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November 5, 1991

OPINION
OF
TOM UDALL
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Opinion No. 91-12

By: Elizabeth A. Glenn
      Assistant Attorney General

TO: Honorable H. John Underwood
      State Representative
      Adobe Plaza, Suite 8
      200 Mechem
      Ruidoso, New Mexico 88345

QUESTION:

May county commissioners telephonically authorize county purchases without violating the Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4 (Repl. Pamp. 1990)?

CONCLUSION:

A county commission may not, consistently with the Open Meetings Act, approve purchases by telephone.

FACTS:

The Lincoln County Board of County Commissioners adopted a resolution providing that:

> All purchases determined to be an unauthorized
> purchase shall be considered by the County
> Commission, which may at its discretion
> approve an unauthorized purchase for payment
> only after at least two Commissioners have
> been notified by the Finance Office.   The

Finance Office must document the approval with
the name, date and time of the approval.

Resolution No. 79-41 (Feb. 12, 1991). The commissioners understood
this resolution to permit telephonic approval of purchases.

ANALYSIS:

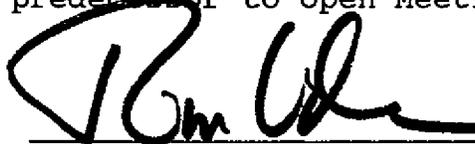The Open Meetings Act provides that:

All meetings of a quorum of members of any
board, commission or other policy-making body
of any ... agency or authority of any county
.. held for the purpose of formulating public
policy, ... discussing public business or for
the purpose of taking any action within the
authority ... of any board, commission or
other policy making body are declared to be
public meetings open to the public at all
times....

NMSA 1978, § 10-15-1(B)(Repl. Pamp. 1990). The statute also
specifically prohibits the formation of public policy or the
conduct of business by vote in a closed meeting. Id. § 10-15-
1(A). Unless taken at a meeting held according to the requirements
of the Open Meetings Act, an action of a board, commission,
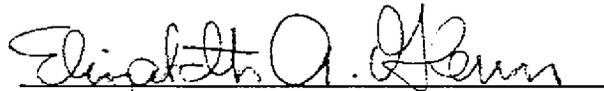committee or other policy-making body is invalid. Id. § 10-15-
3(A).

In addition, the statutes regulating county governments
provide that "[t]he powers of a county as a body politic and
corporate shall be exercised by a board of county commissioners."
NMSA 1978, § 4-38-1 (Repl. Pamp. 1984). The New Mexico Supreme
Court has held that this provision and the Open Meetings Act
require a county commission to act as a body at a duly constituted
meeting. Trujillo v. Gonzales, 106 N.M. 620, 747 P.2d 915 (1987)
(oral promise of employment by two of three county commissioners
was without statutory authority and did not bind the county).
According to the court, "[a]ction of all the members of the council
separately is not the action of the council, and an agreement
entered into separately by the members of the council outside a
regular meeting is not binding." Id. at 622, 747 P.2d at 917
(quoting 56 Am. Jur. 2d Municipal Corporations, Counties, and Other
Political Subdivisions § 155 (1971)).

When it approves an unauthorized purchase, a county commission
is conducting public business and taking official action. See NMSA
1978, §§ 4-38-16 (Repl. Pamp. 1984) (empowering a county board to
examine and settle the county's accounts and to allow accounts

chargeable against the county). To be valid, this action must be taken by the commissioners acting as a body at a meeting open to the public and according to the requirements of the Open Meetings Act.[1] Thus, the commissioners may not act separately to approve unauthorized purchases by telephone. See AG Op. 59-105 (1959) (final decisions made by telephone are not made at a meeting open to the public as required by predecessor to Open Meetings Act).

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[1]The Open Meetings Act permits a public body to discuss in a closed session purchases in an amount exceeding $2,500 that can be made only from one source. NMSA 1978, § 10-15-1(E)(4) (Repl. Pamp. 1990). Actual approval of the purchase must be made in an open meeting. Id.