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Opinion No. 12-109

County Commission Meetings

QUESTIONS

1.a. How does a vacancy on a county commission affect the number of members required for a quorum?[1]

b. Does a vacancy affect the number of votes needed to get a "majority vote" on a particular issue?

c. Does an abstention affect the number of votes needed to get a "majority vote" on a particular issue?

2.a. Does the Tennessee Open Meetings Act, codified at Tenn. Code Ann. §§ 8-44-101 to -111, require a county commission meeting to be held in any particular type of space or facility?

b. Has the Open Meetings Act been violated where the space where a county commission meets cannot safely accommodate all members of the public who wish to attend?

OPINIONS

1.a. Where there are vacancies on a county commission, a quorum is the majority of county commissioners in office when the vote is taken. The vacancy, therefore, is not counted for the purpose of determining a quorum.

b. Generally, where there are vacancies on a county commission, a majority vote is the vote of a majority of county commissioners in office when the vote is taken. The vacancy, therefore, is not counted for the purpose of determining whether a majority vote has been cast. Where the commission votes to adopt a private act under Tenn. Const. Art. XI, § 9, however, a two-thirds affirmative vote of the entire authorized membership of the commission is required. Other statutes may also explicitly impose different voting requirements when the county commission addresses specific matters.

[1] This opinion does not address meetings of a county legislative body operating under a county charter, or meetings of the legislative body in a county that has adopted metropolitan government.

c. Generally, Tennessee law requires the affirmative vote of a majority of the county commissioners in office when a vote is taken to transact business. Neither members who are absent nor members who are present and abstain are excluded from determining whether a majority of affirmative votes have been cast. The general law provides at least two exceptions. First, under Tenn. Code Ann. § 12-4-101(c)(3), where a commissioner who is also a county employee abstains from voting on an issue in which he or she has an interest by reason of such employment, the member is excluded in determining a majority vote. Second, under Tenn. Code Ann. § 5-5-111(c), where a member accepts a nomination for an office filled by the county commission and is prohibited from voting on filling the office, the member is excluded in determining a majority vote. Depending on the issue before the commission, some other statute or private act could also address the effect of an abstention on the number of votes required.

2.a. Tennessee courts have not addressed this specific issue. Under the Open Meetings Act, county commission meetings are public meetings and must be open to the public at all times. For this reason, county commission meetings should be held in a facility that can accommodate a public audience reasonably expected to attend. The audience should be able to hear the proceedings.

b. As discussed above, Tennessee courts have not addressed this specific issue. But courts in other jurisdictions have found that the state's open meetings act did not require the governing body to meet in a space that would accommodate all the members of the public who came to attend it, so long as no person was arbitrarily excluded and authorities provided some way for the overflow crowd to hear the proceedings. Thus, the county commission should take reasonable steps to enable any overflow crowd to hear its meeting, especially where it expects an unusually large audience.

ANALYSIS

This opinion addresses several questions about meetings of a county commission. We assume the questions refer to county commissions operating under Tenn. Code Ann. §§ 5-5-101 to -127.

1.a. The first question is whether a vacancy on a county commission affects the number of members required for a quorum. Tenn. Code Ann. § 5-5-108 provides:

> A majority of the members of the county legislative body of each county shall constitute a quorum for the transaction of all business by the bodies in regular or special sessions.

Tenn. Code Ann. § 5-5-109(a) provides:

> (a) A majority of all the members constituting the county legislative body, and not merely a majority of the quorum, shall be required to:

(1) Elect county officials required by law to be elected by the body;

(2) Fix salaries;

(3) Appropriate money; and

(4) Transact all other business coming before the county legislative body in regular or special sessions.

(Emphasis added). The majority referred to under this statute is a majority of the actual membership of the county legislative body at the time and not a majority of the total authorized membership. *Beckler v. State*, 198 Tenn. 372, 376, 280 SW.2d 913, 915 (1955); *Bailey v. Greer*, 63 Tenn. App. 13, 35, 468 S.W.2d 327 (Tenn. Ct. App. 1971). Thus, where there are vacancies in a county commission, a quorum is the majority of county commissioners in office when the vote is taken. The vacancy is not counted for the purpose of determining a quorum.

