LOCAL GOVERNMENT LAW

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THE COURT OF APPEALS ADDRESSES CLOSED SESSIONS HELD TO CONSIDER THE PURCHASE OF REAL PROPERTY

■ David M. Lawrence

The open meetings law permits a public body to hold a closed session to "establish, or to instruct the public body's staff or negotiating agents concerning the position to be taken by or on behalf of the public body in negotiating the *price or other material terms* of a contract or proposed contract for the acquisition of real property."[1] On August 6 the Court of Appeals issued its opinion in *Boney Publishers, Inc. v. Burlington City Council*,[2] construing this statutory language. The court held that in the circumstances of the case, the name of the landowner, the location of the property, and the city's proposed use of the property were not material terms of a contract to acquire the property and that consequently the city was obliged to disclose those facts in open session. [3]

The Facts

At a council meeting on November 6, 2000, the Burlington city council voted to move into closed session to discuss the acquisition of an unidentified tract of real property. A reporter for the plaintiff weekly newspaper who was present at the council meeting requested that the city disclose, before the closed session, the three facts noted above, and the council declined to do so. In the closed session, the council heard from the city's recreation director, who identified the property and the property's owners, explained its appropriateness for a park, and disclosed the site's appraised value and the owners' asking price. The council directed the recreation director to proceed, setting a maximum price the city was willing to pay.

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[1] N.C. G.S. § 143-318.11(a)(5) (italics added).

[2] No. COA01-878. The opinion may be read at http://www.aoc.state.nc.us/www/public/coa/opinions/2002/010878-1.htm. Citations to the opinion are by reference to this version.

[3] The city attorney has informed the author that the city intends to seek review of the Court of Appeals decision by the Supreme Court.

On November 15 the plaintiff wrote a letter to the city, requesting again to be informed of the property's location and owners and of the city's plans for the site. In addition, the letter sought copies of any documents received or discussed during the closed session and the minutes of the closed session itself. Again the city refused, and the plaintiff brought suit.

On November 28 the council met and disclosed the information under dispute.[4] In addition, the council authorized purchase of the property.

During December the trial court held a hearing on the suit and on December 29, 2000, the court entered an order and judgment finding generally for the plaintiff. The trial court held that the city council had violated the open meetings law by holding the closed session without first disclosing the property's location and the city's purpose in acquiring the property. (The trial court held that it was appropriate for the city to refuse to disclose the property's owners.) The court went on to hold that the city was entitled to withhold the minutes of the closed session until disclosure would not frustrate the purpose of the closed session and concluded by refusing to hold any city actions void because of the open meetings violation. All parties gave notice of appeal.

The Meaning of "Material Terms"

The core of the dispute, according to the court of appeals, was whether the disputed information – the property's location and owners and the city's proposed use of the property – constituted material terms of the contract to purchase the property. The city argued that these were material terms and for that reason the council had no obligation to disclose the information before holding the closed session. The plaintiff newspaper contested this characterization of the information, and the core of the appellate opinion considers that issue. The court held that, in the circumstances of this purchase, these were not material terms.

The court interpreted the statutory language instrumentally, looking to the apparent purpose of the authorization for this kind of closed session. The court identified the statutory purpose is being to permit a public body to discuss contractual terms that "may be subject to negotiation."[5] That a particular term may be part of a contract to purchase land does not itself support a closed session to discuss that contractual term, unless the term is one that is or will be negotiated with the property owner. In this particular instance, the court noted that the council was considering the purchase of a single tract of land from a single set of owners, and that the city's purpose in acquiring the property was clear. These matters were not subject to negotiation between the city and the owners. Obviously any contract to purchase the property would include the property's location and its owners, and it might include the city's intended use of the property as well. But because these matters were not being negotiated with the owners, they were not material terms within the statutory language and therefore could not be the subject of discussions within the closed session.

