

Comments and recommendations regarding SB876 (a bill directed to requiring final actions voted on by public bodies be on their agendas before meetings commence)

Jason V. Morgan, PRP, CP-T
jvm.rules.order@gmail.com
443-538-4338

Introduction

I am a Professional Registered Parliamentarian with the National Association of Parliamentarians, a Certified Parliamentarian – Teacher with the American Institute of Parliamentarians, and a licensed attorney in the Commonwealth of Virginia. I have an education in Computer Science (B.S., University of Utah), Law (J.D., George Washington University), and Business (EMBA, New York University). I have volunteered in multiple private and public bodies. I also have had a practice for nearly thirteen years providing parliamentary services to multiple deliberative bodies, including public bodies.

I learned about Senate Bill 876 (SB876)—a bill limiting the final actions a public bodies can take primarily to those included on an agenda before the public body’s meeting commences—during the last legislative session of the General Assembly.

<https://lis.virginia.gov/bill-details/20251/SB876>. I did not believe it was ready for adoption and spoke against adopting it unless key changes were made.

https://hodspeak.house.virginia.gov/meetings/18133/public_comments. SB876 was referred to the Council and, after consideration in the Meetings Subcommittee, the Honorable Senator Ebbin proposed several changes.

<https://foiacouncil.dls.virginia.gov/LD26100105D.pdf>. Unfortunately, I believe that these changes fall short of mitigating serious risks of unintended consequences. Fortunately, there is still time for this bill to be improved.

To that end, I have five recommendations that I believe will ensure that SB876 addresses the concerns its advocates have raised, that it addresses issues that they have not considered but should have, and that minimizes the risk of serious unintended consequences. Moreover, these recommendations would serve to promote, rather than hinder, transparent, democratic deliberations in Virginia's public bodies.

I respectfully request that, before this bill is returned to the General Assembly, the Virginia Freedom of Information Advisory Council incorporate these recommendations. SB876 is likely to have significant, unwanted ramifications if it is not tailored precisely to mitigate foreseeable risks.

Recommendations

My recommendations are (1) limit injunctive relief for taking a final action that was not on the agenda so that the body that adopted the final action has time to consider rescinding the final action; (2) allow members of a public body to provide notice of proposed motions to be considered at a future meeting even if the motion was not on the agenda; (3) use adoption of the agenda, rather than commencement of the meeting, as the basis for when an item must be included on the agenda; (4) exclude management of a public body and its subordinate public bodies from the scope of the bill; and (5) exclude non-binding communications to other public bodies from the scope of the bill.

Based on Sen. Ebbin's most recent proposal, these recommendations could be effected with the following changes (*italics* indicate Ebbin's proposed additions, underlines indicate language that I recommend inserting, and ~~strike-outs~~ indicate language I recommend deleting):

Recommended changes to § 2.2-3707:

G. At least one copy of the proposed agenda and all agenda packets and, unless exempt, all materials furnished to members of a public body for a meeting shall be made available for public inspection at the same time such documents are furnished to the members of the public body. *The public body shall also post the proposed agenda on the public body's official government website, if any, prior to the meeting. No final action may be taken on items added to the agenda after the meeting commences* agenda is adopted, whether explicitly or constructively, unless they are time-sensitive, or are the subject of a closed meeting properly identified in a motion in accordance with § 2.2-3711, or if a member gave notice during the preceding meeting of intent to move to consider taking the final action.

For purposes of this subsection, “final action” means a vote, adjudication, or other formal action taken by a public body that completes a matter or acts as final consideration of an item. “Final action” does not include:

~~1. Referral to a committee or advisory body;~~

~~2. Referral to a future meeting for action;~~

1. Management of the public body or its subordinate bodies, such as committees, sub-committees, advisory bodies, and working groups;

2. Non-binding communications to another public body;

3. Direction to staff to provide further information; or

4. Issuance of a commending or memorial proclamation.

Recommended changes to § 2.2-3713:

G. Injunctive relief for a final action taken on an item that was not on a public body's agenda, in violation of § 2.2-3707(G), shall not extend beyond the public body's next regularly scheduled meeting or beyond a special meeting of the public body called for the purpose of considering rescinding improperly adopted final action.

Purposes of recommendations

Limiting injunctive relief for taking a final action that was not on the agenda so that the body that adopted the final action has time to consider rescinding the final action

Limiting injunctive relief as proposed would allow for court intervention, particularly in extreme cases, to ensure that public bodies seek to fulfill the requirements of SB876 as fully and faithfully as possible. But it would keep the locus of final decision making in the public bodies themselves, where democratic, even collaborative deliberations should prevail, rather than in the courts, which operate based on a hierarchical, adversarial model. This would minimize the chances of frivolous litigation that might tie up matters indefinitely without a compelling reason.

