STATE OF NORTH CAROLINA MOORE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION CASE NO. 22 CVS000515
NC CITIZENS FOR TRANSPARENT GOVERNMENT, INC. and KEVIN DRUM, Plaintiffs vs. THE VILLAGE OF PINEHURST, JOHN STRICKLAND in his official capacity as Mayor of the Village of Pinehurst; and JANE HOGEMAN in her official capacity as a member of the Village of Pinehurst Council, Defendants.	BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

> It is the policy of this State, as announced by the General Assembly, to conduct the public's business in public.

Boney v. Burlington City Council, 151 N.C. App. 651, 657–58, 566 S.E.2d 701, 705–06 (2001). In particular, the Open Meetings Law clearly states that when a public body considers the behavior of one of its own members, they must do so in public:

> A public body may not consider the qualifications, competence, performance, character, fitness, appointment, or removal of a member of the public body or another body and may not consider or fill a vacancy among its own membership except in an open meeting.

G.S. § 143-318.11(a)(6).

Yet, a majority of the members of the Village Council of the Village of Pinehurst repeatedly violated both the letter and the spirit of the Open Meetings

Law. In September 2021, the Council held a closed meeting to criticize one of the Councilmembers. The Council then deliberately misrepresented in the minutes what had happened to conceal their wrongdoing. In late September and October, three of the five Councilmembers communicated and deliberated through email about whether to censure the two other members. Those three Councilmembers ("the Majority") then instructed the Village Attorney to prepare resolutions to that effect. The same Majority of Councilmembers prepared and finalized a public statement for the Mayor to make about the censures.

The plaintiffs in this case are former Councilmember Kevin Drum and a nonprofit he founded to address issues of transparency in government, NC Citizens for Transparent Government, Inc. This suit seeks an order from the Court (1) declaring that the defendants violated the law and (2) enjoining them from committing such violations in the future. In considering the defendants' Rule 12(b)(6) motion, the court must accept the facts alleged and must give every benefit of the doubt to plaintiffs.

> In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, *giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom* and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

Turner v. Duke Univ., 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989) (emphasis added) (citation omitted).

FACTUAL BACKGROUND

Accepting the allegations as true, as the Court must do at the Rule 12(b)(6) stage, the following facts establish how the defendants violated Open Meetings Law.

In September 2021, the Village of Pinehurst released a notice of a special meeting that inaccurately informed the public where and when the special meeting would take place. Complaint ¶ 19. The Notice also inaccurately described what public business would be conducted at the meeting. Only five people attended the primary meeting: Mayor John Strickland, Mayor Pro Tem Judy Davis, Councilmember Lydia Boesch, Councilmember Kevin Drum, and Councilmember Jane Hogeman. Complaint ¶¶ 21, 22. The misleading public notice had indicated the meeting would be for the discussion of personnel, and Councilmember Drum did not know that the meeting would include illegal closed session discussion. Complaint ¶ 18. Instead, the meeting was an opportunity for three of the Councilmembers (Strickland, Davis and Hogeman) to excoriate Councilmember Boesch for what they perceived as her departure from proper protocol as a Councilmember. Complaint ¶¶ 22, 27, 28, 30, 31.

Following the September 20 meeting, that same Majority of the Village Council – Mayor Strickland, Mayor Pro Tem Davis, and Councilmember Hogeman – used email to covertly engage in deliberations about censures of Councilmembers Boesch and Drum. Complaint ¶ 52. The Majority engaged the Village Attorney and Village Manager in this effort, circulating drafts and finalizing both the censures

and a script of what would take place – down to the precise words to be spoken – at the October 12, 2021, meeting. Complaint ¶ 62, 63, 67, 68. Throughout the process, the Village Attorney repeatedly documented that he was acting according to "the consensus of the Council," asking what "the Council desires," and asking for "the Council's preference." Complaint ¶ 57, 64. The Village Attorney evidently thought he was taking orders from a majority of the Council, acting as the Council and enacting the Council's decisions. Complaint ¶ 74.

At the October 12 meeting, Mayor Strickland followed the script that had been developed and approved by the Majority. Complaint ¶ 71. At a related, later meeting, Mayor Strickland made a statement that he described as being the consensus of the Village Council. Complaint ¶ 74. If that statement was accurate, the consensus must have been reached through the email discussions, as there were no votes in public sessions to establish any consensus of the Council. Complaint ¶¶ 94, 95, 96, 97.

