No. 24-309 JUDICIAL DISTRICT NINETEEN D

NORTH CAROLINA COURT OF APPEALS

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NC CITIZENS FOR TRANSPARENT GOVERNMENT, INC. and KEVIN DRUM,	)	
Plaintiffs,	)	
v.	)	From Moore County
THE VILLAGE OF PINEHURST and JOHN STRICKLAND in his official capacity as Mayor of the Village of Pinehurst	)	
Defendants.	)	

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P L A I N T I F F S - A P P E L L A N T S ' B R I E F

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ISSUES PRESENTED

1. Did the trial court err in finding that emails exchanged among a majority of members of the Village of Pinehurst Council, discussing substantive issues, did not violate N.C. GEN. STAT. § 143-318.9 et seq?

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). The Open Meetings Law makes clear that the public's business is only conducted in public if three requirements are met: notice, access, and minutes. N.C. GEN. STAT. § 143.318.12, 143-318.11 and 143-318.10. Further, when a public body considers the behavior of one of its own members, it 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.

N.C. GEN. STAT. § 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 ("OML") through a series of email deliberations that

discussed whether to censure 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 deliberation and final resolution were concluded out of the public eye and then sprung upon the public in an October 2021 council meeting. The secrecy of these deliberations was antithetical to the spirit and letter of the OML, which requires government decisions to be made in the open.

STATEMENT OF THE CASE

Plaintiff Citizens for Transparent Government, Inc. is a North Carolina nonprofit corporation committed to transparency in local government, and Plaintiff Kevin Drum is a former member of the Village of Pinehurst Council. (R p 4). Plaintiffs filed their complaint and issued their summons on 6 May 2022. (R p 3). Defendants accepted service, moved to dismiss, and then filed an amended, verified motion to dismiss on 30 August 2022. (R p 242, 245). The motion was granted on 29 September 2022. *N.C. Citizens for Transparent Government, Inc. v. Village of Pinehurst*, No. COA23-69, 2023 WL 4876478 at *1, *2 (N.C. Ct.

App. Aug. 1, 2023) (unpublished). Plaintiffs served and filed notice of appeal on 4 October 2022. *Id.* at * 3. After the appeal, which concerned the statute of limitations, the case was reversed and remanded to the trial court for further proceedings. *Id.* at *1, *7.

Once the case returned to the trial court, Defendants filed a motion for judgment on the pleadings on 8 September 2023. (R p 259–61). Plaintiffs voluntarily dismissed Defendant Jane Hogeman and her estate from the suit after her passing. (R p 263). Plaintiffs also voluntarily dismissed, without prejudice, all claims related to the September 20, 2021, Special Meeting described below. (R p 265). Judge Webb heard arguments on the motion for a judgment on the pleadings on 25 September 2023. (T pp 1-28). An order granting judgment on the pleadings was entered for Defendants on 12 October 2023. (R p 265–66). Plaintiffs served and filed notice of appeal on 13 November 2023 (R p 271).

STATEMENT OF THE GROUNDS OF APPELLATE REVIEW

Judge Webb's order granting Defendants' motion for judgment on the pleadings is a final judgment, and appeal therefore lies to the Court of Appeals pursuant to N.C. GEN. STAT. § 7A-27(b).

STATEMENT OF THE FACTS

Plaintiffs sought two rulings in their initial complaint. Under both the Uniform Declaratory Judgment statute, N.C. GEN. STAT. § 1-253, and the OML, N.C. GEN. STAT. § 143-318.16A, Plaintiffs sought a declaration that the actions of a majority of the Pinehurst Village Council (hereinafter, "the Council") violated the OML. Under the OML, N.C. GEN. STAT. § 143-318.16, the Plaintiffs also sought an injunction against future violations. Plaintiffs did not ask the court to void, alter or in any way disturb any action taken by the Council.

On 20 September 2021, the full Pinehurst Village Council met in a closed session for a "personnel discussion." (R pp 9–10). The meeting's purpose was to reprimand Councilmember Boesch for perceived violations of the Village Ethics Policy. (R p 10). After the September meeting, a majority of the Village Councilmembers — Village Mayor John Strickland, Mayor Pro Tem Judy Davis and Councilmember Jane Hogeman (hereinafter, "the Majority") — engaged in an extensive and simultaneous exchange of emails in which they concluded that Councilmember Boesch and Councilmember Drum needed to be formally censured. (R p 14). The basis for the Drum censure was that allegedly he

had been disrespectful of Village residents, which, according to the Majority, violated the Village Ethics Policy. (R p 14). Through the exchange of these emails, the Majority consulted with both the Village Attorney and the Village Manager, who were copied on the emails and participated in the discussion. (R pp 14-19). Through the emails, the Majority drafted the language of censures to be proposed and the exact language that ultimately would be used to introduce and explain the Majority's perceived need for the censures. (R pp 14-19).

In a public meeting on 12 October 2021, the Village Attorney described what he had been asked to by "a consensus or a majority of the Village Council." (R p 19). After the Village Attorney provided background, as planned, Village Councilmember Hogeman read the motion that had been created and approved by the Majority in their email exchanges. (R p 20).

Councilmember Boesch was stunned and reacted to the censure motion. She said, "I've never seen that," and asked, "Did somebody provide that to you to read?" Councilmember Hogeman replied, "No. I worked on that." (R p 20). "With whose help?" Councilmember Boesch asked. She continued, "I mean, you're reading something that was

prepared before this meeting. And again, these are things that are being written about and against me, and I've never had an opportunity to see this. This. There's something so just uneasy about this. So you wrote that by yourself?" (R pp 20-21). At that point, Mayor Strickland said, "As far as I know yes, and Jane's an attorney." (R p 21).

