A.2d at 1060 (emphasis added).

Likewise, the California Attorney General has reached a conclusion similar to that of the Ansonia case. In 79 Ops. Cal. Atty. Gen. 69, Op. No. 95-614 (June 10, 1996), the California Attorney General concluded that "[a] fourth member of a seven member legislative body of a local agency may not attend, as a member of the public, an open and noticed meeting of a less than a quorum advisory committee of that body, without violating the notice, agenda, and public participation requirements of [state law] ...." The California Attorney General expressed his concern about such a situation with the following:

> [h]ere, items within the subject matter jurisdiction of a committee will necessarily also be within the subject matter jurisdiction of the parent legislative body. If a majority of the legislative body is allowed to be present at a subcommittee meeting held to consider items that presumably will appear on a future agenda of the legislative body, proper notice and public participation cannot be assured. An item may be resolved at the subcommittee meeting by a quorum of the members, with the action later taken at the legislative body's own meeting constituting a mere "rubber stamp." Although the subcommittee meeting would be noticed and open to the public, the public would not anticipate that items will be resolved at the meeting due to the less than a quorum composition of the subcommittee. Members of the public wishing to present their views when the item is decided will attend the legislative body's meeting only to find that the decision has in effect already been made. The public will effectively be denied the right to present views prior to the legislative body's actual determination. Such result would undermine the Legislature's purposes in requiring notice, a posted agenda, and public participation prior to the resolution of a matter by a legislative body.

A third line of authorities adopts the rule which creates a rebuttable presumption that anytime there is present a quorum of a public body, such is for the purpose of holding a "meeting." The burden would be placed upon the body or its members to show that no such "meeting" took place and that the fact that a quorum was physically present was coincidental or by reason of chance. In State v. Village Bd., 173 Wis.2d 553, 494 N.W.2d 408 (1993), the Wisconsin Supreme Court addressed the question whether having a quorum of village board of trustees present at planning commission meetings constituted a meeting of the board of trustees. It was the practice of a majority of the trustees to attend regularly scheduled planning commission meetings such that "these gatherings were not social or chance." 494 N.W.2d at 408. Relying upon State ex rel. Newspapers v. Showers, 135 Wis.2d 77, 398 N.W.2d 154 (1987) and State ex rel. Lynch v. Conta, 71 Wis.2d

662, 239 N.W.2d 313 (1976), the Court emphasized that "interaction between members of a governmental body is not necessary for convening of a meeting to have taken place nor is interaction necessary for the body to have exercised its powers, duties or responsibilities." 494 N.W.2d at 415. Elaborating thereupon, the Supreme Court observed:

> [l]istening and exposing itself to facts, arguments and statements constitutes a crucial part of a governmental body's decisionmaking. We recognized the importance of exposure to information in Lynch v. Conta [239 N.W.2d 313] ... and again in Showers [398 N.W.2d 154] ... (quoting Conta):
>
> > Some occurrence at the session may forge an open or silent agreement. When the whole competent body convenes, this persuasive occurrence may compel an automatic decision through the votes of the conference participants. The likelihood that the public and those members of the governmental body excluded from private conference may never be exposed to the controlling rationale of a government decision thus defines such private quorum conferences as normally an evasion of the law. The possibility that a decision could be influenced dictates that compliance with the law be met.

In this case, a quorum of trustees gathered information at the Plan Commission meetings concerning the Sileno project, a project over which they would later exercise final control. They listened to the developer's presentation, heard the developer discuss the proposal with the Plan Commission, heard the Plan Commission's views on the proposal, and heard the suggestions of the Village planner. The Village Board members present could have, and in all likelihood did, reach some conclusion about the Sileno project based upon information, data and material that was presented at the Plan Commission meetings.

However, because no notice was given of their attendance, the public may not have been aware of the perceived importance of these meetings to the Village Board and therefore failed to attend. Thus, the public was not made aware that information was being presented that could form the rationale behind the Village Board's action. The open meeting law is intended to allow the public access to the fullest information possible concerning the workings of government and the decisionmaking process. The public can hardly have access to this information if not made aware of its existence. Thus, even if the Village Board members did not interact at the Plan Commission meetings, their presence at the meetings allowed them to gather information that influenced a decision about a matter over which they had decisionmaking authority. The public had a right to be made aware of the existence of this information as well. This is sufficient to trigger the open meeting law.

494 N.W.2d at 415 (emphasis added).

In response to the argument that the meetings of the Village Board's members' attendance "were chance gatherings" and not meetings. Members attested that "they attended the meetings [of the Plan Commission] as interested citizens and observers." However, the Court noted that the members' attendance was part of "the regular practice of a quorum of the Village Board to attend Plan Commission meetings." 494 N.W.2d at 415. Attendance was to allow members to "inform themselves so that they could vote intelligently at Village Board meetings. Their regularity at each meeting allowed them "to anticipate that at least a quorum of the Board would be present." 494 N.W.2d at 416. Thus, the Supreme Court of Wisconsin concluded:

> [b]ased on the above, we hold that when, as here, one-half or more of the members of a governmental body attend a meeting of another governmental body in order to gather information about a subject over which they have decisionmaking responsibility, such a gathering is a "meeting" within the meaning of the open meeting law unless the gathering is social or chance. We also conclude that the meetings at issue in this case were clearly not social or chance gatherings .... Their [the members'] attendance was not haphazard, irregular, nor spontaneous.

The Court noted that the Plaintiff had argued that "having a quorum of Village Board trustees present at the Plan Commission meetings created the rebuttable presumption that "such gatherings were Village Board meetings which required notification." 494 N.W.2d at 413. The Court agreed that this was the legal standard which applied an that the Village Board had failed to rebut the presumption.

Conclusion

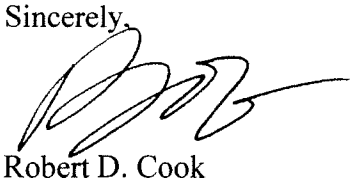
Based upon the foregoing authorities, we agree with Mr. Young's analysis that, certainly, where the non-committee members in attendance at the committee meetings participate in the deliberations of the committee, a "meeting" of counsel has occurred. Moreover, we are of the opinion as well that the better analysis with respect to the situation which you reference is provided by the Wisconsin Supreme Court in State v. Village Bd., supra: that when a quorum of a body is assembled together there is created a rebuttable presumption that such assemblage is for a "meeting" of that body. While, clearly, non-committee members are free to attend committee meetings as spectators or observers, the physical assemblage of a quorum in the same room of a public body – in this instance Mt. Pleasant Town Council – creates the appearance, at least, that the Town Council is conducting a meeting. Like the Wisconsin Supreme Court, our courts would look to facts such as whether non-committee council members regularly attend such meetings; and whether there are any discussions prior to the committee meeting between committee and non-committee members in order to determine whether there was or was not a "meeting" of full council. If the attendance of non-committee members is occasional, sporadic or intermittent, then such would suggest that the non-committee members are there by "chance" and no council "meeting" has occurred. If attendance

by non-committee members at committee meetings is regular and if there is advance "discussion" between committee and non-committee members, a court could hold that the full Council has held a meeting.

In short, as Mr. Young indicates in his opinion, each situation would have to be judged on its own facts. If there is interaction or discussion or participation by non-members, clearly there is a "meeting." If there is no participation, but merely physical presence, then a court will look behind that situation to the real underlying facts. The presumption – which is rebuttable – is that the physical presence of a quorum of council would constitute a "meeting" of that body.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,



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