Open Meetings and Other Legal Requirements for Local Government Boards

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This article describes various legal requirements that affect elected and appointed local governing boards. In addition to the county and city elected governing boards, there are many other appointed boards that carry out important functions and activities at the local government level. The North Carolina open meetings law applies to all public bodies, including local elected and appointed boards, councils, and commissions, and to subcommittees of these bodies. County and city governing boards are subject to additional state statutory requirements regarding meetings and voting. There are numerous locally appointed boards as well. Some are governed by state statutory requirements, such as rules about voting and conflicts of interest for quasi-judicial boards. Many locally appointed boards are created by local ordinance and are governed primarily by the rules and requirements set out in those ordinances.

The first section of this chapter provides a summary of the open meetings law. The second section deals with procedures that apply only to governing boards of counties and cities. The final section outlines how to determine the procedures that apply to statutorily mandated and locally appointed boards and commissions.

Open Meetings Law Requirements for All Public Bodies

Overview

The North Carolina open meetings law[1] gives the general public a right to attend official meetings of public bodies, except in those cases where the law permits closed sessions. The law defines the types of public entities and meetings to which it applies and sets out mandatory forms and timing of notice that must be provided. If public officials conduct a meeting and do not comply with the notice and access requirements under the law, there is no immediate legal consequence. Rather, the law creates a legal remedy for a person who has been denied access to the meeting to seek redress in court, as further outlined below. Failure to comply with the open meetings law often does, however, create negative publicity for the public body and may diminish the public's trust and confidence in their local government representatives.

Public Right of Access to Open Meetings

The public's right to attend meetings of public bodies represents a strong policy in favor of transparency in local government decision making. Compliance with the notice requirements is an essential element of providing the mandated access. As part of the right of access, the law allows media broadcast of meetings and permits any person to photograph, film, tape-record or otherwise reproduce any part of an open meeting.[2] The open meetings law does not, however, provide the public any right to speak at public meetings. As noted later in this chapter, a separate statute requires regular public comment periods at certain governing board meetings. Public hearings also provide opportunities for public input and are required for some types of actions.[3] Other than these provisions, however, there is no general right for members of the public to be heard by, or to hear from, members of public bodies. It is up to each board to establish, in its discretion, additional opportunities for public input, either at meetings or through other channels. For a more complete discussion of citizen involvement in local government, see Article XXX, Citizen Participation[x-ref].

Official Meetings of Public Bodies

The notice and access requirements under the open meetings law are triggered when there is an "official meeting" of a "public body." The statute[4] defines the term *public body* as any elected or appointed board, commission, committee, council, authority, or other body in state or local government that (1) has at least two members and (2) exercises or is authorized to exercise any of these powers: legislative, policy-making, quasi-judicial, administrative, or advisory. This definition—and thus the scope of the statute—is very broad. Public bodies in county or city government include the elected governing board; each committee of that board, whether it is a standing committee or an ad hoc committee; boards created by statute, such as the board of health and the board of social services; and each body established by action of the governing board, such as a planning board, a zoning board of adjustment, a parks and recreation commission, or a human relations commission. Other local level governing boards include local boards of education, community college boards of trustees, and governing boards of public hospitals.

All official meetings of public bodies must be open to the public, unless the purpose of the meeting is one for which a closed session is allowed under the statute. As defined in the statute[5] an official meeting occurs whenever a *majority* of the members of a public body gather together to take action, hold a hearing, deliberate, or otherwise transact the business of the body. Even an informal gathering that includes a majority of the board triggers the statute if the members discuss or otherwise engage in the business of the public body.

Meetings solely among the professional staff of a public body and purely social gatherings among members of a public body are specifically excluded from the requirements of the law.

1. N.C. Gen. Stat. (hereinafter G.S.) Ch. 143, Art. 33C, §§ 143-318.9 through -318.18.
2. G.S. 143-318.14.
3. Public hearings are only required when a statute specifically calls for them. *See* David Lawrence, "When Are Public Hearings Required," *Coates' Canons: NC Local Government Law Blog* (Aug. 21, 2009), http://canons.sog.unc.edu/?p=77.
4. G.S. 143-318.10(b).
5. G.S. 143-318.10(d).

The definition of official meeting makes clear that an official meeting occurs by the simultaneous communication, in person *or electronically*, by a majority of the board. Because the definition includes electronic communication, a telephone call or email communication that involves a simultaneous conversation among a majority of a public body would violate the open meetings law if notice and access are not provided.

