MUNICIPAL LAW NOTES

NC LEAGUE OF MUNICIPALITIES
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March 2017 Volume XXXVI, No. 9

Open Meetings Law; Public Records Act; Minutes; Redacted Material

Times News Publ'g Co. v. Alamance-Burlington Bd. of Educ., ___ N.C. App. ___ (No. COA16-588, Alamance– 3/7/17)

- ***Holding***– In daily newspaper's action seeking an order compelling defendant-Board to provide unredacted minutes of a series of closed sessions, Court of Appeals affirms trial court's order determining that only certain portions of the minutes were subject to disclosure.

- ***Key Excerpt***– Here, the trial court redacted the majority of forty-five (45) pages of minutes, stating that "the redacted material was properly withheld as containing personnel information related to Dr. Cox [the superintendent who resigned] and other employees, [] discussions protected by the attorney-client privilege[,]" and confidential student information.

The Court initially noted that this was the second appeal in this matter. Times News Publ'g Co. v. Alamance-Burlington Bd. of Educ., ___ N.C. App. ___, 774 S.E.2d 922 (2015) (remanding for *in camera* review). Regarding the appeal in the case *sub judice*, the Court stated, "In this appeal, Times News argues that even where minutes have been properly redacted, the Open Meetings Law requires a public body, such as the Board, to create and make public a 'general account' of the redacted portions with sufficient detail such that members of the public would be able to 'reasonably understand what transpired' at the meeting. *See* [G.S.] 143-318.10(e). Essentially, Times News contends that a 'general account' of a closed session created pursuant to [G.S.] 143-318.10(e) is separate from the actual minutes of the session, and further contends that even if the minutes themselves might not be subject to public inspection, the general account is subject to public inspection. We disagree with this interpretation of the Open Meetings Law."

"The plain language of the Open Meetings Law provides that 'every public body shall keep full and accurate *minutes*' of a closed session. The statute also provides that a public body 'shall keep a *general account*' of a closed session. Our Court has previously delineated the differences

between 'minutes' and a 'general account' as follows: 'The purpose of *minutes* is to provide a record of the actions taken by a board and evidence that the actions were taken according to proper procedures. If no action is taken, no minutes (other than a record that the meeting occurred) are necessary. The purpose of a *general account*, on the other hand, is to provide some sort of record of the discussion that took place in the closed session, whether action was taken or not. A public body must always prepare a general account of a closed session, even if minutes of that closed session are unnecessary. As a practical matter, *the general account of a meeting at which action is taken will usually serve as the minutes of that meeting as well*, if the account includes a record of the action.' Multimedia Publ'g of N. Carolina, Inc. v. Henderson Cnty., 145 N.C. App. 365, 372-73, 550 S.E.2d 846, 851 (2001) (emphasis added).'" (Emphasis in original.)

"In accordance with Multimedia, we hold that where a public body has kept minutes which are sufficient to give someone not in attendance 'a reasonable understanding of what transpired,' the public body has met its obligation to create a 'general account.' Multimedia Publ'g, 145 N.C. App. at 372-73, 550 S.E.2d at 851. We note that Times News has not challenged the trial court's conclusion of law in its 2015 Order that 'the minutes of the closed session . . . do comply with the statutory requirement.'"

"Further, we hold that the statute is unambiguous in allowing a public body to prohibit public inspection of any portion of minutes *or* a 'general account' of a closed session where disclosure would 'frustrate the purpose of [the] closed session.' *See* State v. Hooper, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004) ('The first step in determining a statute's purpose is to examine the statute's plain language. Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.'). Specifically, [G.S.] 143-318.10(e) states that both '*minutes or an account* of a closed session . . . may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session.' [G.S.] 143-318.10(e). Our Supreme Court has recognized that the non-disclosure provision in the Open Meetings Law is an exception to the Public Records Act. News & Observer v. Poole, 330 N.C. [465] at 480, 412 S.E.2d [7] at 16 [(1992)]." (Emphasis in original.)