Despite the Mayor's misrepresentation and misdirection that Councilmember Hogeman had worked alone, it appeared to Councilmembers Boesch and Drum that there may have been some discussion among the members of the Majority prior to the 12 October 2022 meeting. If there was, they had been excluded from the discussion. Councilmember Boesch sent a question to the UNC School of Government asking about the propriety of that exclusion. Although Defendants submitted part of that email exchange to the trial court, part was missing. The portion filed with the court did not include what question had been asked or what background information had been provided. Only the response from Professor Frayda Bluestein is in the record, attached to Defendants' amended motion to dismiss. (R p 257).

Professor Bluestein wrote that it would be "hard" for a public body to meet by email. She did not say it was impossible. (R p 257). She wrote,

"if they are having a conversation spaced over a span of time, it's not illegal," (R p 257) but the record is devoid of what level of detail Professor Bluestein had been provided when she responded. For example, the record does not reveal whether Professor Bluestein knew that the Majority had at times exchanged emails in very short blocks of time or that the Majority had, in the words of the Village Attorney, reached a "consensus" to censure the two other councilmembers. (R p 51).

Following the October meetings, Former Councilmember Drum[1] undertook to understand exactly what had taken place by email. A public records request revealed dozens of emails related to the proposed censures (R p 48–238). On 6 May 2022, Plaintiffs filed suit. (R p 3). The lawsuit sought a declaration that both the 20 September 2021 meeting and the October meetings by email violated the OML and an injunction prohibiting the Village Council from further violations. The Plaintiffs' claims were grounded in N.C. Gen. Stat. § 1-253, North Carolina's declaratory relief statute, as well as two distinct provisions of North Carolina's OML, N.C. Gen. Stat. § 143-318.16 and N.C. Gen. Stat. § 143-318.16A. The case went to the North Carolina Court of Appeals to resolve

[1] Plaintiff-Appellant Drum was not re-elected in the 2021 Village Council election.

a question about the statute of limitations and was reversed and remanded to the trial court for further proceedings. *N.C. Citizens for Transparent Government*, 2023 WL 4876478 at *7. As noted above, the claims regarding the 20 September 2021 meeting were voluntarily dismissed. (R p 265). An order granting judgment on the pleadings was entered for Defendants in October 2023. (R p 265–66).

STANDARD OF REVIEW

"Whether a violation of the Open Meetings Law occurred is a question of law." *Garlock v. Wake County Bd. of Educ.*, 211 N.C. App. 200, 214 (2011). Therefore, the trial court's decision is reviewed de novo. *Id.* This Court's broad objective in interpreting the OML is to construe it "in favor of public access." *Id.* at 221.

ARGUMENT

The public's business should be conducted in public. Instead, the Village Council Majority conducted the public's business in secret, crossing a line that must be maintained for the OML's purpose to be fulfilled. This Court should recognize that the emails exchanged by a majority of the Village Council, along with the Village Attorney and Village Manager, constituted meetings and violated the law. Rather than

remanding to the trial court for further proceedings, this Court should reach the merits of this appeal.

I. THE OCTOBER EMAILS VIOLATED THE OPEN MEETINGS LAW.

North Carolina's Open Meetings Law defines an official meeting as 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.

N.C. GEN. STAT. § 143-318.10(d).

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

the emails were meetings involving topics not allowed in closed session and were held without notice or public access, they violated the OML.

A. The emails were simultaneous communications via electronic means for the purpose of deliberating on public business.

The October emails were simultaneous communications via electronic means for the purpose of deliberating on public business: the fitness of two members for office. This conclusion is supported by the plain meaning of simultaneous as applied to the emails at issue, and by scholarly and judicial analysis of the capability of emails to constitute meetings.

Merriam-Webster defines simultaneous as "existing or occurring at the same time." *Simultaneous*, MERRIAM-WEBSTER (2022). Each email in question was sent to and received by the Majority at the same time. Members of the Majority responded within minutes, exactly how a conversation would unfold in a meeting held in the town hall. 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.

Several exchanges show the Majority's back-and-forth deliberation, which mirrors what would have happened if they were all together in a room. One illustrative exchange occurred in the afternoon on October 8. At 3:21 p.m., Village Attorney Mike Newman sends a revised version of the censure resolution to Mayor Strickland, Mayor Pro Tem Davis, and Councilmember Hogeman. (R p 70). Roughly twenty minutes later, Mayor Strickland replies to all the recipients on the email thread, asking Hogeman and Davis if they have suggestions about the resolutions and if they are "prepared to support these and to speak about them on Tuesday." (R p 75). Within the hour, Hogeman replies all, writing "[w]e can't not address these behaviors" and asks what opportunity should be given for a response. (R p 83). In summary, in this thread, the majority offered opinions about two other members and solidified its approach for disciplining them. The OML requires the entirety of the discussion,

which concerns the behavior of members of a public body, to be conducted in the open.

An exchange from October 11 further demonstrates how similar the emails were to an in-person meeting. Over the course of seventeen minutes, the Majority engaged in a collective revision of the statements they planned to make in the October 12 meeting. At 2:38 p.m., John Strickland writes:

> Mike, we are proceeding tomorrow on a slightly different path. Rather than distribute and vote on the censure motion, we have discussed today using a simpler motion after to be made after Council discussion. In your absence, Jane and Jeff have authored these, to be found in the attachment below. I hope they are satisfactory to you….

