

**OPEN RECORDS AND MEETINGS OPINION
2005-O-18**

DATE ISSUED: November 8, 2005

ISSUED TO: Grand Forks City Council

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Kyle Braaten asking whether the Grand Forks City Council ("City") violated N.D.C.C. § 44-04-20 by failing to give public notice that contained the general subject matter for a proposed executive session; violated N.D.C.C. § 44-04-19.2 by failing to announce, in the open portion of the meeting, the topic to be discussed in an executive session; and violated other provisions of the open meetings law relating to the executive session.

FACTS PRESENTED

On July 11, 2005, the City held a regular meeting. One of the items on the agenda was a proposed executive session to provide advice to City staff regarding negotiations to purchase property within the buffer zone of a proposed landfill.

The City has been attempting to locate a new solid waste landfill for several years. In 1998, the City acquired land in Turtle River Township, Grand Forks County, on which it planned to build a landfill. Both Turtle River Township and Grand Forks County have zoning regulations that include setback requirements between residential properties and landfills. There is one residence within a quarter-mile (the county's setback requirement) of the proposed landfill site. The property in question is located in Levant Township, which is immediately west of the section line between Levant and Turtle River Townships. The City has been actively engaged in negotiations with the property owner to acquire this property. There have been various proposals and counterproposals made by both parties, but the negotiations had reached a temporary impasse. City staff determined it would be useful to obtain guidance on whether and how to proceed with further negotiations to acquire the property. Accordingly, the matter was placed on the agenda for the City's meeting scheduled for July 11, 2005.

Prior to the meeting, the City's agenda was prepared and distributed. Item 2.13 of the agenda provided: "Negotiations regarding property purchase in Turtle River Township, Grand Forks County (under separate cover). **(city council may adjourn into**

executive session pursuant to NDCC § 44-04-19.2).¹ At the meeting, the mayor allowed a presentation by Mr. Jason Schaefer, who presented the views of the Grand Forks County Citizens Coalition (“Coalition”), a group opposed to the proposed landfill and the purchase of property associated with it. After introducing Mr. Schaefer, the auditor indicated the presentation was related to agenda item 2.13 and read the title as it appeared on the published agenda. Mr. Schaefer stated that he was aware the City intended to go into executive session to discuss the possible purchase of property “near the Turtle River site.” He stated that he assumed the property to be discussed was related to the proposed landfill. After the presentation, which lasted about four minutes, the City unanimously approved a motion to convene in executive session to consider agenda item 2.13.

An audiotape of the executive session was made as required by N.D.C.C. § 44-04-19.2(5) and supplied to this office. A review of the audiotape indicates that, except for a brief background statement at the beginning, the executive session was limited to a discussion of matters directly relevant to the purchase of the Loreal Heebink property located in Levant Township within the buffer zone of the proposed landfill. The discussion included an upper limit on the price the City would pay, the conditions that must be accepted by the landowner in connection with any purchase, and other options short of an outright purchase of the property.

ISSUES

1. Whether the City violated N.D.C.C. § 44-04-20(2) because the notice for its July 11, 2005, regular meeting failed to describe the general subject matter to be discussed during an anticipated executive session.
2. Whether the City violated N.D.C.C. § 44-04-19.2 by failing to announce in the open portion of the meeting the legal authority for the meeting and the topic to be discussed, and by discussing a topic in the executive session that was not announced.
3. Whether the City’s executive session was authorized by law under N.D.C.C. § 44-04-19.1(9) and limited to discussing negotiating strategy or providing negotiating instructions to the City’s attorney or other negotiator.
4. Whether the City violated N.D.C.C. § 44-04-19.2(2)(e) by voting on a substantive matter during an executive session.

¹ Emphasis in original.

5. Whether the City violated N.D.C.C. § 44-04-19.2(4) by failing to include in the minutes of the open meeting information specified in that section.

ANALYSES

Issue One: Whether the City violated N.D.C.C. § 44-04-20(2) because the notice for its July 11, 2005, regular meeting failed to describe the general subject matter to be discussed during an anticipated executive session.

