

Legally (Relevant



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Preparing for the Unexpected – Some Lessons Learned

“There are known knowns – things we know we know. There are known unknowns – we know there are things we do not know. But there are also unknown unknowns – the ones we don’t know we don’t know.”

*– Secretary of Defense Donald Rumsfeld
February 12, 2002*

These past few months have had more than their share of “unknown unknowns”. At the time of this writing, it is not at all clear that there won’t be more to come. These unknowns came fast, including some legal ones, and answers had to come fast too. Out of all of this we now have some new “known knowns”, ready to use in the next emergency and some of these new “knowns” are proving to be very useful in normal conditions too.

This article will discuss some of the legal implications of these new “knowns” from the rural water district perspective. Some of these lessons will apply to cities and other entities, but because of complexities concerning the various legal frameworks, specific reference will only be made to RWDs.

Meetings

One of the first things that surfaced was the need to conduct meetings in an environment where the participants were not permitted to be together. There have long been meetings held electronically, usually by conference call, but these events, together with new technology, has introduced many to meetings via video conferencing. Services such as Zoom, GoToMeeting, Microsoft Teams and others have proved to be highly efficient ways to conduct meetings without the need for physical presence.

But a meeting by video conference is just as much a “meeting” as is a physical meeting for the purposes of the Kansas Open Meetings Act (KOMA) (“meeting means any gathering . . . in person or through the use of a telephone or any other medium for interactive communication by a majority of the membership of a public body . . . K.S.A. § 75-4317a). Thus, a Zoom meeting in which four members of a seven member RWD board participate and discuss RWD business is a “meeting” for purposes of the KORA. As such, the Zoom meeting must be open to the public (K.S.A. § 75-4318).

So how to legally make a video conference open to the public? On March 20, 2020, following declaration of disaster emergency by the Governor, the Kansas Attorney General issued temporary regulation 16-20-1 outlining procedures to be followed in the conduct of meetings, and on that

same date published a set of best practices to be followed to assure continued compliance with KORA. Although issued as a temporary regulation, the guidance is sound advice for how to avoid KORA violations in virtual meetings under almost any circumstance. The regulation provides that in the case of meetings conducted by telephone or video



conference, provisions be made as follows:

- 1) To allow the public to listen to, and if available, watch the meeting without cost;
- 2) If possible, provide an alternate means to access the meeting by the public who do not have internet access;
- 3) Provide direction for how the public can access the meeting;
- 4) Require each speaker to state his or her name and title before speaking;
- 5) Explain if public comments will be permitted and if so how (it is not required that public comment be allowed);
- 6) Other requirements involving dissemination of agendas and papers, conduct of executive sessions, authorization for signing of any documents and other subjects.

The best practices direction adds recommendations that notices of meetings be distributed as widely as possible, including on the agency's website, along with any agenda and papers to be discussed at the meeting. It is also recommended that meetings be recorded and the recording, along with resulting meeting minutes, be posted on the agency's website.

The temporary regulation also addresses the case where the governing body can legally meet in person, but the public is not allowed to attend due to space/distancing restrictions. The requirements of allowing for electronic observation of the meeting to the public, at no cost, are similar to those required

when the meeting is being conducted electronically. If a Zoom-type service is used, the district should include a link with the access number and password with any KORA meeting notice and on its website. A district could also ensure access for those without internet service or a computer by having a computer and monitor set up in the usual meeting

place, which should ensure that a limited number of people attend at that location.

So, what are the lessons learned? First, water service and the business of providing it will always be essential. For most RWDs, that means the board needs to meet periodically to conduct its business. Unless suspended by order of the Governor (which did not occur during this emergency), the law still places requirements on RWDs to conduct that business on behalf of the district legally, including the need to make any meetings, however conducted, open to the public.

Technology like Zoom now allows these meetings to be conducted electronically through the internet, interactively and in most cases, fairly efficiently. Documents can be shared and reviewed, consultant reports can be received and discussed, staff can report and binding votes taken, all with the opportunity for interactive discussion. If they have not already done so, every district should look at the various services available, choose the one best suited for them, make sure everyone has downloaded it and then learn how to use it. If there are members without a computer, smart phone or other suitable device, or without internet service, arrangements need to be made for how they can be made available. A virtual meeting administrator should be selected, with that administrator's responsibility to be to see that all of these things are in place, that everyone needed for a meeting is familiar with them, and last but not least that the kinds of practices described in the recent temporary regulation are in place. Many

are finding that meetings conducted by video conference have their place not just in an emergency but can be a very effective way to hold meetings in normal conditions. A board member who is unavailable to attend a physical meeting can participate electronically. Short meetings, such as to vote on a construction contract award or to approve an extraordinary expenditure can be arranged and held much more quickly and efficiently. Just be sure to remember that these technological shortcuts are not a license to shortcut the requirements that these meetings be truly open to the public.

Elections

The discussion above concerns how to conduct virtual board meetings efficiently and legally. This could theoretically also be used for meetings of RWD members, such as the annual meeting required by State law to be held by April 1 of each year (K.S.A. § 82s-626). However, it seems unlikely that a virtual meeting of members would be practical. In cases where an annual meeting cannot be held, which was the case for some districts whose annual meetings were scheduled in late March 2020, the best practice is for a member to appear at the time and place of the scheduled meeting, call it to order, and then adjourn it to a later date to be determined by the board. This does not mean that elections of directors cannot occur without an in-person meeting. State law already provides us with an alternative to that practice.

KRWA's annual meeting, and thus its election of directors, was similarly affected when the March 2020 meeting was cancelled. As a not-for-profit corporation, KRWA had flexibility to provide through resolution of the board for a mail-in ballot election.

RWDs have this option as well, but as quasi municipal corporations governed by state law, RWDs must provide for this option by adopting an appropriate bylaw.

Kansas Statute, K.S.A. § 82a-648, provides that any RWD may provide for any election of the district to be by mail ballot "in accordance with the bylaws of the district". This was first authorized in order to allow for greater voter participation (turnout for RWD annual



meetings and thus member/voter participation, especially in larger districts, has been historically low). Districts may not have seen much need for this in the past, and few have taken advantage of this option. But now it seems like districts should at least consider a bylaw that would permit such, providing for the procedure to be followed, the elections where mail ballots will be permitted (State law provides for member elections of directors, as well as on questions of consolidation and acquisitions) and whether

the process is to be employed consistently or only those occasions when directed by the board – such as in the case of emergency rendering the in-person voting impractical.

Conclusion

The recent public health emergency forced some changes in the way we do things. For RWDs these changes meant, in many cases, learning how to accomplish the mission while still complying with important legal requirements. Having learned these lessons, RWDs should be better prepared for any such future emergencies. Some of these lessons can be used very effectively in usual conditions too.

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