Notice Requirements

A key component of the open meetings law is the requirement to provide advance notice of meetings. The statute[6] requires that each public body give public notice of its official meetings, even those that will be conducted in closed session. These requirements apply to meetings of the governing board, to meetings of each appointed board, and to meetings of each committee of any of these boards. The type of notice required depends on the nature of the meeting, as described below. Specific additional types of notice required for county and city *governing boards* are described later in this chapter.

Regular Meetings

If a public body holds regular meetings, it gives public notice of those meetings by filing its schedule of regular meetings in a central location. For public bodies that are part of a county government, that location is the office of the clerk to the board of commissioners. For public bodies that are part of a city government, that location is the office of the city clerk. For local public bodies not part of a county or city, such as a local board of education, that location is the office of its clerk or secretary. The law also requires the schedule of regular meetings to be posted on the public body's website, if it maintains one. Once this notice is properly filed and posted, no other public notice is required for regular meetings held pursuant to the schedule. Changes in the regular meeting schedule are made by filing and posting a revised schedule at least seven days before the first meeting to occur under the revised schedule.

Special Meetings

If a public body meets at some time or place other than that shown on its regular meeting schedule, or if the public body does not meet on a regular schedule, it must give special meeting notice. Such a notice sets out the time, place, and purpose of the meeting and is provided in three ways. First, it must be posted on the *principal bulletin board* of the public body (or on the meeting room door if there is no principal bulletin board). Second, it must be mailed, emailed, or delivered to any person who has made a written request for notice of special meetings. Third, it must be posted on the website of the public body, if it has one. Each of these forms of notice must occur at least forty-eight hours before the meeting. A public body may require media requests to be renewed annually. Non-media requesters may be required to renew quarterly and must be charged a fee of $10 per calendar year. No fee may be charged for email notices.

It is important to note that the statute requires the notice to specify the *purpose* of the meeting. Public bodies should be careful when conducting special meetings not to discuss or take action on matters not included in the scope of the notice.

Emergency Meetings

If the public body must meet within less than forty-eight hours, notice must be given to all *local* news media that have requested notice. Notice may be given by telephone or email or by the same method used to notify the members of the public body. An emergency meeting may be held only to address "generally unexpected circumstances that require immediate consideration by the public body," and only matters meeting this standard may be discussed at the meeting.[7] As noted later in this chapter, because of a separate notice requirement for city council members, a city council usually must allow at least six hours when scheduling an emergency meeting.[8]

6. G.S. 143-318.12.
7. G.S. 143-318.12(b)(3).
8. *See* G.S. 160A-71(b)(1).

Recessed Meetings

If a public body is in a properly noticed regular, special, or emergency meeting, it may recess that meeting to a time, date, and place certain. Notice of a recessed meeting is provided by announcing the time, date, and place of the recessed meeting in open session at the original meeting. In addition, the statute[9] requires notice of the recessed meetings to be posted on the public body's website, if it has one.

Closed Sessions

The open meetings law authorizes a public body to meet in closed session for any of nine specific reasons listed in the statute.[10] This authority applies to all public bodies (not just governing boards), although many appointed boards rarely have justification to meet in closed session.

Procedures for Closed Sessions

A closed session can be a part of any regular, special, or emergency meeting, and the applicable notice of the meeting must be given, even if the entire meeting consists of the closed session. If a public body wishes to hold a closed session, the body must first meet in open session and then vote to hold the closed session. It is not sufficient for the presiding officer simply to announce that a closed session will be held. Rather, there must be a motion to go into closed session, and the motion must identify the permissible purpose from among those authorized in the statute. (A specific citation is not necessary as long as it is clear from the motion which provision is being invoked.) Once the closed session is complete, the public body must return to the open session to complete its business or to adjourn.