Unless otherwise provided by law, all meetings subject to N.D.C.C. § 44-04-19 must be preceded by written public notice.² The notice must include all topics the governing body expects to consider at the time the notice is prepared.³ In addition, a meeting notice must contain the general subject matter of any executive session expected to be held during the meeting.⁴ The description of the “general subject matter” must be “sufficient to provide information about the topic or purpose of the executive session to a member of the public.”⁵

In this case, the notice stated:

- 2.13 Negotiations regarding property purchase in Turtle River Township, Grand Forks County (under separate cover). **(city council may adjourn into executive session pursuant to NDCC 44-04-19.2).**⁶

Mr. Braaten alleges in his opinion request that the City “chose to use a deceptive description” that “misinform[ed] the public as to the reason for the executive session” because the property under consideration was actually located in Levant Township. The City admits the error, but asserts that the notice was sufficient because in the public mind the property to be purchased was identified with the landfill located in Turtle River Township. The City’s position is that the general area of the landfill is often referred to as the “Turtle River Township site” and that referring to the land as land in Turtle River Township is “actually more likely to allow the general public to understand that the negotiations are related to the landfill site than if the agenda item used ‘Levant Township’ which has no involvement with the landfill except to be an adjacent township.” The notice stated “[n]egotiations regarding property purchase in Turtle River Township.”⁷ The notice does not mention that the purchase of property was in relation to the landfill and it specifically stated the wrong township. In addition, using the term

² N.D.C.C. § 44-04-20.

³ N.D.C.C. § 44-04-20(2); N.D.A.G. 2005-O-01.

⁴ N.D.C.C. § 44-04-20(2).

⁵ N.D.A.G. 2004-O-19; N.D.A.G. 2003-O-22; see also N.D.A.G. 2005-O-04.

⁶ Emphasis in original.

⁷ Emphasis added.

OPEN RECORDS AND MEETINGS OPINION 2005-O-18

November 8, 2005

Page 4

“negotiations” implies that the City was going to actually negotiate, rather than discuss negotiation strategy or give negotiating instructions to its negotiators. While the notice may have been sufficient to alert those familiar with the landfill project as to the true nature of the proposed executive session, other members of the public would not have known that the subject matter of the executive session was to give negotiating instructions to its negotiators regarding property in Levant Township related to the proposed landfill.

Therefore, it is my opinion that the City’s notice did not sufficiently identify the general subject matter of the executive session, and, accordingly, the City violated N.D.C.C. § 44-04-20.⁸

Issue Two: Whether the City violated N.D.C.C. § 44-04-19.2 by failing to announce in the open portion of the meeting the legal authority for the meeting and the topic to be discussed, and by discussing a topic in the executive session that was not announced.

Topic to be discussed.

Prior to going into an executive session, the governing body must announce both the legal authority for the session and the general topics to be discussed or considered.⁹ The purpose of the announcement is to provide the public with a legally sufficient reason for holding the executive session.¹⁰ Topics discussed during an executive session must be limited to those announced.¹¹

Mr. Braaten asserts that because the topic announced identified the property as being located in Turtle River Township, rather than in Levant Township, it was improper for the City to discuss the purchase. He states that “there was no discussion of the announced topic, and the topic discussed was not announced.”

During the open portion of the meeting the mayor announced that the City’s council members would hear a presentation from Mr. Schaefer, who had asked to make the presentation prior to the council members going into executive session. The auditor stated that the presentation would be in regard to item 2.13, which was the executive session. The auditor then read the title of item 2.13 as it was printed on the agenda.

⁸ Even if a notice is legally insufficient, the recording of an otherwise authorized executive session is not an open record. N.D.A.G. 98-O-25. The remedy is to publish minutes that explain the legal basis for the executive session and the topic that was discussed. Id.

⁹ N.D.C.C. § 44-04-19.2(2)(b); N.D.A.G. 99-O-04.

¹⁰ N.D.A.G. 2004-O-13; N.D.A.G. 2004-O-10; N.D.A.G. 2003-O-22; N.D.A.G. 2000-O-10.

