Community and Economic Development in North Carolina and Beyond Blog: Acquiring real property for redevelopment—can local governments keep it confidential?

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The town of Renewville wants to improve the look of its downtown Main Street, which is pocked with poorly-maintained commercial buildings. The Mayor has had his eye on a few key properties on Main Street, which, if redeveloped, would transform the look and feel of downtown, perhaps spurring additional private investment in the area. After years of watching potential developers and investors "kick the tires" downtown but decline to invest, the Mayor has given up on the private sector. He now firmly believes that the town must take the lead in acquiring properties, because the private sector isn't willing. He knows, however, that if the town's interest in purchasing any particular property is made public, the owner of that property will hold out for a premium on the sale price. Can the council direct the acquisition of properties downtown and keep the town's involvement confidential during negotiations? Under North Carolina law, it depends. This post examines several situations to illustrate the possibilities.

Background on property acquisition and open meetings law

As a general matter, local government units are authorized to acquire real property for governmental purposes. Except for a few limited circumstances such as economic development (as discussed in this post), there are no particular procedural requirements imposed by law. It is largely a matter of local discretion to determine how staff is to go about acquiring property. Certainly records related to the acquisition are public records (see this 2013 on-demand webinar), but there are no general requirements to release details about real property acquisitions ahead of time (except for economic development transactions).

However, when the local process involves discussions or decisions at an official meeting of a public body (such as a town council), there are limits, imposed by the North Carolina open meetings law, regarding when the public body may enter closed session to discuss property acquisition in a confidential setting. When in closed session, the public body must restrict its discussion to the narrow topic that is statutorily permitted to be discussed in closed session. Any discussion outside of the allowable topic must be conducted in open session. My colleague Frayda Bluestein provides a quick reference guide to the open meetings law in this blog post.

Two types of closed sessions are pertinent to the scenario described at the beginning of the post:

1. Acquisition of Real Property.

G.S. 143-318.11(a)(5) permits a closed session "[t]o 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 and other material terms of a contract or proposed contract for the acquisition of real property by purchase, option, exchange, or lease." A North Carolina Court of Appeals case, *Boney Publishers v. Burlington City Council*, 151 N.C. App. 651

(2002), addressed what could be discussed in this type of closed session. The case involved a city council that went into closed session to discuss acquisition of property. A news reporter asked the council to reveal the location of the property, the identity of the owners, and the purpose of the acquisition before going into closed session. The city council refused, thus leading to the lawsuit.

In analyzing the case, the court made two important preliminary points. First, it noted that only "material terms" could be discussed in closed session, and it defined material terms as those "actually subject to negotiation." Second, the court pointed out that the General Assembly in 1994 had removed the authority to enter into closed session to "consider the selection of a site," and therefore site selection could not be discussed in closed session unless it was a term "actually subject to negotiation." The court then looked closely at the facts of the case—and carefully limited its holding to the facts of the case—and held that the information requested by the news reporter (location, owner's identity, and purpose of acquisition) was not material and must be provided in open session upon request.

2. Location or expansion of businesses.

G.S. 143-318.11(a)(4) permits a closed session "[t]o discuss matters relating to the location or expansion of industries or other businesses in the area served by the public body," and also, if appropriate, to agree on a tentative list of economic development incentives. The original purpose of this closed session, as explained by the 1979 Legislative Study Commission that recommended the original statutory language, was to protect "contacts with public groups" by a business that is considering locating or expanding in the jurisdiction. The original closed session authority did not address economic development incentives. In 1997, following a landmark economic development incentive case, the statute was amended to clarify that a board could go into closed session to agree upon a tentative list of economic development incentives, provided that final approval occurred in open session.

With that background, we can return to the Renewville scenario and explore how the open meetings law applies when the Mayor attempts to hold a closed session discussion about property acquisition.

Scenario 1: The assumed consensus scenario

The Mayor of Renewville has been telling every council member that will listen that the city should purchase a single important parcel at the corner of Main and Key Streets. Based on those earlier informal conversations, he has come to believe that there is consensus on council for the purchase of the Key parcel. At the next regularly scheduled council meeting, the Mayor calls for council to go into closed session to "instruct staff on the town's negotiating position for acquisition of real property" as permitted by G.S. 143-318.11(a)(5). A reporter is seated in the back of the room, sleeping, and barely stirs as council retires to a separate room.

Once in closed session, the mayor informs the entire council that the closed session has been called to provide instructions about the town's negotiating position for the Key parcel. The Mayor has assumed that a majority of council agrees with purchasing the Key parcel, but the parcel has never before been mentioned at an official meeting of the council. The town attorney recognizes that fact and therefore immediately stops the closed session discussion and advises the council to return to open session to state its consensus position about the site to be acquired.

Why is the attorney's advice correct?

The attorney recognized that a consensus position about acquiring the parcel had never been discussed or stated in open session. By waiting until closed session to reveal the location, the council was essentially making its decision about which site to purchase in closed session—and site selection is not a permitted topic for closed session unless it is a material term "actually subject to negotiation." The attorney's logic is straight forward. In order for the board to enter into closed session to instruct its staff on its negotiating position with respect to acquiring a parcel, it must first reach consensus about the property to be discussed—and that consensus must be reached in open session.

Some boards handle this by making a verbal announcement about the location of the property prior to entering closed session. Others include the property's address in the agenda for the meeting. Still others simply allow the discussion to proceed naturally by discussing site options in open session and then, upon coming to agreement about the site to be acquired, enter into closed session to discuss the board's negotiating position.