By focusing on the purpose of the authorization for a closed session, the court recognized that there might be circumstances in which some or all of the information disputed in this case might become material terms in a contract to purchase real property. It wrote that the "Council neither had to consider reasons to choose among multiple properties nor discuss different possible uses for the tract under consideration. . . . While there may certainly be cases in which the location and intended use of property being considered for acquisition may constitute material terms to be negotiated, this was not such a case." Although the court does not mention ownership, if in a particular instance the property's location is material, then perhaps its ownership would be as well.

The court also looked to statutory history to support its interpretation. Before 1994 the open meetings law permitted a closed session to "consider the selection of a site or the acquisition by any means . . . of interests in real property;" the current language was enacted by the 1993 General Assembly and became effective October 1, 1994. The court concluded that the change was meant to narrow the scope of this authorization for closed sessions, a fact that is clearly true.

How is a Public Body is to Proceed Now

Having held that the disputed information did not constitute material terms of a contract to purchase the property, the court held that consequently the council was "required to disclose, in open session," the information in question.[6] The court's discussion of whether the information constituted material terms is grounded firmly in the statute's language and purpose.

[4] In its opinion the court of appeals acknowledged that this action by the city made the appeal "technically moot," but the court decided to consider the issues anyway. Id. at 2.

[5] Id., at 3.

[6] Id., at 4.

This requirement of disclosure, however, is not grounded in any positive duty found in the statute and is therefore somewhat ambiguous and confusing.

The open meetings law does specifically require disclosure of certain kinds of information when a public body proposes to hold certain categories of closed sessions. Whenever a public body holds a closed session, it must do so by motion that "shall cite one or more of the permissible purposes" listed in the statute.[7] The motion adopted by the Burlington city council met this requirement by specifying the acquisition of real property as the purpose of the closed session, and there is no suggestion in the opinion that the motion was insufficient. For two sorts of closed session, the statute requires that the motion set out additional information.[8] First, if the purpose of the closed session is to prevent the disclosure of privileged or confidential information, the motion must give the name or citation of the law that makes the information privileged or confidential. Second, if the purpose of the closed session is to consult with an attorney in order to preserve the attorney-client privilege, the motion must identify the parties of any existing lawsuit concerning which the public body expects to receive advice during the closed session. The statute does not, comparably, require that the motion for a closed session to discuss the material terms of a contract to purchase real property state the property's location, the property's owners, or the city's intended use of the property. Nor does any other provision in the open meetings law directly impose upon a public body any duty to disclose this information.

So, what is the basis of the court's holding that the city was required to disclose the disputed information? Is the court simply amending the statute to add the requirement, or is there some other way to understand this part of the opinion?

Here's one possible answer to these questions. According to the opinion, during the closed session the city's recreation director "identified the property, explained why the land would be useful as the site for a public park, [and] identified the owners of the property."[9] This suggests that city staff used the closed session to convey this information to the council members. Because these were not material terms of a contract to purchase this particular property, the court may have believed it violated the statute to use the closed session in this way. Rather, it would appear, this information should have been conveyed to the council in open session before the closed session began. If that had happened, perhaps there would have been no need to separately disclose the disputed information; because it did not happen, the need to disclose arose.

If this theoretical basis for the court's holding on disclosure is correct – and again the court itself spent no time connecting this holding to the statute or otherwise explaining it – then it may be that if the city had used other ways of conveying the disputed information to the council members, the duty to disclose might have been different. For example, the city staff might have sent a memorandum to council members, setting out the disputed information about the property. Obviously such a memorandum would be public record and available pursuant to the public records law, but the memorandum's use would obviate the need to give the information to the council members at a council meeting, and perhaps would therefore cancel the obligation to affirmatively disclose the information before holding a closed session. This is speculative, however, because the opinion itself simply announces the council's duty to disclose the information, and a trial court or subsequent panel of the court of appeals might enforce the duty in all circumstances despite its apparent lack of statutory basis.

[7] G.S. 143-318.11(c).

[8] Id.

[9] Boney Publishers, at 2.

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