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The Court of Appeals Addresses Emergency Meetings and Remote Quorum

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In State of North Carolina v. Anson County, the Court of Appeals addressed two key unsettled issues. First, the court interpreted the definition of an emergency meeting under the Open Meetings Law. Second, the court evaluated whether remote participants count toward quorum. After some context, we'll analyze each of these findings.

What happened?

In Anson County, Sheriff Landric Reid died very near the end of his term, creating a brief vacancy for the remainder of the term. At the time of his death, he was on the ballot for election to a new term and after his death he won that election. That created a second vacancy, for the whole new four-year term. The four-year term was to begin December 5, 2022.

The board of county commissioners voted to fill the brief vacancy with Scott Howell, who was immediately sworn in as sheriff. But what about filling the four-year vacancy, for the new term to begin very soon? The commissioners met on December 1 and discussed the upcoming vacancy but chose to defer action until their regular December 6 meeting.

On December 5, the commissioners decided they needed to act right away, and an "emergency" meeting was called for that same day. Such short notice is lawful under the Open Meetings Law where there is an emergency. Was this one?

At the meeting, two commissioners were physically present with three attending remotely by telephone. The remaining two were absent, one because he never received notice and one for reasons that the court does not address. Would they fill the four-year vacancy with Scott Howell (already temporarily in office) or would it be Gerald Cannon? The vote was in favor of Cannon, 4-0. The two

members physically present voted for Cannon and two of the remote members voted for him. The third remote participant appears to have lost connection before the vote. Did the four voting members constitute a quorum, as a majority of the seven commission members?

The next day the board of commissioners met again (with a couple of new members being sworn in that very day). They voted again on filling the four-year vacancy, and this time, with all seven members physically present, they chose Howell.

But what about the fact that they had already chosen Cannon?

On February 10, 2023, Cannon began a legal proceeding known as quo warranto, an action that asks the court to determine who is the proper holder of an office when two people claim it.

The Court of Appeals ruled in favor of Howell. Cannon was never validly appointed to fill the vacancy because i) the emergency meeting was improper and ii) even if it wasn't, there was no quorum.

There Was No Emergency

Under G.S. 143-318.10(f), an emergency meeting is proper where there are unexpected circumstances that require immediate attention. Prior to the *Anson County* case, no North Carolina cases had dealt with this specific provision, so the appropriate use of emergency meetings has been open to interpretation. Here, the court noted first that the Sheriff's vacancy was not an unexpected circumstance on December 5. In fact, the board met on December 1 to discuss the vacancy and decided to wait to act. Moreover, Defendant Howell had been appointed as Sheriff after Sheriff Reid's death and would have held over until an appointed successor took an oath of office. For that reason, the vacancy did not require immediate attention. Without an adequate emergency as defined in statute, the December 5 meeting was really a "special" meeting that required at least forty-eight hours of notice to be valid. G.S. 143-318.12(b)(2).

While the court's reasoning is limited to the facts of this case, the opinion suggests that a court will evaluate evidence of prior knowledge of an allegedly unexpected circumstance when trying to assess whether a statutory emergency actually existed. Additionally, if there are statutory or constitutional principles that ameliorate a condition, such as Howell holding over in the *Anson County* case, a court may be less likely to conclude that the matter requires a board's immediate attention. All in all, the court's ruling here is significant as the first time the Court of Appeals has dealt explicitly with the definition of emergency meetings under the Open Meetings Law.

There Was No Quorum

The court's decision on remote quorum might have broader impact. At the December 5 meeting, only two commissioners out of seven were physically present. For county governing boards, a quorum is more than half of the total members. G.S. 153A-43. The Anson County Board of Commissioners has

seven commissioners, so a quorum is four. The court held that these four had to be *physically* present for there to be a valid quorum. While Section 166A-19.24 allows remote quorum and remote participation, the court reaffirmed that this statute applies only during General Assembly- or Governor-declared states of emergency. Because only two commissioners were physically present, the board lacked the proper quorum required to take any valid action.

What does this mean for local governments? Since the lifting of the statewide state of emergency after the COVID-19 pandemic, local governments have been puzzled regarding how to handle remote meetings. (See previous blogs on this topic here and here). Some jurisdictions have relied on G.S. 143-318.13(a) as authority to continue the practice of remote meetings. Others have specifically adopted rules and policies regarding remote meetings, pointing to their authority to adopt local rules of procedure (G.S. 153A-41 for county governing boards; G.S. 160A-71 for city governing boards). The problem with these approaches has been the lack of statutory authority to count remote participants toward quorum. In this case, the Court of Appeals seems to indicate that there is no authority to count remote participants toward quorum, although the court does not explain this reasoning and does not say whether Anson County had any locally adopted rules that could have lent authority.

It is notable that the court found no remote quorum in a county case because the county quorum and voting statutes make no mention of physical presence. Even without any statutory indication that physical presence is required, the court still required it for valid quorum. City voting statutes *do* discuss physical presence (see G.S. 160A-75(a), (b)), so cities should take even more care to ensure that a quorum is physically present before conducting business.

This court ruling does not mean that local governments must immediately cease allowing remote meetings, but it does mean that they should ensure the presence of an in-person quorum to protect against potential legal challenges. Since there was no quorum, the court did not reach the question of whether the remote members can vote, but it may be reasonable to assume that the court would take a similar approach in requiring physical presence for voting as well.

Bottom Line

Governing boards that want to continue allowing remote participation in meetings should ensure that there is an in-person quorum. They should also be very hesitant to pass measures using remote votes, although this may be less risky if the remote votes have no impact on the outcome. While this case was about a county governing board, the court's reasoning could be applied to city governing boards and even appointed boards alike. Remote meetings continue to be an area to exercise caution.