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## Coates' Canons Blog: Can the Board Go Into a Closed Session to Deliberate a Quasi-Judicial Decision?

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The board of adjustment is hearing a hotly contested appeal. The zoning administrator interpreted a somewhat ambiguous provision in the zoning ordinance to allow a controversial land use. Irate neighbors appealed that determination to the board of adjustment. The case quickly turned into one of the hottest land use disputes in recent town's history, garnering multiple front page stories in the local paper and a spot on the local TV news.

The board held two lengthy hearings to gather facts about the issue. They received substantial amounts of conflicting evidence, some from expert witnesses and much from concerned neighbors. Some of the board members are uncertain how to resolve questions about the facts and how to weigh the conflicting testimony. They're not really sure whether they can even consider the opinions of the neighbors in making their decision. Attorneys for the land owner and the neighbors presented detailed legal arguments that have left some of the board members more than a little confused.

After all of the evidence had been received, the board began to discuss the case. The board's confusion and uncertainty about how to resolve the case was quickly apparent to the board chair. She knew this was an important case with significant impact for the owner, the neighbors, and the town. She also knew there was a good chance the board's decision would be appealed to the courts. She realized it would be difficult to have a frank discussion among the members with a large crowd of neighbors, the applicant, and the press looking on. There were also a couple of questions about the law she had for the board's attorney and was concerned he might not be able to answer candidly in open session. It occurs to her that they might best resolve all of these issues in closed session. At the next break in the board's discussion, she says, "Now that we have concluded receipt of all evidence in this matter, I would like to move into closed session for board deliberation and to receive counsel from our attorney about the legal issues involved." One of the board members responds, "Great idea. I would like to second that motion, but I'd first like to find out from our attorney whether this is permissible."

Would it be legal for the board to move into a closed session to conduct its deliberations? What about to talk with their lawyer?

The answers are no, to the first question, and yes to the second..

When a city or county board is making a decision on an appeal, a variance request, or a special or conditional use permit application, it is in many respects acting in a judicial capacity. That is why these types of decisions are classified as "quasi-judicial." In the judicial system juries hear testimony about the facts and then retire to the jury room for private deliberations. City and county boards making quasi-judicial decisions would sometimes like to apply that analogy and be

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able to deliberate cases in private after receipt of the evidence.

The state's **open meetings law** does not allow such a closed session. Public bodies – including boards of adjustment and planning boards, as well as city councils and county boards of commissioners – must conduct all of their business in open session unless the law specifically authorizes a closed session.

**G.S. 143-318.11** sets out nine specific purposes for which a public body may meet in closed session. Most of these include narrowly drawn provisions regarding personnel matters and contract negotiations. There is simply no authorization for a closed discussion by a local government board deliberating a pending quasi-judicial decision, no matter how contentious or complicated the case might be. G.S. 143-318.18(7) exempts state agencies making quasi-judicial decisions from the open meetings act for those meetings held solely for the purpose of making a decision in an adjudicatory proceeding. But that exception does not apply to local government boards.

What about getting legal advice from the board's attorney? In our example we have a case that may well be headed for court and the board would like to get candid legal advice to avoid making a legal error that would result in having their decision overturned or returned for corrections.

G.S. 143-318.11(a)(3) allows a closed session to consult with the board's attorney, but only "in order to preserve the attorney-client privilege." A critical question then is the range of discussion protected by this privilege. The court addressed this attorney-client privilege exception to the open meetings law in **Multimedia Publishing of North Carolina, Inc. v. Henderson County**, 136 N.C. App. 567, 525 S.E.2d 786, *review denied*, 351 N.C. 474, 543 S.E.2d 492 (2000). The county board had gone into closed session with their attorney to discuss a proposed moratorium on new racetracks while new noise regulations were being developed and considered. The court noted that while board's attorney must be present for there to be a privileged conversation, the attorney's presence in and of itself does not justify a closed session. Only the provision of protected legal advice justifies a closed session, not a general policy discussion with the attorney. The court held that a pending or threatened claim or suit against the board was not necessary to invoke the attorney-client privilege so long as legal advice was being discussed. The court ruled the burden is on the board to provide some "objective indicia" that the exemption is applicable. When this case was again before the court after a remand, the court held that it was permissible for the board to consult with their attorney in closed session regarding the statutory authority for the ordinance, the legally permissible length of a moratorium, and the wording of the terms of the moratorium (as distinct from any general discussion about the propriety of a moratorium). **Multimedia Publishing of North Carolina, Inc. v. Henderson County**, 145 N.C. App. 365, 550 S.E.2d 846 (2001). The court affirmed this analysis in a case involving enforcement of Charlotte's minimum housing code, **Carolina Holdings, Inc. v. Housing Appeals Board**, 149 N.C. App. 579, 561 S.E.2d 541, *review denied*, 356 N.C. 298, 570 S.E.2d 499 (2002). In this case the board held a series of six hearings on the appeal of an order to demolish parts of a dilapidated apartment complex. The court held it was permissible for the board to meet with its attorney in closed session at several of the hearings in order to discuss matters within the attorney-client privilege. Board consultation with their attorney in private on constitutional and legal challenges that might result from particular enforcement actions being considered was held to be permissible. David Lawrence has a more detailed discussion of closed sessions under the attorney-client exemption in this 2002 **bulletin**.

So in our example, the board cannot go into closed session to deliberate or to discuss the case among themselves. Prior to adoption of the open meeting law, it was common for some boards to conduct their deliberations in private, returning to open session to vote and announce their conclusions. That is simply no longer legally permissible in North Carolina. No matter how messy or complicated, the public has a legal right to hear the board's discussion and deliberation.

On the other hand, the board can go into closed session for the narrow purpose of a privileged legal discussion with their attorney. To do so, the board must specify the purpose of such private consultation and adopt a motion to go into closed session while in open session. The minutes of the closed session must provide a general account of the meeting (discussed in Frayda Bluestein's blog posts **here** and **here**). It is very important that the discussion in the closed portion of the meeting be limited to only privileged legal consultation. This is a limited exception to the open meetings law and cannot be used to shield board deliberations or general policy discussion from public scrutiny.

## Links



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- [canons.sog.unc.edu/can-the-board-go-into-a-closed-session-to-deliberate-a-quasi-judicial-decision/sign-closed-meeting/](https://canons.sog.unc.edu/can-the-board-go-into-a-closed-session-to-deliberate-a-quasi-judicial-decision/sign-closed-meeting/)
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