

**OPEN RECORDS AND MEETINGS OPINION  
2011-O-01**

DATE ISSUED: January 4, 2011

ISSUED TO: Bowdon 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 Lyle Stewart asking whether Bowdon City Council violated N.D.C.C. § 44-04-19 by meeting and conducting public business before scheduled meetings and whether the City Council violated N.D.C.C. § 44-04-20 by holding meetings without providing public notice.

**FACTS PRESENTED**

The Bowdon City Council (Council) meets monthly on the first Monday of the month at the community center. The meetings are scheduled to begin at 7 p.m. in the winter months and 8 p.m. in the summer months. Notices of the meetings are not usually posted but the minutes are published in the Harvey Press after each meeting and they include the date and time of the next scheduled meeting.

On June 7, 2010, a regular meeting of the Council was scheduled for 8 p.m. Before the meeting, the mayor, city auditor, a representative from Kadrmas, Lee, and Jackson (KLJ) and a representative from the United States Department of Agriculture (USDA) met to review a letter of conditions for a USDA grant.

On June 22, 2010, a special meeting was scheduled for 8 p.m. The Council<sup>1</sup> met in private before the meeting and discussed raising the water and sewer rates. During that time, the Council passed a motion to increase the water and sewer rates. The Council then met publicly at the 8 p.m. meeting.<sup>2</sup>

On July 29, 2010, the Council posted a notice announcing that there would be no regular Council meeting in August. At the same time the Council posted a notice stating

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<sup>1</sup> One Council member was absent.

<sup>2</sup> Letter from requester dated August 31, 2010, referenced a July 22, 2010, meeting, however, after discussion with him, the correct meeting date in question was the June 22, 2010 meeting.

that a meeting would be held Tuesday, August 2 at 8:00 p.m. regarding the Bowdon library re-roofing project. The notice was amended on August 2 to say that the meeting would be held Tuesday, August 10, 2010. However, no meeting took place on August 10. Instead, the special meeting about the library project was held on August 11, 2010, with two of the four Council members and the mayor present. At the special meeting, the Council reviewed bids for the library re-roofing project and awarded a contract.

### ISSUES

1. Whether the Bowdon City Council violated N.D.C.C. § 44-04-19 and N.D.C.C. § 44-04-20 by meeting before its June 2, 2010, regular meeting without providing public notice.
2. Whether the Bowdon City Council violated N.D.C.C. § 44-04-19 when it held a closed meeting on June 22, 2010, and N.D.C.C. § 44-04-20 when it failed to provide public notice of the meeting.
3. Whether the Bowdon City Council violated N.D.C.C. § 44-04-20 when it held a special meeting on August 11, 2010, that was not publicly noticed.

### ANALYSIS

#### Issue One

Public notice of all meetings of a public entity's governing body must be given in advance unless otherwise provided by law.<sup>3</sup> A gathering of a quorum of the members of a governing body regarding public business is a "meeting."<sup>4</sup> For a gathering to be considered a "meeting," two primary elements must be considered: the presence of a quorum and the topic of discussion.<sup>5</sup> A quorum is one-half or more of the governing body's members.<sup>6</sup> Bowden has a five member city council, including the mayor. The mayor of a council form of government is counted as a member of a governing body in determining whether a quorum is present so as to conduct business.<sup>7</sup>

Before the June 7, 2010, regular meeting was held, the mayor, city auditor, and a representative from KLJ and the USDA met to review a letter of conditions for a USDA grant. Although the topic was public business, the only Council member in attendance was the mayor; thus, a quorum of the Council was not present. Additionally, those

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<sup>3</sup> N.D.C.C. § 44-04-20(1).

<sup>4</sup> N.D.C.C. § 44-04-17.1(8)(a).

<sup>5</sup> N.D.A.G. 2009-O-11.

<sup>6</sup> N.D.C.C. § 44-04-17.1(14).

<sup>7</sup> N.D.C.C. § 40-08-01; N.D.A.G. 2003-O-05.

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attending the meeting were not a committee created by the authority of the Council.<sup>8</sup> Therefore, it is my opinion that a “meeting,” as defined in N.D.C.C. § 44-04-17.1(8), did not occur so the Council did not violate the open meetings law.