¹¹ N.D.C.C. § 44-04-19.2(2)(d).

Following that introduction, Mr. Schaefer made his presentation, which lasted about four minutes. Mr. Schaefer's presentation gave background of the status of the proposed landfill. As part of the background, he stated that the city of Grand Forks was proposing to build a landfill in Turtle River Township approximately 17 miles north of Grand Forks. He stated that he understood the council members would be going into executive session to discuss the possibility of purchasing more property near the Turtle River Township site and he expressed the Coalition's opposition to purchasing any more property for the landfill.

I concluded in Issue One that the notice did not sufficiently identify the subject matter of the executive session so that the public would know that the City was discussing purchasing property related to the landfill. Unlike a notice, an announcement may not be an isolated statement. It is reasonable to consider what was discussed at a meeting before or after an announcement to determine whether or not a member of the public could understand what the governing body was planning to discuss in executive session.¹² Neither the City nor the Coalition ever mentioned that the project was in Levant Township, rather than Turtle River Township. Therefore, the announcement was technically wrong. In this case, however, the auditor's statement that the presentation pertained to item 2.13 (the executive session), in conjunction with the presentation itself made immediately after the announcement, made it clear that the City was planning to discuss purchasing property near the landfill.

It is therefore my opinion that the City did not violate N.D.C.C. § 44-04-19.2 by discussing the purchase of land in Levant Township.

Legal authority.

As noted above, before going into executive session, a public entity must also announce the legal authority for the session.¹³ When an executive session is held to discuss negotiation strategy under N.D.C.C. § 44-04-19.1(7), the announcement need not cite the specific statute authorizing an executive session for that purpose.¹⁴ Rather,

¹² Cf. N.D.A.G. 2004-O-13 (discussion among the Board members which occurred after the legal authority was announced provided the public with notice that the topic of the executive session was to develop bargaining strategies for negotiating a contract for teacher compensation); N.D.A.G. 2000-O-05 (had the executive session occurred immediately following a presentation by a member of the public, it might be fair to infer that the "negotiations" in the Board's motion pertained to the topic presented).

¹³ N.D.C.C. § 44-04-19.2(2)(b).

¹⁴ N.D.A.G. 2000-O-05.

an announcement is sufficient if it recites the applicable statutory language,¹⁵ such as “negotiation strategy,” “negotiation instructions,” or similar language.¹⁶

The City announced the legal authority as “negotiations.” The City asserts that, based on N.D.A.G. 2003-O-22, using the term “negotiations” was sufficient to identify the legal authority for the executive session. That opinion stated “[u]sing the word negotiation in some form would have sufficiently identified N.D.C.C. § 44-04-19.1(7) as the legal authority for the executive session.” Using the word “negotiations” does comply with the statement in that opinion. It was not unreasonable for the City, in accordance with that opinion, to use the word “negotiations” to describe the legal authority. Therefore, I do not find the city violated N.D.C.C. § 44-04-19.2(2)(b). I do, however, note that the sentence in that opinion must be read in context with the remaining discussion of that issue. The paragraph in which that sentence appears provides in part:

An announcement is sufficient if it uses the phrases “negotiation strategy” or “negotiation instructions,” or similar language, and identifies the particular contract or contracts for which the governing body was discussing negotiation strategy or providing negotiation instructions under N.D.C.C. § 44-04-19.1(7). . . . In this case, the announcement in the minutes identified the contract under consideration, but did not refer to “negotiation strategy,” “negotiation instructions” or similar language. Using the word “negotiation” in some form would have sufficiently identified N.D.C.C. § 44-04-19.1(7) as the legal authority for the executive session.¹⁷

Read in context with the remaining discussion, it is my opinion that, in the future, a public entity that goes into an executive session under N.D.C.C. § 44-04-19.1(9) must, in addition to using some form of the word “negotiation,” use the word “strategy,” “instructions,” or something similar. Using those words will clarify that the meeting is one the public entity has authority to close. Using simply the word “negotiations” may be misleading. It suggests the public entity is going into executive session to negotiate with another party, which is not a legally authorized reason to close a meeting.¹⁸

¹⁵ N.D.A.G. 99-O-04.