In closing its opinion, the Court stated, "We have carefully reviewed the unredacted minutes submitted under seal to this Court and conclude that the undisclosed portions were properly redacted by the trial court on remand. We also agree with the trial court that the first paragraph on the last page of the minutes concerns a policy issue which must be disclosed to the public. Accordingly, we affirm the trial court's order in its entirety."

- ***Synopsis***−Appeal by plaintiff from December 2015 order. Affirmed. Opinion by Judge Dillon, with Judge Elmore and Judge Hunter, Jr., concurring.

Open Meetings Law; Sub-Quorum Discussions; Meeting Room; Reasonable Opportunity for Public Access

Hildebran Heritage & Dev. Ass'n, Inc. v. Town of Hildebran, ___ N.C. App. ___ (No. COA16-568, Burke− 3/21/17)

- ***Holding***− As to plaintiffs' claims regarding: (1) councilmember's sub-quorum discussions, and (2) inadequacy of venue for access to meeting, trial court did not err in concluding as a matter of law that the Town substantially complied with the Open Meetings Law.

- ***Key Excerpt***− The majority rejected plaintiffs' contention that the Town violated the Open Meet-

ings Law by purposefully conducting sub-quorum meetings. Plaintiffs contended that the Town violated the Open Meetings Law by permitting Councilman Lowman to conduct one-on-one meetings, by contacting members of the Town Council individually and in private, rather than openly. "Plaintiffs attempt to analogize these facts with those in News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976). In that case, the defendant created a special 'committee of the whole' in order to enact business without invoking the Open Meetings Law. This Court acknowledged that certain grounds might exist to form a closed session committee of the whole, such as theft or embezzlement, but held that 'we do not think a board can evade the provisions of statutes requiring its meetings to be open to the public merely by resolving itself into a committee of the whole.' *Id*. at 49, 223 S.E.2d at 588."

"We hold, however, that plaintiffs' analogy is inapplicable. In News & Observer, the defendant board met to conduct votes in closed session, in violation of the Open Meetings Law. Plaintiffs do not allege, however, that Lowman conducted any business during these one-on-one meetings. Rather, Lowman discussed with other members of the Town Council his plan to present a motion to amend at the meeting proper. Even assuming *arguendo* that Lowman's conduct was designed to avoid the protections of the Open Meetings Law, the vote itself took place at the 26 January 2015 meeting, at which the public was present, minutes were taken, and the votes of the Town Council were recorded. Unlike News & Observer, in which a closed session was held in violation of the Open Meetings Law, this meeting was held in view of the public, with members of the public able to speak, and with records taken of the proceedings. As such, we hold that the trial court did not err in concluding that the Town did not violate the Open Meetings Law."

The panel rejected plaintiffs' contention that the Town failed to provide reasonable public access to the 26 January 2015 meeting. "Pursuant to the Open Meetings Law, the court must consider a defendant's actions 'according to the standard of reasonableness of opportunity for public access to the meetings.' Garlock v. Wake Cty. Bd. of Educ., 211 N.C. App. 200, 201, 712 S.E.2d 158, 162 (2011). Plaintiffs contend that the venue used for the meeting was inadequate to address the public's interest, that between twenty and twenty-five people were forced to stand outside the meeting room, and that no equipment was available to permit these excess attendees to observe or hear what transpired during the meeting. Plaintiffs contend that whether the opportunity for public access was reasonable is a question of fact for the jury, and that the trial court erred in ruling on it as a matter of law."

"However, '[w]hether a violation of the Open Meetings Law occurred is a question of law.' Knight [v. Higgs], 189 N.C. App. [696] at 700, 659 S.E.2d [742] at 746 [(2008)]. As such, it was appropriate for the trial court to determine this issue on a motion for directed verdict. The trial court's order set out numerous facts, which are supported by the evidence, in support of its determination as a matter of law that opportunity for public access was reasonable, and that no violation of the Open Meetings Law resulted. We agree. We decline to find that a lack of overflow seating or external speakers, absent more, constitutes an unreasonable failure of access. We therefore hold that the trial court did not err in holding, as a matter of law, that there was reasonable opportunity for access to the meeting under the Open Meetings Law." Plaintiffs' contention that the trial court erred in declining to award attorney's fees based upon defendants' purported violation of the Open Meetings Law was also rejected.