In the October 12 public meeting, the Village Attorney openly stated that he had drafted the proposed censures at the direction of "a consensus or a majority of the Village Council." The Village Attorney described what the Council had "wanted me to answer." Complaint ¶ 73. He described his work as what "the Council asked me to do" and that it was at the Council's direction." Complaint ¶ 74. Neither the public nor two other Councilmembers were made privy to this decision-making process.

ARGUMENT
THE DEFENDANTS VIOLATED THE OPEN MEETINGS LAW.

The Open Meetings Law establishes three essential requirements for public bodies: notice, access, and minutes. G.S. §§ 143-318.12, 143-318.11 and 143-318.10. These requirements apply to "official meetings" of public bodies. Boiled down to its core for purposes of this dispute, the Open Meetings Law defines an official meeting as a "simultaneous communication … of a majority of the members of a public body for the purpose of … participating in deliberations … or otherwise transacting the public business." G.S. § 143-318.10(d).[1] A public body may only exclude the public for one of 10 statutorily defined purposes. G.S. § 143-318.10.

I. The October Email Meetings Violated the Open Meetings Law.

For three reasons, the Village Council's actions constituted a meeting within the meaning of the Open Meetings Law. First, the emails *were* simultaneous communications. Second, this Court must apply the rules of construction that consistently have been recognized by North Carolina's appellate courts, interpreting liberally in favor of access. Third, by including the phrase "other electronic means," the legislature contemplated the development of additional means of meeting.

a. The Emails Were Simultaneous Communications.

The emails at issue in this case ***were*** simultaneous communications, not one-on-one, serial communications. Merriam-Webster defines simultaneous as "existing

[1] The definition reads in full: "Official meeting" means a meeting, assembly, or gathering together at any time or place or the simultaneous communication by conference telephone or other electronic means of a majority of the members of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body. However, a social meeting or other informal assembly or gathering together of the members of a public body does not constitute an official meeting unless called or held to evade the spirit and purposes of this Article." G.S. § 143-318.10(d).

or occurring at the same time." *Simultaneous*, Merriam-Webster (2022). The emails in question were sent to and received by the Majority at the same time. Just as members of a public body do not all speak at once when they are physically in the same room, they do not "all speak at once" in an exchange of emails. The emails were a discussion – a back and forth among a Majority – by which the Majority fashioned the censures and finalized a procedure and script to be used in the October 12 meeting. The work product resulting from the email discussion included the censure motions that Councilmember Hogeman introduced at the October 12 meeting and the statement that was delivered by Mayor Strickland. The emails at issue contained identical content that was communicated to a majority of the Council at the same time. For a representative description of the email exchanges, see Attachment A.

The give-and-take process that occurred during this exchange of emails mirrors what might have happened if the Majority had been together in a room. Repeatedly, Mayor Strickland, Mayor Pro Tem Davis and Councilmember Hogeman – a majority of the Village Council – are all addressed in unified email threads at one time. In short, a majority of Councilmembers communicated collectively and simultaneously among themselves. The emails exchanged between and among the Majority were not one-way communications. Instead, the emails constituted a simultaneous discussion and deliberation of public business.

b. The Emails Constituted a Meeting Under Open Government Laws**.**

The series of September and October emails by which the Majority deliberated and reached consensus on censures of two other Councilmembers fulfills the essence of a meeting under the Open Meetings Law. A majority of councilmembers were present and they deliberated and transacted public business. G.S. § 143-318.10.

> The basic rule [of statutory construction] is to ascertain and effectuate the intent of the legislative body. The best indicia of that intent are the language of the statute[,] . . . the spirit of the act[,] and what the act seeks to accomplish. Legislative purpose is first ascertained from the plain words of the statute. Interpreting an ambiguous statute, 'the proper course is to adopt that sense of the words which promotes in the fullest manner the object of the statute. A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language.

In re B.L.H., 376 N.C. 118, 122, 852 S.E.2d 91, 95 (2020) (cleaned up).

No North Carolina appellate court has addressed whether a public body may "meet by email." However, the Court of Appeals has noted that, "the paramount objective in statutory interpretation is to give effect to the legislative intent," and the "legislative intent behind the Open Meetings Law [is] to promote openness in the daily workings of public bodies." *H.B.S. Contrs. v. Cumberland Cnty. Bd. of Educ.*, 122 N.C. App. 49, 54–55 (1996).

