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## Coates' Canons Blog: Voting and Taking Action in Closed Sessions

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People sometimes assume that local government boards can never vote or take action in a closed session. That's not quite true. Consider the following scenario: A city council has gone into a closed session under **G.S. 143-318.11(5) and (6)** to discuss the short list of candidates for the open city manager position, and to settle on the compensation and other terms of employment they plan to include in the manager's contract. After a short discussion there seems to be general agreement about the top candidate, but there is some disagreement about compensation. To move things along, the mayor says, "O.k. folks, let's just see where stand with a show of hands: Does everyone agree that Ms. Jones is our top choice?" One of the board members says, "Wait a minute – we can't vote in closed session, can we?" This post describes a board's ability to reach a "tentative consensus" in closed session, and lists some examples of specific final actions that can be taken in closed session.

### Tentative Consensus

In the case of *Maready v. City of Winston-Salem*, 342 N.C. 708 (1996), a landmark decision upholding economic development incentives, the plaintiff claimed that the city had violated North Carolina's open meetings law. The board members had indicated their "informal approval" of nine specific incentives in a closed session. The court rejected the plaintiff's claim, concluding that no law prohibits the board from reaching a preliminary decision and "no action was taken at the closed meetings." Indeed, the record indicated that companies would be told that the approvals were preliminary and that final approval at a public meeting would be required before a contract could be signed or funds expended. *Maready*, at 732. The court also noted that the economic development statute specifically requires the notice of the public hearing on the incentives to describe "the board's intention to approve [the acquisition of property for economic development purposes]." Clearly, the court held, the board has to develop that intention by tentative consensus prior to the final approval and nothing in the law required them to do this in open session.

How does the reasoning in this case apply to the scenario with the manager job candidates and discussion of contract terms? Even though there is no statutory language as there was in *Maready* that describes the need for a preliminary decision, it's clear that this need exists as a practical matter. State law requires that the final decision to hire the manager must be made in open session, but the board must come to a tentative decision to move forward with negotiations on the offer and the contract terms before it can take the final vote to approve the contract. There is no requirement that this preliminary decision be made in open session and, like the "preliminary approvals" in *Maready*, a show of hands to identify the leading candidate is not an action that has any legal effect.

If a preliminary "tentative consensus" is acceptable, it shouldn't matter whether it is arrived at through a general sense of where members are after a discussion, or by individual polling, show of hands, or an actual call for a vote. The key point is that the process should be clearly understood as a preliminary decision that is not binding on the board members and has no legally binding effect as to third parties. Indeed, board members are free to change their votes when the matter comes up for the final, legally binding action.

There are at least two situations in which a vote in closed session may be acceptable: 1) when it is a preliminary ("tentative") vote on a matter that requires a vote in open session, and when the final action is subsequently taken in open session, or 2) when the action is one that the statutes allow the board to take in closed session.

### Taking Action in Closed Session

As noted above, there are some things on which a board may legally take action, including in some cases *final* action, in a closed session. Examples of final actions that may be taken in closed session are discussed in David Lawrence's books on open meetings and public records. These include situations where the authority to act is part of the

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explicit basis for going into closed session, such as a decision to authorize a purchase of property or settlement of a claim. In other cases, the authority might be considered necessary to carry out the purpose for which the closed session is authorized, as in the case of a student discipline action that must be carried out in closed session in order to maintain the confidentiality of student records.

Litigation instructions – **G.S. 143-318.11(a)(3)**: authorizes the board to “consider and give instructions to an attorney” concerning anticipated or pending litigation. This could include authorization to agree to the final terms of a settlement agreement on behalf of the unit.

Real property acquisition instructions – **G.S. 143-318.11(a)(5)**: allows the board to instruct its staff or negotiating agents concerning the position to be taken on behalf of the unit in negotiating the price and other terms of a contract to acquire real property or the amount of compensation and other material terms of an employment contract. This could include authorization to agree to the final price and terms of the contract on behalf of the unit. (Note: this provision does not apply to sale of property by the unit – only to acquisition.)

Personnel actions – **G.S. 143-318.11(a)(6)**: Possibly, actions other than those that the statute explicitly requires the board to take in open session (i.e., final action making an appointment, discharge, or removal) may be taken in closed session. Examples include placing an employee on administrative leave, or probation, or imposing some other disciplinary action short of discharge or removal.

Actions involving confidential records – **G.S. 143-318.11(a)(1)**: Confidential student records are an example of records that justify a closed session. It may be necessary for a local board of education to conduct and take final action on a student discipline case in closed session in order to prevent the disclosure of these types of records.

See, David M. Lawrence, *Open Meetings and Local Governments in North Carolina: Some Questions and Answers*, 8th ed., 2017, p.42; and *Public Records Law in North Carolina*, 2d. ed., 2009, p. 347.

## Links

- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_143/GS\\_143-318.11.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-318.11.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_158/GS\\_158-7.1.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_158/GS_158-7.1.html)
- [www.sog.unc.edu/publications/books/open-meetings-and-local-governments-north-carolina-some-questions-and-answers-eighth-edition-2017](http://www.sog.unc.edu/publications/books/open-meetings-and-local-governments-north-carolina-some-questions-and-answers-eighth-edition-2017)
- [www.sog.unc.edu/publications/books/public-records-law-north-carolina-local-governments-second-edition](http://www.sog.unc.edu/publications/books/public-records-law-north-carolina-local-governments-second-edition)