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OPEN MEETINGS AFTER BYRD

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In Student Bar Association Board of Governors v. Byrd, ___N.C. ___, decided on December 15, 1977, the North Carolina Supreme Court, in an opinion by Justice Lake, held that the open-meetings statute (G.S. 143-318.1 et seq.) did not apply to meetings of the faculty of the University of North Carolina law school. (The Chief Justice concurred in the result, while Justice Exum dissented in part.) The holding in itself is of little moment for counties and cities, but the reasoning the Court used to reach the result may be significant. Some of what the Court said may technically be dicta, but it does reveal the Court's position on important matters under the statute. This Local Government Law Bulletin, being sent to county and city attorneys, will discuss the implications of the Byrd decision.

GROUPS SUBJECT TO THE STATUTE

G.S. 143-318.2 provides that the open-meetings statute applies to the "governing and governmental bodies of this State and its political subdivisions, . . . and any subdivision, subcommittee, or other subsidiary or component part thereof" with actual or claimed authority "to conduct hearings, deliberate or act as bodies politic and in the public interest." The Court's unexpected reading of this fundamental language significantly limits the groups subject to the statute.

A. "Governing and governmental bodies." The Court read the "and" in the phrase "governing and governmental bodies" as conjunctive rather than disjunctive. Therefore, to be subject directly to the statute, a body must be both a "governing" body and a "governmental" body. The Court said something about the identifying characteristics of both sorts of bodies.

A governing body is one that has "ultimate power" to determine the policies and control the activities of an agency, institution, or unit. It may delegate to an employee or group of employees the initial authority to decide a matter, but if it retains the right to review and reverse that initial decision it remains the governing body. (Thus, the Court held the Board of Governors and not the law school faculty to be the governing body of the UNC law school.)

A governmental body enjoys "at least some of the powers of government," that is, "the attributes of sovereignty." Among those attributes the Court

listed the following powers: (1) to tax, (2) to appropriate public funds, (3) to adjudicate controversies, (4) to maintain a police force, (5) to exercise eminent domain, and (6) to adopt ordinances or rules carrying criminal sanctions. It is worth emphasizing the Court's statement that a governmental body must have some of the powers of government. It can, for example, be argued that the Board of Governors enjoys at least two of them. First, the General Assembly makes a lump-sum appropriation to the Board for distribution among the sixteen campuses of the university system; this distribution by the Board might well be considered as an appropriation of public funds. Second, G.S. 116-41.2 authorizes the Board to exercise the power of eminent domain in certain circumstances (although the Court seems not to have been aware of this authorization). Despite these two powers, the Court indicated that although the Board was the governing body of the University, it was not a governmental body and thus was not subject to the open-meetings statute.

What are the implications of this part of the Court's opinion for local governments? City councils and boards of county commissioners remain clearly subject to the open-meetings statute, but its extension to other local boards has become problematical. Several local boards enjoy one or more governmental powers--for example, boards of adjustment (adjudication), boards of health (ordinance-making), boards of elections (adjudication), redevelopment commissions (eminent domain)--but it is not clear whether any one such power is sufficient to make the board that holds it a governmental body, nor does that necessarily answer the question of whether such a board is also a governing body. It does seem likely that groups like planning commissions, recreation commissions, library trustees, human relations commissions, and so on are not governing and governmental bodies. Unless they can be characterized as subsidiary or component parts of a governing and governmental body, a question to which we will now turn, they are not subject to the statute.

B. Subsidiary and component parts. It was noted above that G.S. 143-318.2 also extends the coverage of the open-meetings statute to any group that is a "subdivision, subcommittee, or other subsidiary or component part" of a governing and governmental body, if the subsidiary group has or claims authority "to conduct hearings, deliberate or act as [a body politic] and in the public interest." The Court seems also to have limited the reach of this portion of the section in significant ways.

First, the subsidiary group apparently must be a subsidiary part of a body subject to the statute (such as the board of county commissioners) rather than of the agency, institution, or unit of which that body is the governing and governmental body (such as a county). In its opinion the Court noted that the law school faculty is "obviously" a component part of the University, but held that it was not a component part of the Board of Governors. Thus, even if the Board of Governors had been subject to the statute, that fact would not have affected the status of the law school faculty.

Second, even if a group meets that first test--that is, even if it is a subsidiary or component part of a governing and governmental body--it apparently must also be a body politic. The Court spent some time discussing the nature of a body politic, insisting that to be subject to the open-meeting law, the law school faculty had to be such a body. This necessity arises from the Court's apparent reading of the phrase, in G.S. 143-318.2, providing that to be subject to the statute groups must have or claim authority "to conduct hearings, deliberate or act as bodies politic." The Court apparently read "bodies politic" as pertaining not only to "act" but also to "conduct hearings" and "deliberate." Thus, to be subject to the statute as a subsidiary body, a group must have or claim authority to conduct hearings as a body politic, to deliberate as a body politic, or to act as a body politic; in short, it must be a body politic.

And what is a body politic? In the Court's characterization it is a body "exercising powers which pertain exclusively to a government" as opposed to powers that both government and the private sector may exercise. In effect, it would appear that to be a body politic means very much the same thing as to be a governmental body. Probably very few subsidiary bodies would qualify as bodies politic.

NOTICE OF SPECIAL MEETINGS

The trial court in the Byrd case had required the law school faculty to give six hours public notice of its meetings, and this part of its order was affirmed along with the entire order by the Court of Appeals. The Supreme Court, however, began its opinion by noting that "it was error" to enter such an order. The open-meetings statute does not explicitly require that public notice be given of meetings that are required to be open, and the Court felt it was improper to read such a requirement into the statute. (It should be noted that since the law school faculty was held not to be subject to the statute in any event, this discussion of notice can be characterized as dicta. The discussion did, however, lead off the Court's opinion; and in addition Justice Exum noted his agreement with the Court on the question of notice.)

In News & Observer Publishing Co. v. Interim Board of Education for Wake County, 29 N.C. App. 37, 223 S.E.2d 580 (1976), a panel of the Court of Appeals had read a requirement of notice into the open-meetings statute. In that decision, the court indicated that at least six hours public notice would be appropriate for any special meeting. That decision was not appealed to the Supreme Court. Although the Supreme Court in the Byrd case did not discuss or even cite the News & Observer case, it would seem to have overruled that earlier decision on the point of notice.