Five minutes later, responding to the draft that had just been sent, Jane Hogeman writes

> Should it be that the Council has "read" their statements rather than "heard"?

Five minutes later, Jeff Sanborn answers:

> Good point.

Seven minutes later, Jane Hogeman confirms:

> I changed it to "had" because Lydia and Kevin will likely speak.

(R p 189–2000).

Repeatedly, Mayor Strickland, Mayor Pro Tem Davis and Councilmember Hogeman—[OBJ][OBJ] 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 were a simultaneous discussion and deliberation of public business.

The notion that emails can be simultaneous communications under North Carolina's OML is not an invention of Appellant's making. Rather, 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 OML.

> 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.

Furthermore, at least one other state open meetings law that includes "simultaneous" has been interpreted to encompass e-mail conversations. Indiana's Open Meetings Law states:

> A "member of the governing body who is not physically present at a meeting of the governing body may participate in a meeting by any electronic means of communication that does the following:
> (1) Allows all participating members of the governing body to *simultaneously* communicate with each other.
> (2) Allows the public to simultaneously attend and observe the meeting".

IND. CODE §5-14-1.5-3.5 (emphasis added). Indiana's Public Access Counselor, an office that provides advice to members of the public regarding the state's access laws, has interpreted the word simultaneous to include e-mail meetings. Off. of Ind. Pub. Access Couns., *Handbook on Ind.'s Public Access Laws*, 9 (2022), https://www.in.gov/pac/files/pac-handbook.pdf. In response to the question "Are email exchanges considered meetings?", the office noted that it is "largely dependent upon the nature and intent of the communication," but that an email exchange constitutes a meeting "if the governing body is trying to communicate simultaneously and expecting an immediate call-and-response type dialogue for the purposes of taking official action on business[.]" *Id.* Therefore, the word "simultaneous" used in a public meetings context can include e-mail exchanges and does so when there is a "call-and-response" style of dialogue expected from the parties.

Judicial interpretations of open meetings laws in Pennsylvania and Virginia also recognize that it is possible for emails to satisfy simultaneity requirements. The Virginia Supreme Court held that emails can be considered meetings, although "virtually simultaneous interaction" is needed. *Beck v. Shelton*, 593 S.E.2d 195, 198 (Va. 2004). A

lower Virginia court revisited the topic in a later case, holding that a series of emails sent between school board members could not be considered a meeting under state law. *Hill v. Fairfax County Sch. Bd.*, 83 Va. Cir. 172 (Va. Cir. Ct. 2012). But the holding was not that emails could *never* be considered meetings; rather, in *Hill*, the court found that the "emails were used consecutively, rather than cooperatively, and the members never reached any sort of group consensus as if they were sitting in a room, virtual or real, chatting with each other." *Id.* at 175. Further, the emails sent to a quorum of board members in *Hill* "did not generate group conversations or responses with multiple recipients," unlike the Pinehurst emails. *See id.* at 176.

Relying in part on the holding in *Beck*, a Pennsylvania court also did not rule out the possibility of simultaneous meetings occurring via email. *See M4 Holdings v. Lake Harmony Owners' Ass'n*, 237 A.3d 1208 (Pa. Cmwlth. 2020) (holding that "the series of email correspondence at issue" did not constitute a meeting). Rather than stating that emails could never constitute meetings, in *M4 Holdings*, the court merely held that the emails at issue were sent too far apart and were too disjointed to count as meetings. *Id.* at 1222. The emails were sent through several

different threads, such that they could not be "read from start to finish without trying to piece the discussion together." *Id.* That is unlike the emails sent by the Majority, which comprised one thread and focused on a discrete topic. These cases, together with the language of the OML and the SOG's guidance, reveal that simultaneous communications can and did occur through email here.

B. The legislature contemplated the development of additional means of meeting by including the phrase "other electronic means."

The General Assembly's inclusion of the phrase "or by other electronic means" suggests that it understood that technology would evolve, and the legislature protected the public's ongoing right of access by anticipating that evolution. *See* N.C. GEN. STAT. § 143-318.10(d) ("'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"). This "electronic means" language was adopted from a 1979 legislative study commission report. REPORT OF THE LEG. STUDY COMM'N FOR STATE POLICIES ON THE MEETINGS OF GOVERNMENTAL BODIES (N.C. 1979). The Commission explained that "a meeting by means of conference

telephone call or other electronic means is as much a meeting as if the members of the public body were in the same room." *Id.* at 2.

Although no court in this jurisdiction has addressed whether "other electronic means" includes email, last year the North Carolina Court of Appeals found it "informative" to look to other states' courts for guidance on novel issues of public access law. *Gray Media Group, Inc. v. City of Charlotte*, No. COA23-154, 2023 WL 5925600, at *20 n. 20 (N.C. Ct. App. Sept. 12, 2023) (finding that records created by public agencies but housed on external servers were public records). Courts in other states have recognized that meetings by email can violate open meetings laws. For example, although the plain text of the statute did not address the question, 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, 578 S.W.3d 276, 280 (Ark. 2019) (internal citation omitted).