¹⁶ N.D.A.G. 2000-O-05.

¹⁷ N.D.A.G. 2003-O-22.

¹⁸ N.D.A.G. 2004-O-13 (a meeting may be closed for negotiating strategy to give negotiating instructions to its negotiators only if holding the discussion in an open meeting would have an adverse fiscal effect on the public entity’s bargaining position); c.f. N.D.A.G. 2004-O-21 (allowing the adverse party to attend the negotiating session negates the right to hold an executive session).

OPEN RECORDS AND MEETINGS OPINION 2005-O-18

November 8, 2005

Page 7

Issue Three: Whether the City's executive session was authorized by law under N.D.C.C. § 44-04-19.1(9) and limited to discussing negotiating strategy or providing negotiating instructions to the City's attorney or other negotiator.

A governing body may hold an executive session to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiators regarding current contract negotiations¹⁹ if discussing the strategy or instructions in an open meeting would adversely affect the bargaining position of the entity.²⁰ Any such executive session must be limited to the topics announced during the open portion of the governing body's meeting.²¹ The history of negotiations generally may not be conducted in executive session.²²

Approximately the first five minutes of the executive session, up to the point where Mr. Todd Feland, director of public works, said: "So my concern is . . ." contains brief introductory comments by the city attorney followed by a discussion of the landfill project's history, including acquiring property for the landfill, and prior negotiations with the property owners in the landfill buffer zone. These introductory comments were not negotiation strategy or instructions. Presenting this information during the open portion of the meeting would not have negatively impacted the City's position regarding its negotiations with the property owners and was therefore improperly closed to the public in violation of N.D.C.C. § 44-04-19.1(9).

The balance of the executive session contains a discussion of negotiation strategy and instructions to the City's negotiators relating to the landfill. Although council members, staff, and the city attorney continued to refer to past events in the negotiation process, "those remarks were made in the context of the [City's] intent" to pursue further negotiation, and the terms and conditions of any counteroffer that might be made. The incidental discussion of negotiation history is permitted in the context of developing negotiation strategy.²³ The discussion in this portion of the meeting related to negotiation strategy and instruction to the negotiators. Also, it was limited to the topic that had been announced – acquisition of land in connection with the landfill. A review of the recording of the executive session leaves little doubt that a public discussion of the strengths and weaknesses of the City's bargaining position and negotiating options would have had an adverse fiscal effect on the bargaining position of the City. Therefore, except for discussion of the history of the negotiations during the first five

¹⁹ N.D.C.C. § 44-04-19.1(9).

²⁰ Id.

²¹ N.D.C.C. § 44-04-19.2(2)(d).

²² N.D.A.G. 2000-O-05; cf. N.D.A.G. 99-O-04 (an update on the status of the situation and what had occurred up to that time should have occurred in the open portion of the meeting).

²³ N.D.A.G. 2000-O-05.

minutes, is my opinion that the remaining portion of the City's executive session was authorized by law under N.D.C.C. § 44-04-19.1(9) and limited to the topic announced.²⁴

Issue Four: Whether the City violated N.D.C.C. § 44-04-19.2(2)(e) by voting on a substantive matter during an executive session.

Final action on a topic discussed during an executive session must occur during the open portion of the meeting, unless final action is otherwise required by law to be taken during the executive session.²⁵ “[F]inal action means a collective decision or a collective commitment or promise to make a decision on any matter, including formation of a position or policy, but does not include guidance given by members of the governing body to legal counsel or other negotiator in a closed attorney consultation or negotiation preparation session authorized in section 44-04-19.1.”²⁶

In this case, no votes were taken during the executive session. The City's only action during the executive session was to provide authority and instructions for further negotiations regarding the purchase of property. Thus, the discussion was not “final action” as defined in N.D.C.C. § 44-04-19.2(2)(e).²⁷ Accordingly, it is my opinion that the City did not violate N.D.C.C. § 44-04-19.2(2)(e).