A brief overview of the closed session purposes most commonly used by local governments is set out below. For more detail, see the School of Government publication *Open Meetings and Local Governments in North Carolina: Some Questions and Answers.*[11]

Confidential Records

A public body may meet in a closed session to discuss information that is part of a record that is confidential or otherwise not available to the public.[12] Thus, for example, a board of social services may have a closed session to discuss matters involving recipients of public assistance, because records about recipients are closed to public access. A motion to go into closed session under this provision must state the name or citation of the law that makes the information privileged or confidential.[13]

Attorney Consultations

A public body may meet in closed session with its attorney to discuss matters that are within the attorney–client privilege—that is, legal subjects.[14] While in the closed session, the public body may give instructions to the attorney about handling or settling claims, litigation, or other proceedings. If a board meets in closed session under this provision in order to receive advice about an existing lawsuit, the motion to go into closed session must identify the parties to the lawsuit.[15] The basis for this exception to the open meetings law is to preserve the attorney–client privilege. This means that the meeting cannot legally include any person who is not within that privilege.[16]

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9. G.S. 143-318.12 (e).
10. G.S. 143-318.11(a)(1) through (9).
11. David M. Lawrence, *Open Meetings and Local Governments in North Carolina: Some Questions and Answers* (UNC School of Government, 7th ed. 2008).
12. G.S. 143-318.11(a)(1).
13. G.S. 143-318.11(c).
14. G.S. 143-318.11(a)(3).
15. *Id.*
16. For more detail on the scope of the attorney–client exception, see David M. Lawrence, "Closed Sessions Under the Attorney–Client Privilege," *Local Government Law Bulletin* 103 (Apr. 2002), www.sogpubs.unc.edu/electronicversions/pdfs/lglb103.pdf.

Economic Development

A public body may have a closed session to discuss matters relating to the location or expansion of businesses in the area served by the public body.[17] This is the authority under which a public body may in closed session develop an incentives package to attract a new business or encourage an existing business to expand.

Purchase of Real Property

A public body may hold a closed session to develop its negotiating position in the purchase of real property, and it may, while in closed session, give instructions to its bargaining agent in that transaction.[18] Note that this provision *does not* authorize a public body to meet in closed session when it is *selling* real property.[19]

Employment Contracts

A public body may hold a closed session to develop its position in the negotiating of an employment contract, and it may, while in closed session, give instructions to its negotiating agent in that transaction.[20]

Public Employees

A public body may hold a closed session to consider the qualifications, competence, performance, character, fitness, and conditions of appointment or employment of a public employee or public officer.[21] In addition, a public body may hold a closed session to hear or investigate a complaint, charge, or grievance by or against a public officer or employee.[22] A public body may not use this provision to discuss members of the public body itself or members of other public bodies. This provision does not allow closed session discussions of general personnel policies. It applies only to matters involving specific employees of the unit, and does not extend to independent contractors or volunteers.

Criminal Investigations

A public body may hold a closed session to plan, conduct, or hear reports concerning an investigation of alleged criminal conduct.[23]

Minutes and General Accounts

The open meetings law requires public bodies to prepare "full and accurate minutes" of all meetings and a "general account" of closed sessions.[24] Separate statutes for county[25] and city[26] governing boards also require each board, through its clerk, to keep full and accurate minutes of its proceedings. Although the statutes do not detail what full and accurate minutes should include, the proper content of board minutes is suggested by their purpose, which is to provide an official record, or proof, of governing board actions. Therefore, at a minimum the minutes should include two sorts of material: (1) the actions taken by a board, stated specifically enough to be identified and proved; and (2) proof of any conditions necessary to action, such as the presence of a quorum. Additional detail about matters that were discussed or individuals who addressed the board is often included but is not legally required. Minutes should be approved by the public body. The statutes do not establish a specific time frame within which minutes must be prepared or approved.

17. G.S. 143-318.11(4).
18. G.S. 143-318.11(5).
19. Procedures for selling real property are governed by Article 12 of Chapter 160A of the North Carolina General Statutes and are described in Article XXXX[X-ref] of this publication.
20. G.S. 143-318.11(a)(5).
21. G.S. 143-318.11(a)(6).
22. *Id.*
23. G.S. 143-318.11(a)(7).
24. G.S. 143-318.10(e).
25. G.S. 153A-42.
26. G.S. 160A-72.

As noted, the purpose of minutes is to provide an official record, or proof, of council action. In a judicial proceeding, the minutes are the only competent evidence of council action, and as such, they may not be attacked on the ground that they are incorrect. Once approved, minutes may be modified in only two ways: (1) a person may bring a legal action alleging that the minutes are incorrect and seeking a court order to correct them; and (2) much more common, a council may itself modify its minutes if they are found to be incorrect.