Courts and attorneys general in at least nine other states have come to similar conclusions.[2] For example, Massachusetts' highest court held that emails expressing opinions of board members to a quorum violated the state's open meetings law. *Boelter v. Board of Selectmen of Wayland*, 93 N.E.3d 1163 (Mass. 2018). The court found that these emails

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[2] *See, e.g.*, *Boelter v. Board of Selectmen of Wayland*, 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 (Nev. 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.*, 27 P.3d 1208 (Wash. Ct. App. 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.).

constituted deliberation, and that "[t]he open meeting law was intended to ensure that the public is able to see for themselves how such decisions are made." *Id.* at 1172. The Michigan Court of Appeals also held that email exchanges constituted meetings when they involved a quorum of a body's members deliberating on a matter of public policy. *Markel v. Mackley*, No. 327617, 2016 WL 6495941, at *2, *5 (Mich. Ct. App. Nov. 1, 2016). The Supreme Court of Nevada found that "if a quorum is present, or is *gathered by serial electronic communications*, the body must deliberate and actually vote on the matter in a public meeting." *Del Papa v. Board of Regents*, 956 P.2d 770, 778 (Nev. 2000) (emphasis added).

The Supreme Court of Maryland held that Maryland's open meetings law applies when there is "evidence of an actual meeting or an exchange of emails or other communications between members of the [public body] which might rise to the level of a 'meeting' or an evasive device purposefully designed to avoid the requirements of the Act." *Grant v. County Council of Prince George's County,* 465 Md. 496, 533 (Md. App. Ct. 2019). Similarly, the Supreme Court of Ohio held that Ohio's Open Meetings Law, codified at OHIO REV. CODE § 121.22, applied to emails. It found that the "distinction between serial in-person communications and

serial electronic communications via e-mail for purposes of § 121.22 is a distinction without a difference because discussions of public bodies are to be conducted in a public forum". *White v. King*, 147 Ohio St. 3d 74, 79 (Ohio 2016) (holding that "e-mail discussions between members of board qualified as a discussion of "public business"). By recognizing the reality that meetings can take place by email, this Court would both honor the intent of the General Assembly and join a growing body of other jurisdictions.

C. Public access precedent and policy mandate a liberal interpretation in favor of access.

Both public access precedent in the state and public policy counsel in favor of a liberal interpretation of meetings under the law. First, allowing councilmembers to deliberate and conduct business via email would circumvent the legislative intent of the OML, which 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). And, as this Court has noted, "the paramount objective in statutory interpretation is to give effect to the legislative intent." *Id.*

To allow an exception to the OML, such that secret meetings could be conducted by email, would also contravene another established tenet

of statutory construction, that "exceptions to the operation of open meetings laws must be narrowly construed." *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 658 (2002). This Court has prioritized the OML even in the almost sacrosanct context of attorney-client privilege, finding that "in 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 (2000). *See also*, *Times News Publ'g Co. v. Alamance-Burlington Bd. of Educ.,* 242 N.C. App. 375, 376 (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 authoritative interpretation of the OML similarly cautions against public bodies using pretexts to evade the requirements of public deliberation. The 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://tinyurl.com/NCAG-Open-Govt It further 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*. In other words, email communication should not be used as an end-run around the requirement of public deliberation, allowing members to violate the law.

This is especially true given the similarity of email to another convenient form of communication: text messages. Professor Bluestein specifically addressed the similarities between the two, stating that board members texting during a meeting could cross the line. 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 using electronic means. Professor Bluestein offers two examples of "group text messages" during a meeting and clarifies that one example is not a violation of the OML 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: a discussion about getting beers after the meeting versus a discussion about 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, as in this case, the communications were sent at one time, that is simultaneously, among a majority of Councilmembers. They were received at one time, though even text messages may be read at different times. As in the hypothetical, the subject matter of the emails was plainly a matter of public business—albeit on a subject that was forbidden in closed session.

In conclusion, the implications of holding that the Majority's emails were not meetings that should have been conducted in public, are far-reaching. That decision would invite public bodies to conduct public business using inaccessible text messages. Given this risk, this Court should follow its precedent that strongly supports public access and find that the OML applies to meetings conducted by email.

D. Because the Majority's email meetings concerned a topic only allowed in open session and lacked notice or access for the public, they violated the Open Meetings Law.

Because the Majority's email discussions were meetings, by "other electronic means," they needed to comply with the requirements of the OML. *See* N.C. GEN. STAT. § 143-318.13 ("If a public body holds an official

meeting by use of conference telephone or other electronic means, it shall provide a location and means whereby members of the public may listen to the meeting . . . ."). Since the emails centered on a topic forbidden in closed session, and there was no notice or access for the public, these meetings violated the law. The OML clearly 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. Further, neither notice nor access was provided to the public, a clear violation of the OML. *See* N.C. GEN. STAT. §§ 143-318.12 and 143-318.11.

II. THIS CASE CAN BE RESOLVED WITHOUT REMAND.

If this Court holds that emails can, in some cases, constitute meetings within the meaning of the OML, this Court should reach the merits of this appeal rather than remanding to the trial court for further proceedings. "[A] remand to the trial court is not necessary if the facts are not in dispute and if only one inference can be drawn from the

undisputed facts." *Harris v. N.C. Farm Bureau Mt. Ins. Co.*, 91 N.C. App. 147, 150 (1988). The interests of judicial economy favor a decision on the merits because it is a pure question of law whether the emails sent by the Councilmembers constituted a meeting under the OML, and none of the material facts in this case are disputed.

Here, there is no need for further development of the factual record. The emails in question are in the record before the Court and neither party has disputed the authenticity of the emails. As such, additional discovery would be unnecessary.

While remanding to the trial court would be appropriate, resolving the underlying merits of this appeal would be most efficient outcome. If remanded, this case will almost certainly return to this Court to resolve this same question.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the court to reverse and remand the trial court's order.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Plaintiffs-Appellants certifies that the forgoing brief, which is prepared using a 14-point font proportionally spaced font with serifs, is fewer than 8,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificate of service, this certificate of compliance, and appendixes) as reported by word processing software.