1.b. Tenn. Code Ann. § 5-5-109(a) expressly provides that a majority of all the members constituting the county legislative body, and not merely a majority of the quorum present, is required to transact most business. As discussed above, the majority referred to under this statute is a majority of the actual membership of the county legislative body at the time and not a majority of the total authorized membership. Thus, a majority vote is the vote of a majority of county commissioners in office when the vote is taken. The vacancy is not counted for the purpose of determining whether a majority vote has been cast.

This general rule may not apply where there is a special statute or constitutional provision requiring a different methodology for calculating an affirmative vote for passage. For example, under Article XI, § 9 of the Tennessee Constitution, a local legislative act must be adopted by a two-thirds vote of the legislative body of the municipality, or in a referendum. This provision requires a two-thirds vote of the total authorized membership of the local legislative body, and not two-thirds of the effective membership or of those present or legally voting. *Kesterson v. McKee*, 527 S.W.2d 144, 146 (Tenn. Ct. App. 1975). Other statutes explicitly impose different voting requirements when the county commission addresses specific matters. *See, e.g.,* Tenn. Code Ann. § 5-1-118(c)(1) (county decision to exercise certain municipal powers); Tenn. Code Ann. § 5-1-204(c)(2) (ratification of county charter); Tenn. Code Ann. § 5-7-117(a) (transfer of county water system to utility district); Tenn. Code Ann. § 5-8-102(c)(1) (imposition of motor vehicle privilege tax).

1.c. An abstention by a county commissioner generally does not affect the number of votes needed to get a majority vote on a particular issue. Under Tenn. Code Ann. § 5-5-109(a), a majority of all members constituting the county legislative body is generally required to transact business before the county commission. Members who are present and abstain still are part of the commission. Thus, ordinarily, a majority of all members constituting the commission must affirmatively vote in favor of a measure for it to pass. Neither members who are absent nor members who are present and abstain are excluded from determining whether a majority of affirmative votes have been cast. *Lawrence v. Ingersoll*, 88 Tenn. 52, 62-3, 12 S.W. 422, 425 (1889) (officer did not receive a majority of the votes cast where eight of nine members were present, four voted in favor, three voted against, and one abstained).

At least two statutes provide exceptions to this general rule. First, under Tenn. Code Ann. § 12-4-101(c)(1), a member of a county commission who is also a county employee and whose employment predates the member's election to the commission may vote on matters in which he or she has a conflict of interest after informing the governing body of the interest immediately prior to the vote. Under Tenn. Code Ann. § 12-4-101(c)(3), the member can also abstain from voting. If the member abstains from voting on the issue, his or her vote is not counted for the purpose of determining a majority vote. Tenn. Code Ann. § 12-4-101(c)(3)(B). Similarly, under Tenn. Code Ann. § 5-5-111(c), where a member of a county commission accepts a nomination for an office or vacancy filled by the commission, that member may not vote on the appointment or any motions or resolutions relative to making the appointment until the office or vacancy is filled. The statute provides that "[f]or the purposes of determining a majority, the membership of the county legislative body shall be reduced to reflect any member or members prohibiting from voting on the appointment." Tenn. Code Ann. § 5-5-111(c). Depending on the issue before the commission, some other statute or private act could also address the effect of an abstention on the number of votes required for that particular issue.