Since public bodies have limited authority to take action in closed sessions, minutes of closed sessions can be quite skeletal. For closed sessions, the open meetings law requires, in addition to minutes, a general account of the closed session. The statute requires that the general account be detailed enough "so that a person not in attendance would have a reasonable understanding of what transpired."[27] It is common for boards to combine the minutes and general account in a single document.

Minutes are generally open to the public under the public records law (see Article XXX[x-ref]) and must be permanently retained. Closed session minutes, however, may be withheld from public access (sealed) for as long as is necessary to avoid frustrating the purpose of the closed session. Many public bodies initially seal all minutes and general accounts of closed sessions and then delegate to their attorney or other staff the responsibility for periodically reviewing these documents and opening them to public access when that is appropriate. Closed session minutes should be approved by the public body, and it may hold a closed session to do so.[28]

Remedies

There are two statutory remedies for correcting violations of the open meetings law. The first is an injunction.[29] Any person may seek an injunction to stop the recurrence of past violations of the law, the continuation of present violations, or the occurrence of threatened future violations. The second is the invalidation of any action taken or considered in violation of the law.[30] Action taken at a meeting held in violation of the open meetings law is not automatically invalid, but a trial judge does have the option of entering such an order if a lawsuit is filed seeking that remedy. The court may award attorneys' fees to the prevailing party in a lawsuit alleging a violation of the open meetings law, and it may order that they be paid personally by individual members of the public body if they are found to have knowingly or intentionally violated the law.[31] Individuals cannot be held liable for costs if they follow the advice of counsel.

Additional Meeting Requirements for County and City Governing Boards

Boards of county commissioners and city councils hold ultimate authority to act for the local government. Article 5, "County and City Governing Boards,"[x-ref] describes the structure and roles of these important bodies. This section describes some of the specific meeting requirements that apply—in addition to those under the open meetings law—to these governing boards.

Governing Board Meetings

Specific statutes in Chapters 153A (counties) and 160A (cities) of the North Carolina General Statutes prescribe procedures for governing board meetings that supplement the requirements of the open meetings law. Both sets of requirements must be met.

27. G.S. 143-318.10(e). A case that sets out an acceptable general account is *Multimedia Publishing Co. of N.C., Inc. v. Henderson County*, 145 N.C. App. 365 (2001).

28. G.S. 143-318.11(a)(1).

29. G.S. 143-318.16.

30. G.S. 143-318.16A.

31. G.S. 143-318.16B.

Organizational Meetings

After each election the newly elected (or re-elected) members must qualify for office by taking and subscribing the oath of office. In addition, the governing board must organize itself. The meeting at which these events take place is known as the *organizational meeting.*

Counties

G.S. 153A-26 directs that each commissioner elected or re-elected at the November election must take the oath of office on the first Monday in December following the election; at the same time, the board elects its chair and vice-chair for the ensuing year. If a commissioner is unable to take the oath at that time, he or she may take it later.

Cities

Unless a council sets an earlier date,[32] a city council's organizational meeting is held at the board's first regular meeting in December following the election. At the organizational meeting, all newly elected and re-elected members, and the mayor, if newly elected or re-elected, must take the oath of office. If the city is one in which the board elects the mayor, this is done at the organizational meeting. The board must also elect a mayor pro tempore.[33]

Regular Meetings

Counties

G.S. 153A-40 directs boards of county commissioners to hold at least one meeting each month, although they may meet more often if necessary. Many boards hold two regular meetings each month. The board may select any day of the month and any public place within the county for its regular meetings, but unless it selects some other time or place by formal resolution, the law requires the board to meet on the first Monday of the month at the courthouse.

Cities

G.S. 160A-71 directs each city's governing board to fix the time and the place of its regular meetings. If the board fails to act, the statute provides that meetings shall be held on the first Monday of each month at 10:00 a.m. Cities are not required to hold a meeting every month.

Special Meetings

Although both county commissioners and city councils may hold special meetings, the statutes under which they may do so are somewhat different. Under the county and city statutes governing meeting notice, a *special meeting* is any meeting other than a regular meeting.[34]

In general, a governing board may take any action at a special meeting that it may take at a regular meeting. A few exceptions do exist, however, as some statutes require action to be taken at a regular meeting. Examples include adoption of ordinances awarding or amending franchises and action on several procedures for selling property. (Even so, a board may *discuss* these matters at a special meeting; it simply may not act.) Because of these exceptions, before taking any action at a special meeting, a board should consult its attorney to ascertain whether it may properly take the action. As noted earlier, it is also important to limit actions taken at special meetings to those matters identified in the notice of the meeting.

