
Coates' Canons Blog: Statutory Permission to Take Up Items Not on the Special Meeting Notice

By Trey Allen

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The Mayor of Transparent City has called a special meeting to allow the city council to designate an interim manager following the former manager's unexpected departure. In accordance with the open meetings law, the clerk posts a notice stating the time, location, and purpose of the meeting on the council's bulletin board 48 hours before the meeting. She also e-mails the notice to individuals and media representatives on the council's "Sunshine List" 48 hours in advance and posts the notice on the city's website prior to the meeting's start time.

The mayor has long dreamed of enlarging one of the city's parks, which just happens to be located near his home. On the day before the special meeting, he learns that the owner of a large tract next to the park would like to sell the property. The mayor quickly calls the clerk and asks her to add a closed session to the special meeting agenda so that the council may discuss making an offer on the tract.

The clerk is worried that adding a closed session to the agenda at this point would violate the open meetings law. She voices her concern to the city attorney, who asks whether the full council will be present for the meeting. When the clerk indicates that all members have said that they plan to attend, the attorney advises her not to worry. He tells her that G.S. 160A-71(b) permits the council to take up matters that don't appear on the special meeting notice, provided all members are present or any absent members have executed a written waiver of their right to attend. Is the city attorney right?

In my view, the city attorney is only half right. While the mayor's desired action may be permissible under G.S. 160A-71(b), the notice referred to in that provision is separate from the notice mandated by the open meetings law. Even if all members are present, the council risks violating the open meetings law if it takes up the property issue at its special meeting.

The Open Meetings Law's Notice Requirements for Special Meetings

Like other public bodies, local governing boards are subject to the open meetings law's notice requirements for special meetings. (A "special meeting" is one that is not part of a public body's regular meeting schedule. For purposes of this blog post, the term does not encompass recessed and emergency meetings.) In particular, the open meetings law makes a public body responsible for:

- Posting written notice of the time, location, and purpose of the special meeting on the its principal bulletin board or, if there is no such a bulletin board, on the door of its usual meeting room at least 48 hours ahead of the meeting;
- Providing the same notice a minimum of 48 hours before the meeting by mail, e-mail, or delivery to any media organization or individual who has submitted a written request for such notice (the list of requesters is often referred to as a "Sunshine List"); and
- Posting notice of the meeting on its website prior to the meeting's scheduled start time, if the website is maintained by its employees. G.S. 143-318.12.

Although it requires the notice to state the purpose of the meeting, the open meetings law does not expressly say whether or when a public body may take up matters at a special meeting that were not included on the notice provided to the public and its Sunshine List. Moreover, North Carolina's appellate courts have not addressed this issue. As my colleague David Lawrence has pointed out, however, courts in states with similar laws have found violations when items not listed in a public notice were discussed and acted upon. David Lawrence, *Open Meetings and Local Governments in North Carolina: Some Questions and Answers*, p. 14 (7th ed. 2008). For this reason, David advises local governments to be careful about

taking up matters that aren't listed among the express purpose(s) for a special meeting. *Id.*

The remedies available for violations of the open meetings law offer a public body additional reasons to think twice before it risks contravening the notice requirements for special meetings. Depending on the circumstances, if a court finds that a public body has run afoul of the open meetings law, it may order the public body to refrain from future violations, invalidate any action taken in contravention of the law, or compel the public body or its members to pay all or a portion of the prevailing party's legal fees. G.S. 143-318.16, -318.16A, 318.16B.

Extra Notice Requirements for Local Governing Boards

Special meetings of city councils and boards of county commissioners may be subject to statutory notice requirements beyond those imposed by the open meetings law. The precise requirements vary, depending on whether the board in question is a city council or board of county commissioners and, if a city council, on the method used to call the meeting.

City Councils

Section 160A-71 of the General Statutes authorizes a special meeting of a city council to be called in one of three ways.

- The council may schedule a special meeting at any regular or duly called special meeting. G.S. 160A-71(b)(3).
- The mayor, mayor pro tempore, or any two council members may call a special meeting. G.S. 160A-71(b)(1).
- A special meeting may be held if the mayor and all council members are present and consent thereto or any absent members have signed a written waiver of their right to be present. G.S. 160A-71(b)(2).

The statute sets forth notice requirements in addition to those of the open meetings law for the first two methods of calling a special meeting.

- When a city council sitting at a regular meeting or duly called special meeting schedules a special meeting for a later time, it must adopt a motion or resolution in open session that specifies the time, place, and purpose(s) of the upcoming meeting. G.S. 160A-71(b)(3).
- If a special meeting is called by the mayor, mayor pro tem, or two council members, the person(s) calling the meeting must sign a written notice stating the meeting's time and place and the subjects to be considered. This notice must be delivered to the mayor and all council members or left at their usual dwelling places at least six hours before the meeting. G.S. 160A-71(b)(1). (It's common for locally adopted rules to require delivery of notice to members a full 48 hours prior, on the theory that they should receive at least as much advance warning as the public.)

Boards of County Commissioners

Pursuant to G.S. 153A-40(b), either the chair or a majority of members may call a special meeting of a board of county commissioners. The statute requires the individual(s) calling the special meeting to sign a written notice stating the meeting's time and place and the subjects to be considered. It further directs the individual(s) to ensure that:

- The notice is delivered to each board member or left at his or her usual dwelling place a minimum of 48 hours ahead of the meeting, and
- The notice is posted on the courthouse bulletin board at least 48 hours in advance of the meeting.