Dissent −Judge Bryant concurred in part and dissented in part. Upon reviewing Councilman

Lowman's testimony (appearing verbatim in the opinion), Judge Bryant stated, "The trial court's findings of fact, particularly that Councilman Lowman (1) contacted other council members one-on-one specifically 'to avoid holding an official meeting,' and (2) did not contact Councilman Hildebran as he knew he held an adverse position, are clearly based on evidence in the record that the other council members were called 'to ensure that they had the vote to amend the agenda, which would allow them to vote on the school building demolition without any prior notice to the public.' Councilman Lowman admitted that he didn't contact Councilman Hildebran because he knew Hildebran held an adverse position, and if Lowman asked Hildebran about voting to amend the agenda, he would alert the public. The only reasonable inference to be drawn from these facts is that Councilman Lowman's action of contacting other council members individually was to evade the purpose of the Open Meetings Law."

"Thus, because the findings by the trial court support a conclusion that Councilman Lowman's actions were purposeful and undertaken in order to evade the purpose and spirit of the Open Meetings Law and the council's obligation to conduct meetings in public, I submit the trial court erred in concluding the above-described actions did not amount to a violation. Therefore, I respectfully dissent."

- ***Synopsis***− Appeal by plaintiffs from August 2015 judgment and September 2015 order. Affirmed in part and dismissed in part. Opinion of the Court by Judge Calabria, concurred in by Judge Tyson. Judge Bryant concurring in part and dissenting in part.

Personnel; Retirement Benefits; Negligent Misrepresentation

Rountree v. Chowan County, ___ N.C. App. ___ (No. COA16-555, Chowan− 3/7/17)

- ***Holding***− Trial court properly entered summary judgment for defendant-County as to former tax administrator's action alleging negligent representation regarding continued eligibility for retirement benefits.

- ***Key Excerpt***− Plaintiff, a tax administrator, retired from Nash County before accepting a new position with defendant-Chowan County on a limited basis: after working for nearly two years, plaintiff learned that the terms of his employment with defendant-County had rendered him ineligible to receive retirement benefits. Plaintiff resigned and filed an action against defendant-County alleging *inter alia* negligent misrepresentation. The trial court entered summary judgment for defendant-County.

The Court held that the entry of summary judgment for defendant-County was proper because: (1) plaintiff failed to forecast evidence which, taken as true, would establish that defendant-County owed plaintiff a duty of care apart from defendant-County's purported contractual obligation; and (2) assuming the existence of a separate legal duty, plaintiff failed to produce evidence tending to show that his reliance was justifiable.

In so holding, the Court observed that defendant-County met its burden by proving the absence of a separate duty of care and justifiable reliance. Addressing the duty of care issue first. The Court stated, "Unlike the buyer in Kindred [of North Carolina, Inc. v. Bond, 160 N.C. App. 90, 584 S.E.2d 846 (2003)], however, here plaintiff has failed to establish a viable tort action based on a violation of a duty of care. The dispute arose out of a potentially adversarial arm's-

length negotiation between an employer and prospective employee. Defendant did not have exclusive access or control over the benefits eligibility information, which was publicly available and readily accessible. In addition, plaintiff had an equal opportunity to perform his own investigation to determine whether the proposed terms of employment were suitable. In the course of their discussions, therefore, defendant had no legal duty to provide accurate information regarding plaintiff's continued benefits eligibility."

The Court then turned to the issue of justifiable reliance. "In this case, plaintiff failed to produce any evidence—or allege in his complaint—that he made a reasonable inquiry into [the County manager's] representations, that he was denied the opportunity to investigate, or that he could not have learned the true facts through reasonable diligence. On the contrary, defendant directs our attention to plaintiff's deposition testimony in which plaintiff stated that he was familiar with LGERS [Local Government Employees' Retirement System] and was aware that the rules governing his benefits were available in the State Employee Retirement Handbook. Plaintiff also confirmed that his understanding of his benefits eligibility was based purely on his review of the handbook, and that he even consulted the handbook for other benefits information as he prepared to retire from Nash County. And while he acknowledged his own responsibility for maintaining his personal retirement benefits, he did not consult with anyone else regarding his eligibility requirements before accepting the position with defendant. In the absence of any evidence tending to show justifiable reliance, the trial court properly granted summary judgment in favor of defendant."