In this first scenario, the mayor was required to reveal the location of the site in open session. There are, however, two circumstances in which site selection can appropriately be discussed in closed session: (1) when there are multiple properties involved and the sites to be selected are a material term "actually subject to negotiation," or (2) another closed session authority is appropriate for the discussion, such as the closed session authority for discussing the location or expansion of businesses. Those situations are examined in the next two scenarios, below.

Scenario 2: The dependent properties scenario

As part of his larger acquisition strategy, the Mayor believes that two adjacent properties along Consolidation Drive can be purchased from two separate owners, and when combined into a single parcel, could be appealing to a developer. For now, however, the two Consolidation Drive properties are owned by different owners who are known to drive a hard bargain. Owning just one property is not helpful to the town, so each property will be purchased only if both properties can be purchased. In this sense, the selection of the parcels is a material term "actually subject to negotiation." At the next regular meeting, the Mayor announces that council will go into closed session to discuss the acquisition of real property.

This time, the news reporter is awake for the announcement and dutifully requests that the council reveal in open session the location of the parcel, the identity of the owner, and the purpose of the acquisition. The town attorney steps in and explains that the purpose of the acquisition is redevelopment, but that the location of the parcels and the identity of the owners will not be revealed in open session because they are material terms and are "actually subject to negotiation."

Has the council complied with the open meetings law?

Yes. This is clearly permissible—even the Court of Appeals in *Boney Publishers* stated that when an "acquisition involved different tracts of land with different owners, such facts could be protected by the statute from the requirement of disclosure in an open session because they would be material to the terms of any proposed contract to be negotiated." Accordingly, in this second scenario, the board can lawfully go into closed session to instruct the town manager about the town's negotiating position without revealing the location of the properties and the identities of the owners in open session.

Scenario 3: The business-requested property acquisition scenario

The Mayor isn't the only one interested in downtown. A medium-sized company with branch offices stretching from Virginia to South Carolina is interested in locating its headquarters office downtown. A company representative requests to meet with the town council to explain what the company needs from the town—and insists that the company will not seek incentives. The mayor invites the representative to attend the next regularly scheduled meeting.

At the meeting, the town enters closed session to discuss matters relating to the location or expansion of a business. No incentives will be discussed, but a closed session is still permitted to protect business contacts with public groups. In closed session, the company representative shares that a building at the corner of Main Street and Enterprise Drive meets the company's site location criteria, but the company wants to learn more about the town's plans for downtown and the condition of public infrastructure. The representative reiterates that no incentives are desired, but he encourages the town to "lock up" the property until the company makes its final decision about its headquarters location, which will occur before the end of the year. If the company chooses the town for its headquarters, the company would be willing to buy the Enterprise Drive property from the town for fair market value. While still in closed session, council unanimously agrees that the town must acquire the property to ensure it isn't sold before the company makes a decision.

After the representative departs, the council begins to discuss how much it would be willing to pay for the property, when the town attorney stops the discussion. Council went into closed session to protect contacts with a business, not to instruct staff regarding its negotiating position for the acquisition of property. Under advice from the town attorney, the town concludes its closed session on the business location matter, goes back into open session, takes care of some other business, and then announces it will be going back into closed session to instruct agents on acquisition of property.

The faithful news reporter, hyped up on No-Doze, asks for the location of the parcel and the purpose of the acquisition. The town attorney responds that the purpose of the acquisition is for economic development, and the location was decided in an earlier closed session on a business location matter. The council properly discussed and made the site selection decision in an earlier closed session. No further information will be provided, as it would frustrate the purpose of the prior

closed session to reveal the location. (The attorney envisions a situation in which the local anti-growth league convinces the owner not to sell in order to thwart the company's arrival.)

Is the town attorney's response to the reporter correct under the open meetings law?

Probably yes, though the absence of case law directly on point must be acknowledged. We know that under the specific facts of the *Boney Publishers* case, the governing board was required to reveal upon request, in open session, the non-material terms that were not actually subject to negotiation. One of those non-material terms was the location of the property. However, the facts in *Boney Publishers* did not contemplate a situation in which the location of the parcel, although not actually subject to negotiation, was properly discussed and decided upon in a separate closed session. The facts in this third scenario can therefore be distinguished from *Boney Publishers*, where the court was careful to limit its holding to the facts of that case.

Scenario 4: Acquisitions by staff without specific prior approval of the public body

Are there other ways for the town to acquire real property without first announcing its interest publicly? One possibility is for an acquisition to be undertaken by staff (or agents) without specific prior approval of the public body. Keep in mind that *Boney Publishers* did not create a new general obligation for local governments to announce the details of every property acquisition ahead of time—it merely addressed the limited situation of the public's right to information about non-material terms before a public body enters closed session to discuss real property acquisition. In the example of Renewville, the council could make a general delegation of authority to the town manager to hire an agent to negotiate and enter into purchase or option contracts as the town manager deems appropriate. The delegation could be limited to purchases or options under a certain dollar amount and for specific enumerated purposes. Should such a broad delegation of authority to the town manager or other agent be attempted, the delegation and any acquisition policy should be approved in open session (no closed session authority applies). And, of course, any documents or contracts related to such policy or process would be public record.

Final approval could still be reserved for the public body (and must be reserved for the governing board for acquisitions related to economic development). It is common for purchase contracts to contain a brief no-obligation due diligence period during which the purchaser may investigate the property and cancel the purchase contract for any reason without penalty. Such provisions could allow the unit's agent to enter into a purchase or option contract while reserving final approval of the acquisition for the board—approval which could be discussed and voted in open session.