Governing boards must comply with the separate requirements for notice to the public of special and emergency meetings under the open meetings law as well as the procedures for notice to the board members, as described below.

32. G.S. 160A-68 permits a board to establish an earlier date, which may be any date within the period beginning on the day that the election results are officially determined and published and ending on the day that the board holds its first regular meeting in December.

33. G.S. 160A-70 specifies that the mayor pro tempore is to serve at the pleasure of the governing board.

34. G.S. 153A-40(b); G.S. 160A-71((b)(1).

Counties

G.S. 153A-40 permits a special meeting to be called by the chair or by a majority of the other board members. The law sets specific rules for calling special meetings. They must be called by written notice stating the time, place, and subjects to be considered. This notice must be posted on the courthouse bulletin board and delivered to each board member at least forty-eight hours before the meeting. Unless all members attend the meeting or sign a written waiver, only business related to the subjects stated in the notice may be transacted at a special meeting. It is important to remember, however, that expansion of the subjects to be addressed in a special meeting, even if allowed under this statute, may violate the open meetings law.

Cities

G.S. 160A-71 permits special meetings of a city council to be called in either of two ways. First, if a board is convened in a regular meeting or a duly called special meeting, it may schedule a special meeting. Second, the mayor, the mayor pro tempore, or any two members of the board may call such a meeting. They may do so by preparing and signing a written notice of the meeting—setting out the time and place and the subjects to be considered—and causing this notice to be delivered to each board member (or to his or her home). The notice must be delivered at least six hours before the meeting, but as noted earlier, the open meetings law requires forty-eight hours' *public* notice of a special meeting.

Emergency Meetings

Counties

G.S. 153A-40 provides that notice to board members is not required for a special meeting that is called to deal with an emergency, but it requires the person or persons calling the meeting to take reasonable actions to inform the other board members and the public of the meeting.

Cities

The city statutes do not specifically address emergency meetings. This means that the six-hour notice for special meetings applies to these types of meetings. Even though there is no minimum time for public notice of emergency meetings under the open meetings law, the six-hour board member notice requirement will usually limit a city's ability to hold a meeting with less than six hours notice. If, however, an emergency meeting is set in a regular or duly called special meeting, the six-hour notice requirement does not apply.

Meeting Location

While county commissioners' meetings are generally held within the county, G.S. 153A-40 permits out-of-county meetings in four specific instances (and not otherwise):

1. In connection with a joint meeting of two or more public bodies, as long as the meeting is within the boundaries of the political subdivision represented by the members of one of the participating bodies;
2. In connection with a retreat, forum, or similar gathering held solely to provide the county commissioners with information relating to the performance of their public duties (no vote may be taken during this type of meeting);
3. In connection with a meeting between the board and its local legislative delegation while the General Assembly is in session, as long as no votes are taken except concerning matters directly relating to proposed or pending legislation;
4. While the commissioners are attending a convention, association meeting, or similar gathering, if the meeting is held solely to discuss or deliberate on the board's position concerning convention resolutions, association officer elections, and similar issues that are not legally binding.

There are no comparable statutory restrictions on the location of city council meetings.

Rules of Procedure

Each governing board has the power to adopt its own rules of procedure. Exercise of this power can help prevent arguments over procedure that cannot otherwise be satisfactorily resolved. Boards often base their rules on *Robert's Rules of Order* or similar sources. Boards should be careful, however, to adapt these models, which are primarily intended for large groups, to the special needs of a small board. The School of Government publishes two resources—*Suggested Rules of Procedure for the Board of County Commissioners*[35] and *Suggested Rules of Procedure for a City Council*[36]—that are adaptations of *Roberts Rules* designed specifically for North Carolina county and city governing boards.

Quorum

As noted earlier, a governing board may take action only during a legally constituted meeting. A meeting is legally constituted only when a quorum is present. As described below, the rules for determining a quorum are slightly different for counties and cities.

In both counties and cities, once a quorum has been attained and the meeting convened, a member may not destroy the quorum by simply leaving. G.S. 153A-43, for counties, and G.S. 160A-74, for cities, both provide that if a member withdraws from the meeting without being excused by a majority vote of the remaining members present, he or she is still counted as present for purposes of a quorum. In addition, the city statute provides that the member is counted as voting "yes" on all matters that come before the board after he or she leaves. There is no comparable provision in the county statute, but many boards of commissioners have adopted the same rule by board action.