By: Amanda Martin
C. Amanda Martin

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Plaintiffs-Appellants' Brief was filed electronically and served via email pursuant to Rule 26(c) of the North Carolina Rules of Appellate Procedure, addressed to:

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This the 10th day of May 2024

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APPENDIX

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-69

Filed 01 August 2023

Moore County, No. 22 CVS 515

N.C. CITIZENS FOR TRANSPARENT GOVERNMENT, INC. and KEVIN DRUM, Plaintiffs,

v.

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.

Appeal by Plaintiffs from order entered 29 September 2022 by Judge James M. Webb in Moore County Superior Court. Heard in the Court of Appeals 7 June 2023.

First Amendment Clinic at Duke Law School, by C. Amanda Martin and Sarah Ludington for plaintiffs-appellants.

Hartzog Law Group, LLP, by Dan M. Hartzog and Dan M. Hartzog Jr., and Van Camp, Meacham & Newman, PLLC, by Michael J. Newman for defendants-appellees.

MURPHY, Judge.

Plaintiffs N.C. Citizens for Transparent Government, Inc. and Kevin Drum appeal the dismissal of their claims for relief under the Uniform Declaratory Judgment Act, N.C.G.S. § 1-253, and for violations of the Open Meetings Law,

N.C.G.S. §§ 143-318.10. *et seq.,* as barred by the 45-day statute of limitations period in N.C.G.S. § 143-318.16A. We hold that the trial court erred by applying a 45-day limitations period to Plaintiffs' claims for relief under N.C.G.S. § 1-253, for an order declaring that actions taken by the Village Council were in violation of the Open Meetings Law under N.C.G.S. § 143-318.16A, and for injunctive relief under N.C.G.S. § 143-318.16.

BACKGROUND

This appeal arises from a Rule 12(b)(6) dismissal of Plaintiffs' claims arising under the Uniform Declaratory Judgment Act, N.C.G.S. § 1-253, and for violations under the Open Meetings Law, N.C.G.S. §§ 143-318.10. *et seq.* Plaintiff Drum is a former member of the Village of Pinehurst Council and founder of N.C. Citizens for Transparent Government, Inc. Plaintiffs filed their complaint against the Village of Pinehurst, John Strickland in his capacity as mayor of the Village of Pinehurst, and Jane Hogeman in her capacity as a member of the Village of Pinehurst Council on 6 May 2022.

As this is an appeal of a 12(b)(6) dismissal order, we provide this background based upon Plaintiffs' allegations. Plaintiffs' claims arise from actions taken by the Village Council during a number of council meetings occurring from September 2021 until October 2021. The first of these meetings was noticed on 16 September 2021 by a posting that the Village Council planned to hold a "Special Closed Session Meeting"

sometime before the regularly scheduled meeting on 28 September 2021. The Special Meeting was subsequently held on 20 September 2021, and Plaintiff Drum was in attendance. At that meeting, the Village Council entered into a closed session purportedly pursuant to the personnel exemption under N.C.G.S. § 134.318.11(a)(6) to discuss issues pertaining to a strained relationship between a councilmember and citizens. At the next regularly scheduled Village Council meeting, Plaintiff Drum voted to approve the minutes from the 20 September 2021 Special Meeting.

The second "meeting" in dispute is a series of emails that began on 8 October 2021 between a majority of the members of the Village Council. On this date, Defendant Strickland, Defendant Hogeman, the Village Manager, and the Village Attorney began participating in an email thread to consider possible censures against Plaintiff Drum and another Village Council member. The emails discussed complaints received from local business owners about Plaintiff Drum's negative treatment of them and continued through the Village Council meeting on 12 October 2021.

During the 12 October 2021 meeting, Defendant Strickland and the Village Attorney explained that there had been consensus by the majority of the Village Council to investigate whether Plaintiff Drum and another councilmember had violated the Village Council's Code of Ethics. Defendant Hogeman then read a motion for censure that had been discussed and formed in the email thread. Following the

meeting, more emails regarding the proposed censure of Plaintiff Drum were exchanged between the majority of the Village Council until 26 October 2021. Coincidentally, Plaintiff Drum and another Village Council member discussed the potential that the email thread between the Village Council majority could be in violation of the Open Meetings Law in an email conversation on 13 October 2021. At the regularly scheduled meeting on 26 October 2021, Defendant Strickland read a prepared statement regarding Plaintiff Drum's potential ethics violations.

On 6 May 2022, Plaintiffs brought a complaint for violations of the Open Meetings Law, claiming that: (1) notice for the council meeting conducted on 20 September 2021 was legally insufficient and in violation of N.C.G.S. § 143-318.12; (2) the closed session during the council meeting conducted on 20 September 2021 was a violation of N.C.G.S. § 143-318.11(a)(6); (3) the recorded minutes for the 20 September 2021 closed session are inaccurate and violate N.C.G.S. § 143-318(e); and, (4) emails exchanged between the majority of the Village Council between 20 September 2021 and 26 October 2021 violated the Open Meetings Law for lack of notice, access, and minutes.

Plaintiffs further claim that, under the Uniform Declaratory Judgment Act, the trial court had jurisdiction to declare the rights of parties pursuant to N.C.G.S. § 1-253 and § 1-254 and any other relevant statutes because of the presence of one or more "genuine, subsisting and justiciable disputes or controversies" between

Plaintiffs and Defendants as to applicable rights under the Open Meetings Law.