"We believe exceptions to the operation of open meetings laws must be narrowly construed," and "this Court is compelled to construe narrowly exceptions to the operation of [the open meetings] laws." *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 658, 566 S.E.2d 701, 704, 706 (2002). The Court of

Appeals has reached this conclusion even in the almost-sacrosanct context of attorney-client privilege. "[I]n light of the general public policy favoring open meetings, the attorney-client exception is to be construed and applied narrowly." *Multimedia Pub. Of North Carolina, Inc. v. Henderson Cnty.*, 136 N.C. App. 567, 575, 525 S.E.2d 786, 791 (2000). *See also*, *Times News Publ'g Co. v. Alamance-Burlington Bd. of Educ.,* 242 N.C. App. 375, 376, 774 S.E.2d 922, 924 (2015) ("'[c]ourts should ensure that the exception to the disclosure requirement should extend no further than necessary to protect ongoing efforts of a public body, respecting the policy against secrecy in government that underlies both the Public Records Act and the Open Meetings Law.'") (internal citation omitted).

The North Carolina Attorney General's Open Government Guide plainly states: "The General Assembly has declared it to be the public policy of North Carolina that the hearings, deliberations, and actions of public bodies be conducted publicly." Att'y Gen. Josh Stein, North Carolina Open Government Guide (2019) https://ncdoj.gov/download/141/files/17891/2019-open-government-guide. The Open Government Guide advises, "Members of public bodies may not hold a social gathering or communicate through an intermediary — for example, in a series of telephone or other communications — to evade the spirit and purpose of the Open Meetings Law." *Id.*

The UNC School of Government's guidance suggests that depending on its content, an email exchange by a majority of a public body, in which members conduct official business, constitutes a meeting subject to the Open Meetings Law.

> 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.

Frayda Bluestein, *Open Meetings and Other Legal Requirements for Local Government Boards*, *in* COUNTY AND MUNICIPAL GOVERNMENT IN NORTH CAROLINA, 53-3 (2d. ed. 2014) (emphasis supplied). In writing specifically about the possibility of email meetings, Professor Bluestein notes that "more than passive receipt of an email" has been required for courts to deem emails to be meetings. Frayda Bluestein, Polling the Board, Coates' Canons NC Local Gov't Law (Dec. 3, 2014), https://canons.sog.unc.edu/2014/12/polling-the-board/. Professor Bluestein warns against email exchanges that cross the line.

> It might be tempting, however, to use the scheduling email to also get consensus on other matters, such as what should be on the agenda, or whether everyone approves of a final draft of a proposed policy to be discussed at the meeting. It's difficult to define or describe the point at which a scheduling or transactional email poll becomes a policy discussion. Board members and staff should be careful to avoid using email to do the substantive work of the board, especially if the process engages a majority of the board in the discussion.

Id.

Addressing a similar question – board members texting during a meeting – Professor Bluestein has a similar warning. She writes:

> There is no legal prohibition on individual board members communicating with each other or with others during a meeting, ***as long as*** 1) the meeting is not a quasi-judicial hearing; and 2) the number

> of board members communicating with each other about a matter of public business does not add up to a majority of the board.

Frayda Bluestein, Texting While Meeting: Is It Illegal for Local Gov't Officials, Coates' Canons NC Local Gov't Law (Nov. 2, 2011), https://canons.sog.unc.edu/2011/11/texting-while-meeting-is-it-illegal-for-local-government-officials/ (emphasis supplied).

Put another way, it ***is*** a violation of the law for a majority of board members to communicate with each other about a matter of public business. Professor Bluestein offers two examples of "group text messages" during a meeting and clarifies that one example is not a violation of the Open Meetings Law and the other could be.

> The following hypothetical communications during a public meeting are examples of things that do not violate the open meetings law: … A majority of the members of the board are texting about where to go for beers after the meeting. (Note that as long as the beer drinking remains entirely social with no discussion of public business, that gathering does not violate the open meetings law either.)
> ***
> In contrast, the following hypothetical communications during a board meeting are examples of things that could violate either the open meetings law or due process. … Three of the five board members are emailing back and forth about the text message they just got from the lobbyist sitting in the audience.

Id. In both of Professor Bluestein's hypotheticals, the communications are by text message. In both hypotheticals, a majority of board members are "present." The only difference between the two is the subject matter of the messages: discussing getting beers after the meeting versus discussing a text message they received from a lobbyist.