Counties

G.S. 153A-43 defines a quorum as a majority of the membership of the board of commissioners, and it provides that the number is not affected by vacancies. Thus, if a board has six members, its quorum is four; and if there is a vacant seat, the quorum remains four.

Cities

G.S. 160A-74 defines a quorum as a majority of the actual membership of the council, including the mayor but excluding vacant seats. Thus, if a city is governed by a five-member board plus the mayor, the actual membership of the group is six, and a quorum is four. If one seat is vacant, however, the membership becomes five, and a quorum is three.

Governing Board Action

Governing boards take action in a variety of forms: ordinances, resolutions, motions, and orders. Textbooks usually define *ordinance* as a permanent rule of conduct imposed by a county or city on its citizens. Thus, ordinances may limit the amount of noise that citizens may make, regulate how they may use their land, or require their businesses to treat sewage before discharging it into the government's system. In North Carolina, local governments also appropriate money and levy taxes by ordinance.

The other sorts of actions are less precise in their meaning. Textbooks often define *resolutions* as expressions of board opinion on administrative matters and *motions* and *orders* as actions resulting in or expressing a decision. Thus, a board might set out the unit's policy on extension of utilities by resolution while approving specific extensions by motion or order. In practice, the distinction is not always so carefully drawn; often one board takes actions by order or motion that another takes by resolution.

Voting Rules

Both county commissions and city councils are subject to complicated rules that determine whether a measure has passed. In both counties and cities, the number of board members who must vote for a measure in order for that

35. Joseph S. Ferrell, *Suggested Rules of Procedure for the Board of County Commissioners* (UNC School of Government, 3d ed. 2002).
36. A. Fleming Bell, II, *Suggested Rules of Procedure for a City Council* (UNC School of Government, 3d ed. 2000).

measure to pass differs according to a number of factors: whether the measure is an ordinance or some other form of action, when the measure first comes before the governing board, and whether any members have been excused from voting on the measure. The actual provisions, however, differ between counties and cities.

Counties

The law does not regulate the manner in which orders and resolutions are adopted by a board of commissioners beyond the minimum requirement of a valid meeting at which a quorum is present, but several laws govern the adoption of ordinances.[37] An ordinance may be adopted at the meeting at which it is introduced only if it receives a unanimous affirmative vote, with all members of the board present and voting. If the ordinance passes at this meeting but with less than a unanimous vote, it may finally be passed by a majority of votes cast (a quorum being present) at any time within 100 days of its introduction. This rule does not apply to the following ordinances:

- The budget ordinance (which may be passed at any meeting at which a quorum is present);
- Any bond order (which always requires a public hearing before passage and in most cases requires approval by the voters as well);
- Any ordinance on which the law requires a public hearing before adoption (such as a zoning ordinance);
- A franchise ordinance (which must be passed at two separate regular meetings of the board).

City Ordinances

To be adopted on the day that it is introduced, a city ordinance must be approved by a vote of at least two-thirds of the actual membership of the council, excluding vacant seats. This rule applies to any city action that has the effect of an ordinance, no matter how it is labeled. In determining actual membership, the mayor is not counted unless he or she has the right to vote on all questions before the board. Thus, if a board has seven members and is presided over by a mayor who votes only to break ties, five members must vote in favor of an ordinance for it to be adopted on the day that it is introduced. If there is a vacant seat, however, the actual membership is then six, and only four votes are required to adopt the ordinance on that first day.

Given this special rule pertaining to the day of introduction, what constitutes introduction? The statute states that the day of introduction is the day on which the board *first votes on the subject matter* of the ordinance.[38] Examples of such a vote might include a vote to hold a hearing on the ordinance, refer it to committee, or try to pass it.

After the day on which it is introduced, an ordinance may be adopted by an affirmative vote equal to at least a majority of the board membership; vacancies do not affect the number necessary for approval. Members who have been properly excused from voting on a particular issue (see the discussion under the heading "Excusing of Members from Voting," below) are not included in the membership for a vote on that issue. For example, a six-member board normally requires an affirmative vote of four members to adopt an ordinance. But if one member is excused on a particular issue, the board is treated as having only five members on that issue, and only three need vote affirmatively for the measure to pass.