Plaintiffs sought the following relief for the alleged violations:

> (1) an order pursuant to [N.C.G.S.] § 143-318.16C setting this matter for an immediate hearing and ordering that subsequent proceedings in this action shall be accorded priority;
>
> (2) an order pursuant to [N.C.G.S.] §§ 143-318.16A and 1-253 declaring that the [20 September 2021] meeting was in violation of the Open Meetings Law as a result of a false and misleading Notice;
>
> (3) an order pursuant to [N.C.G.S.] §§ 143-318.16A and 1-253 declaring that the [20 September 2021] meeting was in violation of the Open Meetings Law for conducting in closed session public business that should have been conducted in open session;
>
> (4) an order pursuant to [N.C.G.S.] §§ 143-318.16A and 1-253 declaring that the [20 September 2021] meeting was in violation of the Open Meetings Law, because there are no full and accurate minutes of the meeting;
>
> (5) an order pursuant to [N.C.G.S.] §§ 143-318.16A and 1-253 declaring that the [20 September 2021] meeting was in violation of the Open Meetings Law, because there is no general account of the closed session portion of the meeting;
>
> (6) an order pursuant to [N.C.G.S.] §§ 143-318.16A and 1-253 declaring that the electronic communications that took place between [20 September 2021 and 12 October 2021] constituted the transaction of public business in violation of the Open Meetings Law for lack of notice, access to the public, and minutes;
>
> (7) an order pursuant to [N.C.G.S.] §§ 143-318.16A and 1-253 declaring that it is a violation of the Open Meetings Law for a majority of the members of the Village of Pinehurst Council to attend to, discuss and transact public business without the notice, public access and minutes required by the Open Meetings Law;

> (8) an order, pursuant to [N.C.G.S.] § 143-318.16, permanently enjoining the defendants and anyone acting in concert with them from conducting meetings violations of the Open Meetings Law, including through email;
>
> (9) an order awarding the plaintiffs reasonable attorney fees pursuant to [N.C.G.S.] § 143-318.16B; and,
>
> (10) such other and further relief as the court may determine to be appropriate and necessary.

In response to Plaintiffs' complaint, Defendants filed an amended motion to dismiss in accordance with Rule 12(b)(6) on 30 August 2022. The trial court granted Defendants' motion on 29 September 2022 for failure to state a claim upon which relief can be granted, finding that all claims set forth in the complaint were barred by the applicable 45-day statute of limitations period in N.C.G.S. § 143-318.16A. Plaintiffs timely filed their appeal on 4 October 2022.

ANALYSIS

Plaintiffs argue on appeal that the trial court erred in dismissing their claims for relief pursuant to the North Carolina Uniform Declaratory Judgments Act, N.C.G.S. §§ 1-253 *et seq.*, and N.C.G.S. § 143-318.16 as time barred by the 45-day statute of limitations period contained in N.C.G.S. § 143-318.16A.[1] The main issue

[1] Plaintiffs also argue on appeal that the trial court erred by not making findings of fact as to when Plaintiffs knew or should have known about the challenged action in its order granting the Motion to Dismiss. Plaintiffs cite the language of N.C.G.S. § 143-318.16A(b), which states "the date of its initial disclosure shall be determined by the court *based on a finding* as to when the plaintiff knew or should have known that the challenged action had been taken" and *Knight v. Higgs,* 189 N.C. App. 696, 704 (2008), where we held that "[t]he trial court's failure to make conclusions of law that demonstrate

we face is determining what claims are limited by the 45-day statute of limitations period written in Open Meetings Law N.C.G.S. § 143-318.16A. N.C.G.S. § 143-318.16A(b) states:

> (b) A suit seeking declaratory relief under this section must be commenced within 45 days following the initial disclosure of the action that the suit seeks to have declared null and void; provided, however, that any suit for declaratory judgment brought pursuant to this section that seeks to set aside a bond order or bond referendum shall be commenced within the limitation periods prescribed by [N.C.]G.S. 159-59 and [N.C.]G.S. 159-62. If the challenged action is recorded in the minutes of the public body, its initial disclosure shall be deemed to have occurred on the date the minutes are first available for public inspection. If the challenged action is not recorded in the minutes of the public body, the date of its initial disclosure shall be determined by the court based on a finding as to when the plaintiff knew or should have known that the challenged action had been taken.

N.C.G.S. § 143-318.16A(b) (2022). We review a trial court's decision to dismiss an action as time-barred by the statute of limitations de novo. *Boyd v. Sandling*, 210 N.C. App. 455, 458 (2011).

To ascertain whether Plaintiffs' claims are time-barred, the date of accrual must first be assessed. *See Newton v. Barth*, 248 N.C. App. 331, 341 (2016) ("In general a cause or right of action accrues, so as to start the running of the statute of

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consideration of the statutory factors for such violations, [N.C.G.S. § 143–318.16A], is reversible error." *Id.*

However, our Supreme Court has long held that, when dismissing a plaintiff's claims on a 12(b)(6) motion, findings of fact are not only not required, but conceptually inapplicable. *White v. White*, 296 N.C. 661, 667 (1979) ("[A] trial court cannot make 'findings of fact' conclusive on appeal on a motion to dismiss for failure to state a claim under Rule 12(b)(6)"). Accordingly, we need not further address this argument.

limitations, as soon as the right to institute and maintain a suit arises.") (citations omitted). The relevant date of accrual depends on if the challenged action was recorded in the public minutes. N.C.G.S. § 143-318.16A(b) (2022). If the action was recorded, the 45-day limitations period begins to accrue at the "initial disclosure of the action." *Id.* If that action is not recorded in the public minutes, "the date of its initial disclosure shall be determined by the court based on a finding as to when the plaintiff knew or should have known that the challenged action had been taken." *Id.* We have held that initial disclosure occurs when the plaintiff is aware of documents that contain a reference to the challenged action by the public body and when those documents are read at public hearings in which the plaintiff is present. *See Coulter v. City of Newton*, 100 N.C. App. 523, 526 (1990).