Allowing members of a public body to provide notice of proposed motions to be considered at a future meeting even if the motion was not on the agenda

Allowing for members of a public body to provide notice of proposed motions would ensure that form (inclusion of a matter on a meeting's agenda) is not elevated over substance (whether members of the public and of a public body were made aware of the matter). Allowing for such notice would also ensure that agenda drafters cannot exclude matters from the agenda as a way of preventing such matters from being considered.

Using adoption of the agenda, rather than commencement of the meeting, as the basis for when an item must be included on the agenda

Using adoption of the agenda to establish the point at which an item must be included on the agenda also would ensure that agenda drafters cannot unilaterally exclude matters from the agenda. This change would also make clear that a public body, rather than the chair or staff member, has ultimate ownership or control over the public body's agenda, unless the public body delegates that authority. The recommendation allows for constructive, rather than explicit, adoption of an agenda to serve as the point at which an agenda becomes binding, thus preventing a public body from evading the requirements of SB876 by never voting on adoption of an agenda that it is nonetheless following.

Excluding management of a public body and its subordinate public bodies from the scope of the bill

Excluding management of a public body and its subordinate public bodies from the scope of the bill broadens the exclusions already proposed by Sen. Ebbin's proposed redraft. Such broadening would avoid placing undue constraints on a public body's management of itself or its subordinate public bodies. With regards to management of a public body and its subordinate public bodies, it is the public body—not the public—that is affected by decision-making. Thus, a public body should be responsible for its own operations. Therefore, the risks of trying to effect effective management of public bodies through the courts, which creates potential for confusion, disruption, and delay, are not outweighed by any substantial benefit to the public.

Excluding non-binding communications to other public bodies from the scope of the bill

Non-binding communications from a public body to another public body—such as reports from a committee to the public body that appointed the committee, or formal letters from one public body to another—should be encouraged as a way of promoting transparency and efficiency in inter-body deliberations. Exempting them from the requirements of SB876 would encourage the use of such non-binding communications without eroding any substantial interests of the public.

Risks addressed by recommendations and by existing commonly accepted rules of order

Insufficient notice to public

The cause célèbre inspiring SB876 is that fear that members of the public who may be affected by the actions taken by public bodies may not be aware of if or when those actions are up for consideration. Even with my two recommendations, public bodies would have an incentive, given the penalties under Va. Code § 2.2-3714(A) (up to \$5,000 for repeat willful and knowing violations) and the potential delay under § 2.2-3713(G), to provide the public with notice before taking final actions.

Even without SB876, members of the public can petition members of a public body if a final action taken without notice to the public appears unwise. Under commonly accepted rules of order, such as *Robert's Rules of Order, Newly Revised* (RONR), the unexecuted portion of an action taken can be rescinded or amended through a motion to *Rescind or Amend Something Previously Adopted*. RONR (12th ed.) § 35. Thus, a public body that imprudently takes a final action can take back that action to the extent its effects are not immediate.

Insufficient notice to members of the public body

An issue that supporters of SB876 have not raised, but which is nonetheless important, is whether members of the public body know what they will be considering. The risk is that a temporary majority may meet and, taking advantage of an unrepresentative composition of those in attendance, push through a matter that the majority of the public body opposes.

To make this risk more clear, consider a public body of five members (A, B, C, D, and E). Members A and B may support X, while members C, D, and E may oppose X. A, B, and C

may meet, forming a valid quorum, and adopt X even though the public body as a whole opposes X. With notice, members D and E may have made arrangements to also meet, thus preventing adoption of X by a temporary majority.

Even with these recommendations, SB876 would discourage such gamesmanship. Further, members of a public body facing such situations have options under commonly accepted rules of order for addressing such challenges.

As noted above, the motion to *Rescind or Amend Something Previously Adopted* enables a public body to undo the unexecuted portions of an action that is not supported by the majority of the public body's members. In some cases, members who oppose an action can leave the meeting, depriving the remaining members of a quorum and thus preventing adoption of a matter they oppose. Further, the motion to *Reconsider and Enter on the Minutes* is a powerful tool specifically tailored to respond to an unrepresentative temporary majority's efforts to take actions the body as whole would be unlikely to support. RONR (12th ed.) §§ 37:46–52.

Lawsuits that might thwart or unduly delay final actions

Without modification, SB876 provides a tool for opponents of decisions made through democratic deliberative making by public bodies to attack those decisions using adversarial proceedings of the judicial system. This risk should not be underestimated; even decisions by public bodies that would benefit the general public may be opposed by a small minority of citizens because of concentrated costs or idiosyncratic perceived costs. See, e.g., David Foster and Joseph Warren, *The NIMBY problem*, Journal of Theoretical Politics, Volume 34, Issue 1, January 2022, Pages 145–72, available at <https://doi.org/10.1177/09516298211044852>.