2.a. No statute or Tennessee court has explicitly addressed whether county commission meetings must be held in any particular type of space or facility. Tenn. Code Ann. § 5-5-104(d) provides that "[n]o business [of the county legislative body] shall be transacted, or any appointment made, or nominations confirmed, except in *public session*." (Emphasis added). This statute should be read together with the Tennessee Open Meetings Act, codified at Tenn. Code Ann. §§ 8-44-101 to -111. Under Tenn. Code Ann. § 8-44-101(a), "[t]he general assembly hereby declares it to be the policy of this state that the formation of public policy and decisions is public business and shall not be conducted in secret." Under Tenn. Code Ann. § 8-44-102(a), "[a]ll meetings of any governing body are declared to be *public meetings open to the public at all times*, except as provided by the Constitution of Tennessee." (Emphasis added). A county commission is a governing body within the meaning of the statute. Tenn. Att'y Gen. Op. 10-126 at 1 (Dec. 30, 2010). Thus, county commission meetings must be "open to the public at all times." Tenn. Code Ann. § 8-44-102(a). *See also Watson v. Waters*, 375 S.W.3d 282, 292-93 (Tenn. Ct. App. 2012).

The Open Meetings Act is remedial in nature and "should be liberally construed in furtherance of its purpose." *Neese v. Paris Special School District*, 813 S.W.2d 432, 434 (Tenn. Ct. App. 1990). The Act "should be interpreted to promote openness and accountability in government." *Johnston v. Metropolitan Government of Nashville and Davidson County*, 320 S.W.3d 299, 310 (Tenn. Ct. App. 2009) (quoting *State ex rel Akin v. Town of Kingston Springs*, No. 01-A-01-9209-CH00360, 1993 WL 339305, at *2 (Tenn. Ct. App. Sept. 8, 1993)). Accordingly, to accomplish this purpose, county commission meetings should be held in a facility that can accommodate a public audience reasonably expected to attend with adequate audio equipment available to allow the public to hear the proceedings.

2.b. No statute or Tennessee court has addressed whether the Open Meetings Act is violated if the space where a county commission meets cannot safely accommodate all members of the public who wish to attend. In deciding whether an open meetings act requirement has been violated because the meeting room was too small, courts in other jurisdictions look to all

the facts surrounding the meeting. For example, the North Carolina Court of Appeals found that a county board of education committee violated the state's open meetings act when it held a meeting in a small room with sufficient seating only for staff members, resulting in the complete exclusion of the public from a significant portion of the meeting on a matter of intense public interest. *Garlock v. Wake County Board of Education*, 712 S.E.2d 158, 176 (N.C. Ct. App. 2011).

A number of courts in other states, however, have found that the applicable public meetings statutes were not violated simply because all the members of the public who wished to attend could not safely fit in the meeting room, so long as no one was arbitrarily excluded and authorities provided some way for the overflow crowd to hear the proceedings. *See, e.g.*, *Gutierrez v. City of Albuquerque*, 631 P.2d 304, 307 (N.M. 1981) (open meetings law not violated where, although the meeting room was filled in excess of the maximum occupant limit of 156 persons, loudspeakers were set up outside the meeting room and were operative during at least a portion of the meeting, the meeting was broadcast on a radio station and received extensive media coverage, and members of the public were allowed to address the city council and present their views for over two hours); *Windsor Owners Corporation v. City Council of the City of New York* 878 N.Y.S.2d 545, 551 (N.Y. Sup. Ct. 2009) (a planning commission meeting held in its usual location and at its usual time did not violate the state's open meetings law; while the room provided only 65 seats for members of the public, members of the public were permitted to stand in the meeting room without being asked to leave, there was additional seating and standing areas in the lobby of the meeting location, which contained a television monitor and sound system, and the commission agreed it would not adjourn until it had heard every speaker that had signed up to testify); *Badke v. Village Board of the Village of Greendale* 494 N.W.2d 408, 418-19 (Wis. 1993) (meeting in hall that held 55 people did not violate state open meetings act; the foyer held an additional 20 people, the press attended the meeting, and at most no more than three people were ultimately denied admission). Thus, in order to ensure compliance with the Open Meetings Act, a county commission should meet in a room that will accommodate reasonably expected numbers of the public. Additionally, the commission should take reasonable steps to enable the overflow crowd to hear the meeting, especially where it expects an unusually large audience.

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