Plaintiffs claim that the Village Council violated requirements of the Open Meetings Law during: (1) the 20 September 2021 closed meeting; (2) the 8 October 2021 through 12 October 2021 email thread meetings; (3) the 12 October 2021 Village Council meeting; (4) the 12 October 2021 through 26 October 2021 email thread meetings; (5) and the 26 October 2021 meeting.[2] As to the 20 September 2021 meeting, Plaintiff Drum was present and participated in the action that Plaintiffs now claim was a violation of the Open Meetings Laws. Therefore, Plaintiffs' claim

[2] As no arguments were made on appeal regarding the knowledge of Plaintiff N.C. Citizens for Transparent Government, Inc. as to the challeneged actions, Plaintiff N.C. Citizens for Transparent Government, Inc. is charged with the knowledge of Plaintiff Drum for the purposes of this analysis.

for alleged violations occurring at the 20 September 2021 meeting accrued on 20 September 2021.

The email thread meetings that took place on 8 October 2021 through 12 October 2021 between the majority of the Village Council contained discussion of potential censures against Plaintiff Drum. While these discussions were not recorded in the public minutes, the actions that Plaintiffs contend violated the Open Meetings Law were referenced in a prepared document at the Village Council Meeting on 12 October 2021. Plaintiff Drum was present at this council meeting. Therefore, as we held in *Coulter*, the date of accrual for actions pertaining to the email thread on 8 October 2021 through 12 October 2021 accrued on 12 October 2021.

Similarly, because Plaintiff Drum was present at the meeting on 12 October 2021, Plaintiffs' claims in regard to violations of the Open Meetings Law which occurred at that meeting also began to accrue on that date. Further, the email meeting threads which took place from 12 October 2021 through 26 October 2021 referenced motions against Plaintiff Drum, which were then discussed at the Village Council Meeting on 26 October 2021. Thus, the date of accrual for alleged violations in the 12 October 2021 through 26 October 2021 email threads and at the 26 October 2021 Village Council meeting is 26 October 2021.

Having determined that Plaintiffs' claims accrued on 20 September 2021, 12 October 2021, and 26 October 2021, the claims were properly dismissed by the trial

court as time-barred if the 45-day statute of limitations period applies to all forms of relief sought in Plaintiffs' complaint. However, when determining what claims the 45-day statute of limitations period in N.C.G.S. § 143-318.16A applies to, we must adhere to well-established principles of statutory construction which dictate that, "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *State v. Langley*, 371 N.C. 389, 395 (2018) (quoting *State v. Hooper*, 358 N.C. 122, 125 (2004)). N.C.G.S. § 143-318.16A, entitled "Additional remedies for violations of Article," states:

> (a) Any person may institute a suit in the superior court requesting the entry of a judgment declaring that any action of a public body was taken, considered, discussed, or deliberated in violation of this Article. Upon such a finding, the court may declare any such action null and void. Any person may seek such a declaratory judgment, and the plaintiff need not allege or prove special damage different from that suffered by the public at large. The public body whose action the suit seeks to set aside shall be made a party. The court may order other persons be made parties if they have or claim any right, title, or interest that would be directly affected by a declaratory judgment voiding the action that the suit seeks to set aside.
>
> (b) *A suit seeking declaratory relief under this section must be commenced within 45 days following the initial disclosure of the action that the suit seeks to have declared null and void*; provided, however, that any suit for declaratory judgment brought pursuant to this section that seeks to set aside a bond order or bond referendum shall be commenced within the limitation periods prescribed by [N.C.]G.S. 159-59 and [N.C.]G.S. 159-62. If the challenged action is recorded in the minutes of the public body, its initial disclosure shall be deemed to have occurred on the date the minutes are first available for public inspection. If the challenged action is not recorded in the minutes of the public body,

> the date of its initial disclosure shall be determined by the court based on a finding as to when the plaintiff knew or should have known that the challenged action had been taken.
>
> (c) In making the determination whether to declare the challenged action null and void, the court shall consider the following and any other relevant factors:
>
> (1) The extent to which the violation affected the substance of the challenged action;
>
> (2) The extent to which the violation thwarted or impaired access to meetings or proceedings that the public had a right to attend;
>
> (3) The extent to which the violation prevented or impaired public knowledge or understanding of the people's business;
>
> (4) Whether the violation was an isolated occurrence, or was a part of a continuing pattern of violations of this Article by the public body;
>
> (5) The extent to which persons relied upon the validity of the challenged action, and the effect on such persons of declaring the challenged action void;
>
> (6) Whether the violation was committed in bad faith for the purpose of evading or subverting the public policy embodied in this Article.
>
> (d) A declaratory judgment pursuant to this section may be entered as an alternative to, or in combination with, an injunction entered pursuant to [N.C.]G.S. 143-318.16.
>
> (e) The validity of any enacted law or joint resolution or passed simple resolution of either house of the General Assembly is not affected by this Article.

N.C.G.S. § 143-318.16A (2022) (emphasis added).