Taking Up Other Matters at a Special Meeting

Unlike the open meetings law, both G.S. 160A-71 and 153A-40(b) contain provisions that address taking up other matters at a special meeting. The provisions are nearly identical:

- G.S. 160A-71(b)(1): "Only those items of business specified in the notice may be transacted at a special meeting, unless all members are present or those not present have signed a written waiver of notice."
- G.S. 153A-40(b): "Only those items of business specified in the notice may be transacted at a special meeting, unless all members are present or those not present have signed a written waiver."

These provisions might seem to allow a local governing board in some situations to deal with matters not listed on the

special meeting notice mandated by the open meetings law. It's clear, however, that the "notice" they refer to is the notice which must be given to individual board members, not the notice that the open meeting law requires a public body to furnish to the public and its Sunshine List.

Consider first the city provision. It comes immediately after G.S. 160A-71(b)(1)'s directive that individual council members receive written notice of a special meeting called by the mayor, mayor pro tem, or any two council members. The only reasonable inference is that it is talking about the "notice" that the mayor and council members are entitled to receive. Perhaps even more important, the sentence right after the city provision expressly commands the individual(s) who call(s) a special meeting to "comply with the notice requirements of [the open meetings law]." This admonition clearly shows that the legislature does not want the city provision to be interpreted to create an exception to the open meetings law's notice requirements for special meetings.

The same reasoning pertains with equal force to the county provision. It, too, immediately follows a directive that board members receive individual written notice of a special meeting. Furthermore, like the city provision, the county provision precedes a reference to the open meetings law.

The main point here is that a city or county must comply with the open meetings law's notice requirements even when the city or county provision would allow a local governing board to transact items of business not included on the notice to its members. Accordingly, a local governing board risks violating the open meetings law if it takes up matters at a special meeting beyond the purpose(s) listed in the public notice, even if all its members are present or any absent member has executed a written waiver.

If the city and county provisions don't create exceptions to the open meetings law, why do they exist at all? I suspect the General Assembly was worried that board members might sometimes be tempted by the absence of colleagues at special meetings to take unscheduled actions that the absent members would oppose if present. The open meetings law simply does not address this concern. Nothing in that law mandates the delivery of special meeting notices directly to board members, and as previously observed, it is silent as to whether or when a public body may take up other matters at a special meeting. By forbidding action on matters not included on the member notice unless all members are present or absent members have waived their right to attend, the member notice requirements in G.S. 160A-71 and 153A-40 reduce the likelihood that a member's absence from a special meeting will be exploited.

With the above analysis in mind, let's return to the scenario described at the beginning of this blog post. Since both the open meetings law and the member notice provisions in G.S. 160A-71(b)(1) apply, the fact that all members will be present is not sufficient. If the Transparent City Council devotes time at its special meeting to the possible acquisition of land for public park expansion, G.S. 160A-71(b)(1) won't protect it from a claim that its conduct violated the open meetings law.

Special Meeting Notice Charts

It is easy to get confused by the various notice requirements that can apply to special meetings of a city council or board of county commissioners. The charts below may help.

Notice Requirements for Special Meeting of City Council

Method of Calling	Open Meetings Law Notice Requirements	G.S. 160A-71 Notice Requirements
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<p>Scheduled at regular meeting or duly called special meeting</p>	<ul style="list-style-type: none"> • At least 48 hours before meeting starts, written notice of meeting's time, place, and purpose(s) must be posted on council's bulletin board or meeting room door • At least 48 hours in advance of meeting, notice must be provided by mail, e-mail, or delivery to those who've requested it • Prior to meeting, notice must be posted on council's website 	<ul style="list-style-type: none"> • Motion or resolution stating time, place, and subjects to be considered must be adopted in open session
<p>Called by mayor, mayor pro tem, or any 2 council members</p>	<p>Same as above</p>	<ul style="list-style-type: none"> • Person(s) calling meeting must sign written notice stating time, place of meeting & subject(s) to be considered • At least 6 hours before meeting, notice must be delivered to mayor and council members or to their usual dwelling places
<p>Mayor & all council members are present and agree to hold special meeting or any absent members have executed written waivers of right to notice</p>	<p>Same as above</p>	<p>None</p>

Notice Requirements for Special Meeting of Board of County Commissioners

Open Meetings Law Notice Requirements	G.S. 153A-40 Notice Requirements
<ul style="list-style-type: none"> • At least 48 hours before meeting starts, written notice of meeting's time, place, and purpose(s) must be posted on board's bulletin board or meeting room door • At least 48 hours in advance of meeting, notice must be provided by mail, e-mail, or delivery to those who've requested it • Prior to meeting, notice must be posted on board's website 	<ul style="list-style-type: none"> • Person(s) calling meeting must sign written notice stating time, place of meeting & subject(s) to be considered • At least 48 hours prior to meeting, notice must be delivered to chair and other board members or left at their usual dwelling places • At least 48 hours before meeting, notice must be posted on courthouse bulletin board



Links

- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=160a-71
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-318.12
- www.sog.unc.edu/publications/books/open-meetings-and-local-governments-north-carolina-some-questions-and-answers-eighth-edition-2017
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-318.16
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-318.16A
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-318.16B
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=153a-40