Nonvoting mayors are not counted in determining how many members constitute the board. If there is a tie, however, the mayor's vote is counted in determining whether the requisite majority vote has been attained. Thus, if a six-member board divides three to three on an issue and the mayor votes affirmatively to break the tie, the measure has received the four votes necessary for its adoption.

G.S. 160A-75 requires a majority vote of the board membership on a few other measures besides ordinances: (1) any action having the effect of an ordinance, no matter how it is labeled; (2) any measure that authorizes an expenditure of funds or commits a board to one, other than the budget ordinance or a project ordinance; and (3) any measure that authorizes, makes, or ratifies a contract.

37. G.S. 153A-45 through -50.
38. G.S. 160A-75.

With the exceptions just noted, the general law makes no special provision for the sort of city council vote necessary to adopt resolutions, motions, or measures other than ordinances. (Some charters do require that resolutions or other actions receive the same vote as ordinances.) For these actions the rule is that action may be taken by a majority of those present and voting, as long as a quorum is present. Thus, if a board has eight members, its quorum is five; and if only five members are present, a resolution or a motion may be adopted by a vote of only three of the five.

Excusing Members from Voting

G.S. 153A-44, for counties, and G.S. 160A-75, for cities, permit a board member to be excused from voting in two circumstances in which there is a potential conflict of interest: (1) when the question involves his or her own financial interest, and (2) when it involves his or her official conduct. In addition, these two statutes reference three other statutes that *prohibit* a board member from voting in certain circumstances because of a financial conflict: G.S. 14-234, when the board member may be interested in a contract being approved or considered by the board; G.S. 153A-340 or G.S. 160A-381, when the board is considering a zoning ordinance amendment that is likely to have a "direct, substantial, and readily identifiable financial impact on the member"; and G.S. 153A-345 or G.S. 160A-388, when the board is acting on a land use matter in a quasi-judicial capacity and the board member's participation would violate the constitutional requirement of an impartial decision maker. These statutes are discussed in more detail on Article XXXX, Ethics and Conflicts of Interest[x-ref].

In those situations in which the statutes do not expressly prohibit the interested board member from voting, the county statute specifies that the board must vote to excuse a member. The city statute is silent as to procedure, but unless the board has adopted a procedural rule authorizing a member to be excused by the mayor or to excuse himself or herself, such an abstention should be allowed only by vote of the remaining board members. If a member is excused, that member should neither vote nor participate in any way in the deliberations leading up to the vote.

Unless a board member is excused, he or she must vote; the statutes do not authorize unexcused abstentions. If a council member persists in abstaining without being excused, G.S. 160A-75 directs that the member be counted as voting yes. There is no comparable provision in the county statute, but many boards of county commissioners have adopted such a provision by rule.

The rules for mayors are slightly different than for commissioners or council members. If a mayor is elected by and from the board, he or she remains a board member and must vote. But a mayor who may vote only to break a tie has the option of not voting at all. The statute allows, but does not require, the mayor to break a tie. If he or she refuses to break a tie, the measure is defeated.

Public Hearings and Public Comment

As noted earlier, the open meetings law allows the public to attend meetings but does not provide a right to be heard. The public has opportunities for public comment through hearings and public comment periods. Some hearings are required,[39] such as the hearing on the budget ordinance, a bond ordinance, or a zoning ordinance or amendment. Others are held on the board's own initiative to give interested citizens an opportunity to make their views known to the board on a controversial issue, such as a noise-control or towing ordinance.

State statutes also require boards of county commissioners, city councils, and school boards to offer at least one public comment period each month during a regular meeting, at which members of the public may comment on local government affairs more broadly.[40] This public comment period is discussed in more detail in Article XXXX's[x-ref] discussion of citizen participation.

The laws that require public hearings do not specify the manner in which they must be conducted; the laws only require that they be held. Nevertheless, G.S. 153A-52 and -52.1, for counties, and G.S. 160A-81 and -81.1, for cities, allow the board to adopt reasonable rules governing the conduct of public hearings and public comment periods. These rules

39. Public hearings are required only when a statute specifically calls for them. *See* David Lawrence, "When Are Public Hearings Required," *Coates' Canons: North Carolina Local Government Law Blog* (Aug. 21, 2009), http://canons.sog.unc.edu/?p=77.