In the context of the open meetings law, emails and text messages are qualitatively the same thing. In Professor Bluestein's hypotheticals and in this case,

the communications were sent at one time among a majority of Councilmembers. They were received at one time, though they may have been read at different times. The subject matter of the emails was plainly a matter of public business. The subject matter under discussion in this case was defined by statute as public business, as the Open Meetings Law provides that "A public body may not consider the … performance, character, fitness … of a member of the public body … except in an open meeting." G.S. § 143-318.11(a)(6). The email meeting threads included a Majority of the Village Council, the Village Attorney and the Village Manager. The Council Majority was deliberating sanctions against members of the Council, which falls squarely within prohibited closed-door discussions.

c. <u>The Legislature Contemplated the Development of Additional Means of Meeting by Including the Phrase "Other Electronic Means."</u>

The General Assembly's inclusion of the phrase "or by other electronic means" suggests that in 1994, the legislature understood that technology might evolve, creating the possibility of such things as meeting by email. Courts in other jurisdictions have reached this conclusion. For example, the Supreme Court of Arkansas held that email exchanges can constitute a meeting.

> We liberally construe FOIA to accomplish its broad and laudable purpose that public business be performed in an open and public manner. We therefore have no difficulty in concluding that FOIA's open-meeting provisions apply to email and other forms of electronic communication between governmental officials just as surely as they apply to in-person or telephonic conversations. It is unrealistic to believe that public business that may be accomplished via telephone could not also be performed via email or any other modern means of electronic communication. Neither this court nor the General Assembly can be expected to list all such communication methods or anticipate others yet to emerge. Exempting electronic communication would allow governmental officials who are so inclined to make decisions in secret,

> leave the public in the dark, and subvert the purpose of FOIA's open-meeting provisions.

City of Fort Smith v. Wade, 2019 Ark. 222, 578 S.W.3d 276 (Ark. 2019) (internal citation omitted).[2]

Whether applying a legal or common-sense analysis, the emails in this case qualify as meetings at which a majority of the Village Council deliberated and transacted public business. The weight of public policy tips in favor of holding that email communications can constitute a meeting. Applied to these facts, the emails exchanged did constitute a meeting. These communications were not on insignificant matters. That the communications took place via email, rather than as people sat together in one room, is a matter of form rather than function. In

[2] See also, *See also*, *Boelter v. Board of Selectmen of Wayland*, 479 Mass. 233, 93 N.E.3d 1163 (Mass. 2018) (holding emails that express opinions of board members to a quorum are capable of violating Massachusetts's open meetings law); *Markel v. Mackley*, No. 327617, 2016 WL 6495941, at *1 (Mich. Ct. App. Nov. 1, 2016) (holding email exchanges involving a quorum of members may constitute a "meeting" so long as the other requirements for a meeting are met); Minn. Comm'r Admin. Op. No. 09-020 (Sept. 8, 2009) (An exchange of emails in which a quorum of the government body expresses opinions and provides direction amounts to a "virtual meeting" in violation of the Open Meeting Law.); *Del Papa v. Board of Regents*, 956 P.2d 770, 114 Nev. 388, 956 P.2d 770 (2000) (email communications that are used by a quorum of the members of a public body to deliberate towards a decision or that are used to poll members of a public body are likely covered by the law.); N.D. Op. Att'y Gen. 2007-O-14 (2007) (treating email as simultaneous communication subject to the open meetings law); *Babac v. Pa. Milk Mktg. Bd.*, 613 A.2d 551 (Pa. 1992) (non-public deliberations by e-mail would likely violate the Act unless the deliberations met an exemption); *Wood v. Battleground Sch. Dist.*, 107 Wn. App. 550, 27 P.3d 1208 (2001) (The exchange of e-mail messages may constitute a meeting within the meaning of the Open Public Meetings Act provided a majority of the governing body is involved and the use of e-mail is not merely informational or passive receipt of e-mail.).

function, the emails were the substantive deliberations by a majority to introduce censures of Councilmember Boesch and Councilmember Drum at the October 12 meeting. The Majority was "participating in deliberations" and "transacting the public business." G.S. § 143-318.10(d).

II. The September 20 Meeting Violated the Open Meetings Law.

The defendants have attempted to lodge an unclean hands argument against Kevin Drum to exonerate themselves from their September Open Meetings Law violations. That argument fails on two grounds. First, Councilmember Drum was not on notice the meeting would be illegal until he attended it. Second, the defendants' arguments ignore a core tenet of North Carolina's Open Meetings Law: the law is a specific declaratory judgment act. In addition, the statute of limitations alleged by defendants is inapplicable.