My recommendation to limit injunctive relief so as not to extend beyond the public body's next regularly scheduled meeting or beyond a special meeting of the public body called for the purpose of considering rescinding improperly adopted final action would limit the risk of final actions being thwarted or unduly delayed. Legal action could force the public body to meet once again, ensuring that members of the public and members of the public body are aware of the final action that was taken without having been placed on the agenda. But the pace for resolving the dispute, either by maintaining the final action or by rescinding it, would be set by the public body, not by a court. This would minimize any frivolous use of the law to impede governance rather than remedying significant harm.

Inefficiency or reduced transparency of public body deliberations

A narrow reading of SB876 could discourage public bodies from using meetings to deliberate, listen to each other, reach compromises, and produce the best decisions their members collectively support. For example, a chair may be inclined to rule a motion to amend a proposed final action out-of-order out of fear that the proposed amendment, even if it has popular support, may open the door to a lawsuit defeating the final action. Or members may be disinclined to support such amendments out of similar fears. Alternatively, they could provide such broad notices of proposed final actions that members of the public would lack meaningful notice of what such final actions could entail. Or public body members could skirt around open meeting requirements—perhaps by numerous one-on-one conversations outside the public view—to make sure that proposed final actions are perfected before they are added to the agenda.

Limiting injunctive relief, as recommended, minimizes these risks of inefficiency or reduced transparency by easing the consequences if a final action is deemed to have not been sufficiently included in the agenda for a meeting. Excluding non-binding communications with other public bodies also encourages efficiency and transparency when it comes to deliberations that happen among public bodies, not just within a single public body.

Abuse of agenda management to control deliberations

With public bodies where the proposed agenda is set by the chair or even by a non-member, SB876 creates the potential for abuse because the items the agenda drafter opposes may be omitted. Such abuse has happened in places like Oklahoma, which has agenda publication requirements similar to what SB876 proposes. 25 O.S. § 311, available at <https://oksenate.gov/sites/default/files/2022-05/os25.pdf>. For example, Oklahoma state schools superintendent Ryan Walters has reportedly ignored requests by board members to place items on the agenda for discussion, pre-emptively vetoing even discussion of these items. Murray Evans, *Ryan Walters rejects requests to include new board members' agenda items*, The Oklahoman (Mar. 27, 2025), available at <https://www.oklahoman.com/story/news/education/2025/03/26/ryan-walters-oklahoma-state-board-of-education-agenda-items-rejected/82676029007/>; Emma Murphy, *Oklahoma Education Board asks to hold special meeting regarding its duties*, Oklahoma Voice (July 24, 2025), available at <https://oklahomavoice.com/2025/07/24/oklahoma-education-board-asks-to-hold-special-meeting-regarding-its-duties/>; Sasha Ndisabiye, *'Why am I here?': New Board of Education members frustrated with agenda access, immigration rule*, NonDoc (Feb. 27, 2025), available at

<https://nondoc.com/2025/02/27/new-state-board-of-education-members-frustrated-with-agenda-access-immigration-rule/>.

Waiting until abuse of SB876 occurs before adopting corrections is imprudent as any efforts to further amend Virginia law to limit such abuses would have to wait until the legislative body meets again. Further, there are scenarios in which it would be politically expedient for whoever the governor is to veto corrective lawmaking if, for example, the abuses are by political allies of such a governor. Thus, even if the Virginia General Assembly recognizes that SB876 has resulted in unnecessary harm, it may be difficult to undo such harm.

These limitations limit the potential for abuse in two ways. First, rather than requiring that the agenda be fixed by the time the meeting commences, the agenda is only fixed once it is adopted, either explicitly (e.g., voting to adopt the agenda under rules such as RONR (12th ed.) § 41:61) or constructively (e.g., by proceeding through the meeting in accordance with the agenda). This provides members of the public body the opportunity to amend the agenda to include business that was otherwise excluded. RONR (12th ed.) § 41:62.

Second, a member could give notice of intent to have a final action considered at the next meeting. Such notice would provide both the public and the other members of the public body the opportunity to know that the final action might be brought up and voted on at the next meeting, even if that final action is not included on the agenda for the next meeting.

Conclusion

Proponents of SB876 have the laudable goal of keeping the public informed of final actions public bodies may take. But there are significant risks of unintended consequences that the General Assembly should address before adopting a statute that would limit the flexibility public bodies have to consider and adopt business during their meetings.

I have proposed a limited number of changes to SB876 regarding the extent to which courts can grant injunctive relief if a public body adopts a final action that was not included in the agenda for a meeting, how members of the public can use notice to propose final items for consideration, when an agenda becomes final for purposes of limiting the business of a public body, excluding a public body's management of itself and its subsidiary public bodies from the requirements of SB876, and excluding a public body's communications with other public bodies from the requirements of SB876.

Even with these changes, public bodies would be incentivized to provide notice both to the public and to their membership of final actions to be considered. Moreover, these recommendations would help ensure that public bodies can act with transparency and efficiency, while limiting potential abuses of the courts or of a public body's agenda-setting processes.

Accordingly, I recommend that before SB876 is returned to the General Assembly for further consideration, or reintroduced in the General Assembly, that these recommendations be incorporated.