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
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## MEMORANDUM

To: Nathan A. Miller, Chairman  
Watauga County Board of Commissioners

From: Stacy C. Eggers, IV   
Attorney for the County of Watauga

Date: April 11, 2013

Re: Closed Session Discussions  
N.C. Gen. Stat. §143-318.11

Pursuant to your request, I have researched whether it would be legal for a governmental board, such as Watauga County and the Town of Boone to enter into closed session for the purpose of conducting mediation between the two boards. Based upon a review of the relevant statutory authority and applicable case law, such an action would not be legal in North Carolina.

It is my understanding that recently the Town of Boone requested that the County agree to have a mediated settlement conference for the purposes of attempting to reach a resolution regarding the problems posed by the newly enacted "Supplemental Multi-Family Housing Standards" and the pending sale of the old Watauga High School Property. It is also my understanding that the County is agreeable to the parties engaging in such mediation, but that the Town of Boone will only agree to such mediation if it is conducted in closed session and without the presence of the public or media outlets being allowed to observe the proceedings.

N.C. Gen. Stat. §143-318.11(a) sets forth the only enumerated reasons for which an elected board may enter into closed sessions and have discussions without being observed by the citizens or the media. North Carolina has a strong public policy in favor of having open meetings, and N.C. Gen. Stat. §143-318.9 states: "Whereas the public bodies that administer the legislative [and] policy making ... functions of North Carolina and its political subdivisions exist solely to conduct the people's business, it is the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly." Additionally, a quorum of any public body cannot meet for the purpose of discussing the public business unless it is upon proper notice that such a meeting will be held, and stating the time, place, and purpose of

such meeting. Except as allowed by statute, "each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting. N.C. Gen. Stat. §143-318.10.

The following are the only enumerated reasons for which an elected board may enter into closed session:

N.C. Gen. Stat. §143-318.11(a)(1) – To prevent the disclosure of confidential or privileged information which is not subject to the public records laws

N.C. Gen. Stat. §143-318.11(a)(2) – To prevent the premature disclosure of an award or honorarium

N.C. Gen. Stat. §143-318.11(a)(3) – Attorney – Client Matters

N.C. Gen. Stat. §143-318.11(a)(4) – Economic Development and location of industry

N.C. Gen. Stat. §143-318.11(a)(5) – Land Acquisition

N.C. Gen. Stat. §143-318.11(a)(6) – Personnel Matters

N.C. Gen. Stat. §143-318.11(a)(7) – To hear reports of criminal misconduct

N.C. Gen. Stat. §143-318.11(a)(9) – To discuss responses to terrorist activities and formulate plans

In order for a discussion to properly fall within the context of obtaining or receiving advice from an attorney under the subsection for attorney – client matters, the discussion must be for the purpose of obtaining advice from the governing body's attorney. The mere presence of the attorney in the closed session meeting does not operate to convert an otherwise public discussion into one which is privileged and not subject to disclosure. *Multimedia Publishing of North Carolina v. Henderson County*, 136 N.C. App. 567 (2000). Additionally, in order to have an attorney-client discussion within the meaning of this privilege, the board could not admit unauthorized third parties to attend the discussion. To do so would waive the attorney-client privilege and make such discussion open to the general public. Op. Atty. Gen. Summerell, April 2, 1997.

An appropriate corollary to this line of reasoning relates to mediated settlement conferences in litigation matters. Under the applicable case law, a majority of a governmental board may not attend the mandatory mediated settlement conference in cases pending in Superior Court without their discussions being open to the public and the opposing party. In order to facilitate the mediation of cases in litigation, a board will typically appoint to committee (which would not be a majority of the board) to attend mediation and the committee would make a recommendation of whether to settle or resolve a pending lawsuit for the consideration of the full board. Nothing reached in such mediation would be binding upon the board unless it is accepted by the board at a regularly conducted meeting as part of its general session. However, it is my understanding that the proposal from the Town of Boone would be for each of the full boards to meet together in closed session, and the prohibition on such actions in litigated cases would apply here as well to prohibit such an action.

The other purposes set forth by N.C. Gen. Stat. §143-318.11 would not be applicable to the proposal from the Town of Boone.

If a board were to meet regarding an item which was not appropriate for closed session discussion, it would be subject to a Court order requiring such discussions to be disclosed, imposition of attorney fees against the board for the prevailing party, injunction, and would be in violation of a board members oath of office to uphold the laws of the State of North Carolina. Additionally, if board members vote to conduct such a closed session meeting in violation of State law and against the advice of counsel to the Board, such board member could be held individually liable to the prevailing party for its costs and attorney fees incurred as a result of the violation of N.C. Gen. Stat. §143-318.16B.

Therefore, it is my opinion that the Watauga County Board of Commissioners and the Town of Boone Town Council are not statutorily authorized to meet in closed session as a board for the purposes proposed by the Town of Boone. I hope this information is helpful.