Here, the relevant language contained in N.C.G.S. § 143-318.16A(b) dictating that "[a] suit seeking declaratory relief under this section must be commenced within

45 days following the initial disclosure of the action that the suit seeks to have declared null and void" is unambiguous. This section of the statute provides a limitations period followed by only one of three forms of relief available for claims under the Open Meetings Law. By not including mention of injunctive relief within this section, which is delineated from other forms of relief for violations of the Open Meetings Law in N.C.G.S. § 143-318.16, it is clear that the 45-day period is a limit only on claims which seek nullification as a form of relief.[3]

Defendants argue that a reading of the statute of limitations including only the relief prescribed in N.C.G.S. § 143-318.16A conflicts with the framework we established in *Garlock v. Wake County Bd. of Educ.*, 211 N.C. App. 200, 230 (2011). However, no such conflict exists. In *Garlock*, we held that:

> The Open Meetings Law requires a two-step analysis. First, the trial court must consider whether a violation of the Open Meetings Law has occurred; that is, whether the public body has taken reasonable measures to provide for public access to its meetings. If no violation has occurred, the analysis stops at step one. If there was a violation, the court must consider step two, which is identifying the appropriate remedy. The trial court may consider remedies under [N.C.G.S] § 143–318.16, which governs injunctive relief, and [N.C.G.S.] § 143–318.16A, which provides for "Additional remedies for violations of Article."

[3] N.C.G.S. § 143-318.16 reads in relevant part: "(a) The General Court of Justice has jurisdiction to enter mandatory or prohibitory injunctions to enjoin (i) threatened violations of this Article, (ii) the recurrence of past violations of this Article, or (iii) continuing violations of this Article. 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. It is not a defense to such an action that there is an adequate remedy at law. (b) Any injunction entered pursuant to this section shall describe the acts enjoined with reference to the violations of this Article that have been proved in the action." N.C.G.S. § 143-318.16 (2022).

Id. Defendants argue that, because step one of the *Garlock* analysis requires the trial court to provide declaratory judgment if a violation of the Open Meetings Law is found, all Open Meetings Law claims are subject to the 45-day statute of limitations because they are essentially derivitative of the same claim.

Defendants' argument is without merit. Step one in *Garlock's* two-step analysis requires the trial court to determine whether there is a violation of any law contained within Article 33 generally, and step two provides discretion to the court to apply the appropriate remedy. *Garlock*, 211 N.C. App. at 230. In *Garlock*, we held that "a judicial determination that a public body has violated the Open Meetings Law requires a separate analysis and standard from the determination of the appropriate remedies." *Id.* A plain reading of N.C.G.S. § 143-318.16 and N.C.G.S. § 143-318.16A as being subject to different limitations periods does not inherently conflict with *Garlock*; rather, it time-bars specific remedies under the Open Meetings Law. When interpreting N.C.G.S. § 143-318.16A so as to not conflict with its plain meaning[4], the 45-day statute of limitations period applies only to the statutorily independent remedy of nullification.

[4] *Compare* N.C.G.S. § 143-318.16A(b) (2022) ("[a] suit seeking declaratory relief under this section must be commenced within 45 days following the initial disclosure of the action that the suit seeks to have declared null and void"), *with* N.C.G.S. § 143-318.16 (2022) ("Any person may bring an action in the appropriate division of the General Court of Justice seeking such an injunction. . .").

Defendants further argue that our holding in *Coulter v. City of Newton*, 100 N.C. App. at 526 establishes that the 45-day statute of limitations period in N.C.G.S. § 143-318.16A applies to claims under the Open Meetings Law that do not seek nullification as a form of relief. In *Coulter*, we noted that "a careful reading of [the] plaintiffs' pleadings and brief indicates that the only purpose of this action is to test the legality of the Board's [] action . . . ." *Id.* at 525-526. We then held that the suit was properly dismissed as time-barred when it was filed 60 days after the plaintiff gained knowledge of the action taken by the board. *Id.*

However, the plaintiffs in that case filed a complaint "seeking to have the contract between the City and the [other party] declared void . . ." *Id.* at 524. Further, the plaintiffs there sought merely to "reverse the action of the Board . . ." *Id.* The plaintiffs in *Coulter* did not actually seek declaratory judgment or injunctive relief in their complaint alleging a violation of the Open Meetings Law; rather, those plaintiffs sought to have the Board's action declared null and void under N.C.G.S. § 143-318.16A. Our characterization of those plaintiffs' claims as seeking to "test the legality" of the challenged action in *Coulter* was no more than a framework to analyze the relevant issues in that particular case. Accordingly, our holding in *Coulter* does not render all claims for relief under the Open Meetings Law as limited by the 45-day statute of limitations applicable to N.C.G.S. § 143-318.16A. The trial court erred by dismissing Plaintiffs' claims which sought relief in the form of an order pursuant

to N.C.G.S. § 143-318.16A declaring that the actions by the Village Council were in violation of the Open Meetings Law, for dismissing Plaintiffs' claim which sought relief pursuant to the Uniform Declaratory Judgments Act N.C.G.S. § 1-253, and for dismissing Plaintiffs' claims for injunctive relief pursuant to N.C.G.S. § 143-318.16 as time-barred.

CONCLUSION

As Plaintiffs did not seek an order rendering actions by the Village Council null and void pursuant to N.C.G.S. § 143-318.16A, and because the plain meaning of N.C.G.S. § 143-318.16A provides that, of the three forms of relief the trial court has discretion to grant for violations of the Open Meetings Law, nullification is the only form which is limited by 45-day period contained in the statute, Plaintiffs' claims that allege violations of the Open Meetings Law in relation to the 20 September 2021 Special Meeting, the 8 October 2021 through 12 October 2021 email thread meetings, the 12 October 2021 Village Council meeting, the 12 October 2021 through 26 October 2021 email thread meetings, and the 26 October 2021 are remanded to the trial court for further proceedings.

REVERSED AND REMANDED.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).