Issue Five: Whether the City violated N.D.C.C. § 44-04-19.2(4) by failing to include in the minutes of the open meeting information specified in that section.

The minutes of an open meeting during which an executive session is held must indicate the names of the members attending the executive session, the date and time the executive session was called to order and adjourned, a summary of the general topics that were discussed or considered, and the legal authority for holding the executive session.²⁸

In this case, the minutes failed to specifically identify the members attending the executive session and failed to indicate the time the executive session began and ended. The minutes described the topic considered during the executive session as the “property purchase in Turtle River Township.” Because the minutes contain a

²⁴ Even though the City's counteroffer was subsequently rejected, the recording of the executive session remains a closed record. A tape recording and other records of an executive session “continue to be closed even if disclosure would no longer defeat the purpose of the executive session.” N.D.A.G. 98-O-25.

²⁵ N.D.C.C. § 44-04-19.2(2)(e); N.D.A.G. 2000-O-04.

²⁶ N.D.C.C. § 44-04-19.2(2)(e).

²⁷ See N.D.A.G. 2004-O-22 (because it did not take final action on the mediation offer during a closed session, the council did not violate N.D.C.C. § 44-04-19.2(2)(e)).

²⁸ N.D.C.C. § 44-04-19.2(4).

detailed description of the presentation by Mr. Schaefer and its relationship to the landfill, the City sufficiently described the topic considered. The legal authority for holding the executive session was given as “negotiations” regarding the purchase. Using the word “negotiations” in this instance sufficiently identified N.D.C.C. § 44-04-19.1(7) as the legal authority for holding an executive session.²⁹ The minutes included the date of the meeting. Therefore, it is my opinion that the City violated N.D.C.C. § 44-04-19.2(4) by failing to identify the members attending the executive session and by failing to indicate the time the executive session began and ended.³⁰

CONCLUSIONS

1. The City violated N.D.C.C. § 44-04-20 because its notice did not describe the general subject matter of an item that was discussed during an executive session.
2. The City did not violate N.D.C.C. § 44-04-19.2 because the announcement and the presentation made in the open session of the City’s meeting preceding the executive session described in sufficient detail the topic discussed and using the word “negotiations” in this instance identified the legal authority for the executive session.
3. The City violated N.D.C.C. § 44-04-19.1(9) because the first approximately five minutes of the executive session – a history of the landfill project and prior negotiations to purchase the property – were not authorized to be held in the executive session.
4. The City did not violate N.D.C.C. § 44-04-19.2(2)(e) because it did not take “final action” during the executive session.

²⁹ See supra text accompanying footnotes 13-18.

³⁰ Mr. Braaten also alleged the City violated N.D.C.C. § 44-04-20(8) by failing to follow the Attorney General's suggested text for commencing an executive session. Under N.D.C.C. § 44-04-20(8), the Attorney General is required to “prepare general guidelines to assist public entities in following the provisions of this section [relating to notice of public meetings].” The Attorney General's sample form for closing executive sessions is simply a guideline. There is no requirement that these guidelines be used by public entities. Therefore, although public entities are encouraged to utilize guidelines for the procedures to be followed in the conduct of open meetings, the failure to follow the guidelines for commencing an executive session does not, by itself, violate the open records law.

5. The City violated N.D.C.C. § 44-04-19.2(4) by failing to include in the minutes of the open meeting the names of the members attending the executive session and time the executive session began and ended.

STEPS NEEDED TO REMEDY VIOLATIONS

The City must issue and post a new notice in accordance with N.D.C.C. § 44-04-20. The notice must state in some manner that the subject matter of the executive session was for negotiating strategy and to give negotiating instructions to its negotiators regarding property in Levant Township related to the landfill project. The City must make a copy of the audio recording of the first five minutes of the executive session and provide the recording to the requester free of charge. The City must revise the minutes of its meeting of July 11, 2005, to reflect the topic and legal authority of the executive session as described above, to reflect the discussion in the first five minutes of the executive session, to reflect the names of the members attending the executive session, and to identify the time the executive session began and ended. A copy of the revised minutes must be provided to the requester and anyone else who requests a copy free of charge.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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