First, Councilmember Drum could not have known he was summoned to a meeting that violated the law until it was too late. The Notice deliberately concealed the purpose of the meeting. It stated the meeting would be about personnel matters. In reality, the meeting was held to illegally discuss the performance of a member of the Village Council. Complaint Exhibit B, Complaint ¶¶ 27, 28, 30, 31. The September 20 meeting was called under false pretenses, and the true nature and substance of the meeting only became apparent during the meeting. As such, Councilmember Drum has clean hands.

Second, the defendants' argument ignores a core tenet of North Carolina's Open Meetings Law: the law is a specific declaratory judgment act. The plaintiffs in

this action stand in for the public at large. The law is explicit that "Any person may bring an action in the appropriate division of the General Court of Justice seeking such an injunction; and the plaintiff need not allege or prove special damage different from that suffered by the public at large." G.S. § 143-318.16. The defendants' use of the "unclean hands" argument is entirely misplaced. The defense of unclean hands is an equitable defense to an equitable claim, and "is only available to a party who was injured by the alleged wrongful conduct." *Ray v. Norris*, 78 N.C. App. 379, 385, 337 S.E.2d 137, 142 (1985). The plaintiffs in this action seek declaratory relief, not equitable relief, and the defendants cannot make out any theory by which they were injured by the plaintiffs' actions.

Finally, the defendants alleged an inapplicable statute of limitations. The 45-day statute of limitations described in G.S. § 143-318.16A applies only to bar a party who seeks to void an action taken in an illegal meeting. The plaintiffs here do not seek anything beyond the declaration that the defendants violated the law and an injunction against future violations. As such, the statute of limitations does not apply.

CONCLUSION

A faithful and robust interpretation of the Open Meetings Law confirms that the Defendants violated the Law. There is no question that the Councilmembers' communications would be covered by the Open Meetings Law – and would not be exempt under any provision – if they had taken place sitting around the table. To find that the Open Meetings Law does not apply equally to their communications by

email would fly in the face of the unequivocal intent of the General Assembly that public business be done in public. North Carolina appellate jurisprudence repeatedly affirms that the Open Meetings Law and Public Records Law must be interpreted broadly in favor of the strong public policy interest in open government.

This the 6th day of September 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing upon plaintiff by email and by depositing a copy with the United States Postal Service, first-class postage prepaid, addressed to:

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This the 6th day of September 2022.

Amanda Martin

C. Amanda Martin

ATTACHMENT A

The emails attached to the Complaint illustrate the conversational nature and timing of the emails exchanged among the Majority. Specifically, the Majority debated the precise language of the proposed censures and discussed who might want to speak on the issues.[1] Councilmember Hogeman wrote to the Majority plus the Village Attorney and Village Manager, "I'm not sure how we should present the resolutions, or what opportunity we should give for a response?[2] Within the hour, Mayor Strickland responded to the same group in an email with the subject line "procedure" and laid out a 7-point plan.[3] In response to that email, the Village Attorney asked what "the Council desires" that he do.[4] Councilmember Hogeman answered that she would prefer the Mayor, rather than Village Attorney, open the topic in the meeting. She concluded with her view of how to position the issue: "This is a matter that came to Council's attention. We sought the advice of the Village attorney. Here's that advice."[5]

A few days later, Mayor Strickland returned to the discussion of procedure in the same email thread. In an email to the Majority plus the Village Attorney and Village Manager, he refined the procedure he crafted and invited suggestions.[6] This email drew further, detailed revisions to the planned statements and documents. Councilmember Hogeman asked, "Will Glen, Angie, Katrin and Jim be there

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[1] Complaint Exhibit H-29, 31.
[2] Complaint Exhibit H-35.
[3] Complaint Exhibit H-40.
[4] Complaint Exhibit H-51.
[5] Complaint Exhibit H-63.
[6] Complaint Exhibit H-139.

tomorrow? Should it be that the Council has 'read' their statements rather than 'heard'?"[7] Councilmember Hogeman then emailed that she had changed the script: "I changed it to 'had' because Lydia and Kevin will likely speak."[8] Next, Mayor Strickland circulated his revisions for review and approval.[9] Two minutes later, Councilmember Hogeman approved. The following morning the Village Attorney suggested an edit to the Mayor's script, which the Mayor accepted less than 10 minutes later.[10]

[7] Complaint Exhibit H-144.
[8] Complaint Exhibit H-152.
[9] Complaint Exhibit H-157.
[10] Complaint Exhibit H-182.