- ***Synopsis***− Appeal by plaintiff from December 2015 order. Affirmed. Opinion by Judge Elmore, with Judge Hunter, Jr., and Judge Dillon concurring.

Torts; Immunity; Commercial Building; Negligence; Steps; Slip and Fall

Meinck v. City of Gastonia, ___ N.C. App. ___ (No. COA16-892, Gaston− 3/21/17)

- ***Holding***− Where defendant-City leased commercial building to the Gaston County Art Guild, a private non-profit entity unaffiliated with either defendant or County, and received substantial revenues from multiple sources from the lease and subtenants, trial court correctly held that plaintiff's forecast of evidence presented a material question of fact of whether defendant-City negligently failed to maintain the steps on which plaintiff tripped or acted negligently in failing to warn about the condition of the steps.

- ***Key Excerpt***− The Court initially determined that defendant-City was not immune from suit for tort liability under these facts. "Here, Defendant received substantial revenues from multiple sources from the lease and subtenants of 212 West Main Avenue of $21,572.98 and $21,935.57 for fiscal years 2013 and 2014 respectively. These revenues included amounts Defendant received as rent payments, gift shop proceeds, as well as percentages of the amount of private artwork sold by the subtenant-artists including Plaintiff. The substantial revenue Defendant-city has received from the lease of the premises located at 212 West Main Avenue, solely to the private Art Guild, provides such a pecuniary advantage to exclude the application of government immunity as a matter of law. *See* [Glenn v. City of Raleigh, 246 N.C. 469,] at 477, 98 S.E.2d [913] at 919 [(1957)]. We view the private commercial nature of Defendant's agreement with the Art Guild to receive a 15% commission on all private art sold, Defendant's lease of the building solely to a private organization, and the Defendant's generation of substantial revenues from the lease, gift shop sales, and subtenants' rents, together as weighing heavily towards concluding Defendant's owner-

ship and maintenance of the leased building to be a proprietary function." (Citations omitted.)

The Court also held that plaintiff's forecast of evidence presented a material question of fact of whether defendant-City negligently failed to maintain the steps on which plaintiff tripped or acted negligently in failing to warn about the condition of the steps. "Viewed in the light most favorable to the non-movant, Plaintiff's evidence tends to show the following facts and circumstances. Defendant was responsible for maintaining the exterior of the building, including the steps. Defendant retained and possessed the right to inspect the premises and building at any time. At the time of Plaintiff's fall, the exit from which she left the building and fell was the only means of exit available. Plaintiff was a subtenant of the Art Guild tenant and was not a trespasser on the premises. Plaintiff's expert witness, Dr. Hunt, stated the condition of the building's steps did not meet the building code's requirements. Defendant has not forecasted any evidence tending to show the steps met code standards. Additionally, Defendant's City Manager, Edward Munn, testifying on behalf of Defendant, stated the condition of the steps was such as to necessitate repairs."

- ***Synopsis***− Appeal by plaintiff from June 2016 order. Reversed and remanded. Opinion by Judge Tyson, with Judge Elmore and Judge Dietz concurring.

Nota Bene (N.B.)
Other Recent Decision of Note

Land Use; Accessory Use; Permits; Storage Building; Stop Work Order; Standard of Review Thompson v. Town of White Lake, ___ N.C. App. ___ (No. COA16-104, Bladen− 3/7/17) (In appeal from trial court's order affirming a zoning decision by Board of Adjustment that stopped petitioner from completing construction of a storage building in a residential neighborhood, Court of Appeals reverses. "Because the superior court applied the wrong standard of review and entered its own findings inconsistent with the Board's findings, and because the parties agree the evidence did not support the Board's determination that the Building would be used for commercial purposes, we reverse both the superior court's decision and the Board's decision." (Appeal by petitioner from May 2015 order. Reversed. Opinion by Judge Inman, with Judge Bryant and Judge Tyson concurring.)).