40. G.S. 153A-52.1 (counties); G.S. 160A-81.1 (cities); G.S. 115C-51 (schools).

may regulate such matters as allotting time to each speaker, designating who will speak for groups, selecting delegates from groups when the hearing room is too small to hold everyone who wants to attend, and maintaining order as well as decorum. The statutes requiring public hearings and comment periods create constitutionally protected rights of expression for members of the public. Governing boards must be careful when regulating conduct to avoid restricting speakers based on the opinion or point of view they are expressing.

Rules for Quasi-Judicial Proceedings

County and city governing boards, as well as some types of appointed boards, sometimes function in a quasi-judicial capacity. Examples include decisions on certain types of land use permits or zoning variances and appeals of personnel actions. In these settings, boards are limited in their process and decision making by principles of due process, which is required because these actions affect constitutionally protected property rights. As noted above, the legislature has enacted specific voting rules to avoid conflicts of interest that apply in these situations. In addition, quasi-judicial hearings must be conducted consistent with the basic rules for a legal proceeding, including swearing in of witnesses and decisions based exclusively on evidence presented in the proceeding. These types of hearings should be distinguished from those designed to provide open forums for public comment or opinion. Indeed, only those who are qualified as witnesses or who have a stake in the outcome may speak at quasi-judicial hearings.

Remote Participation in Meetings

A board member who is unable to attend a meeting may wish to participate remotely by phone or Internet connection. The question of whether a person must be physically present to count toward a quorum is unclear under the statutes. The open meetings law definition of *official meeting* includes electronic meetings.[41] But the open meetings law applies to all public bodies throughout the state, not just to local government boards, and it does not specifically authorize or even address the use of electronic meetings or individual electronic participation by local government boards. As noted above, the quorum and voting statutes refer to members being "present,"[42] but courts in other states have found that a person may be considered to be present when participating remotely. Until there is more specific guidance from the legislature or the courts, remote participation may create a risk if the remote participant casts a deciding vote or is necessary to create a quorum. On the other hand, there is no legal risk if a member participates in a discussion (no vote being taken) or if there is a sufficient number of board members physically present to constitute a quorum. It is up to the governing board, in any event, to decide whether and under what circumstances to allow remote participation. Local governments may also authorize remote participation for boards they create and appoint. Boards that wish to allow remote participation should establish policies governing when it will be allowed.[43]

Meeting Requirements for Appointed Boards

The preceding section of this chapter focused on rules that apply to county and city governing boards. Appointed boards are, of course, subject to the open meetings law but not to many of the more specific rules described above.

For purposes of understanding meeting requirements for appointed boards, it is helpful to consider them in two categories: those created by statute and those created by local county or city ordinance. Statutory boards include social services, public health, and ABC boards. Statutes establishing these boards include specific procedural and other requirements. Other boards and commissions are created by local ordinance or resolution under the governing

41. G.S. 160A-75.

42. G.S. 153A-44, 160A-74.

43. For a more detailed analysis of the legal aspects of remote participation, along with considerations for local policies, see Frayda S. Bluestein, "Remote Participation in Local Government Board Meetings," *Local Government Law Bulletin 133* (Aug. 2013), http://sogpubs.unc.edu/electronicversions/pdfs/lglb133.pdf.

boards' general authority to organize the local government[44] or under more specific authority, such as that authorizing the creation of boards of adjustment.[45]

Statutes establishing or allowing the creation of specific appointed boards may include membership and procedural requirements that must be met. County and city governing boards establish other local boards by adopting ordinances, which contain the membership, purpose, and procedure under which they are to operate. Two School of Government resources are recommended for the creation and operation of these types of boards: *Suggested Rules of Procedure for Small Local Government Boards*[46] and *Creating and Maintaining Effective Local Government Citizen Advisory Committees*.[47]

Additional Resources

Additional information can be found by searching *Coates' Canons: NC Local Government Law Blog* (http://sogweb.sog.unc.edu/blogs/localgovt) using the keyword "open meetings." Also see David M. Lawrence, *Open Meetings and Local Governments in North Carolina: Some Questions and Answers* (UNC School of Government, 7th ed. 2008).

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44. G.S. 153A-76 (counties); G.S. 160A-146 (cities).

45. G.S. 153A-345 (counties); G.S. 160A-388 (cities).

46. A. Fleming Bell, II, *Suggested Rules of Procedure for Small Local Government Boards* (UNC School of Government, 2d ed. 1988).

47. Vaughn Mamlin Upshaw, *Creating and Maintaining Effective Local Government Citizen Advisory Committees* (UNC School of Government, 2010).