### Issue Two

Public notice of all meetings of a public entity’s governing body must be given in advance unless otherwise provided by law.<sup>9</sup> The notice of a special meeting must include the date, time, location, and topics to be considered at the meeting.<sup>10</sup> Because special or emergency meetings may be called on very short notice, the topics that may be considered are limited to those included in the notice.<sup>11</sup> Unless specifically required by law, notice of regular or special meetings do not have to be published in a newspaper.<sup>12</sup>

The notice must be posted at the principal office of the governing body holding the meeting, at the location of the meeting on the day of the meeting, and in the case of a city, filed with the city auditor.<sup>13</sup> In addition, due to the potentially short notice, the public entity’s official newspaper, if any, and any representatives of the news media who have requested notice of special or emergency meetings must be informed of the special meeting.<sup>14</sup>

The special meeting of the Council was scheduled for 8 p.m. on June 22, 2010. The requester alleges that the Council met prior to the special meeting to discuss public business without providing public notice. The Council does not deny that it met prior to the meeting; in fact, the minutes from the meeting plainly state that the Council met before the meeting and explain what topic was discussed.<sup>15</sup>

According to the City auditor, the Council did not notice the meeting because it believed it was required to publish the notices in the newspaper which would be impossible to do for special or emergency meetings called upon a moment’s notice.<sup>16</sup> As I have explained in past opinions, although a governing body must provide notice of a special

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<sup>8</sup> See generally, N.D.C.C. § 44-04-17.1(6) (definition of “governing body” including any group of person, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body).

<sup>9</sup> N.D.C.C. § 44-04-20(1).

<sup>10</sup> N.D.C.C. § 44-04-20(6).

<sup>11</sup> Id.

<sup>12</sup> See N.D.A.G. 2010-O-07; N.D.A.G. 2003-O-20.

<sup>13</sup> N.D.C.C. § 44-04-20(4); N.D.A.G. 2010-O-05.

<sup>14</sup> N.D.C.C. § 44-04-20(6); N.D.A.G. 2010-O-05; N.D.A.G. 2007-O-02.

<sup>15</sup> Minutes, Bowden City Council (June 22, 2010).

<sup>16</sup> Most of the Council members are employed in farm-related jobs so special meetings are called at the last minute when it rains or when a quorum of members is available.

meeting to its official newspaper, the purpose of the requirement is not to publish the notice, but to give the newspaper the opportunity to send a reporter to the meeting if it so desires.<sup>17</sup> Therefore, special meetings may be called upon short notice as long as the notice is provided to the public and the media at the same time the governing body's members are notified.<sup>18</sup>

In the case of the June 22, 2010, special meeting, the Council did not post notice of either the meeting or the pre-meeting that occurred. Although the Council attempted to update the public through its minutes, without posting public notice of upcoming meetings the public does not have an opportunity to attend the meetings. Thus, it is my opinion that the Council violated the open meetings law when it failed to substantially comply with the notice requirements of N.D.C.C. § 44-04-20.

### Issue Three

The Council held a special meeting on August 11, 2010, to award a contract for re-roofing the public library. The mayor and two Council members were in attendance. The requester alleges that notice was not properly provided for that meeting.

A notice was posted stating that a meeting was to be held concerning a USDA Community Facility Loan/Grant application for the Bowdon Library re-roofing project. However, the date on the notice was changed multiple times and ultimately the notice provided the wrong date. Thus, no notice was provided for the August 11, 2010, meeting.

As I explained in "Issue Two," the public must be given notice of all meetings of a governing body even if the meetings are called on short notice. Because the Council provided no notice of the August 11 special meeting, it is my opinion that the meeting was in violation of N.D.C.C. § 44-04-19 and N.D.C.C. § 44-04-20.

### CONCLUSIONS

1. It was not a violation of the open meetings law when one member of the Council, the mayor, met with the auditor, KLJ, and USDA regarding a grant prior to a June 7, 2010, regular meeting because a quorum of the Council was not present.
2. The Council violated the open meetings law when it failed to substantially comply with the notice requirements of N.D.C.C. § 44-04-20 for a meeting and pre-meeting held June 22, 2010.

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<sup>17</sup> N.D.A.G. 2010-O-07; N.D.A.G. 2003-O-20; See also N.D.A.G. 2003-O-13.

<sup>18</sup> N.D.C.C. § 44-04-20(5); N.D.C.C. § 44-04-20(6); N.D.A.G. 2005-O-08.

3. The Bowdon City Council violated the open meetings law when it failed to provide the public notice required in N.D.C.C. §44-04-20 in advance of a special meeting held August 11, 2010.

#### STEPS NEEDED TO REMEDY VIOLATION

The action that the Council took prior to the regular meeting on June 22, 2010, is already included in the minutes from that meeting. Minutes for the August 11, 2010, special meeting must be drafted and both the minutes of the June 22 and August 11 meetings must be made available to the official newspaper and to any member of the public, upon request, free of charge.

The Council must post a notice of all future meetings in accordance with N.D.C.C. § 44-04-20 and in the event of an emergency or special meeting, the official newspaper must also be notified. Information regarding providing public notice of public meetings may be found in the Open Meetings Manual located at [www.ag.nd.gov](http://www.ag.nd.gov) provided by this office.

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.<sup>19</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>20</sup>

Wayne Stenehjem  
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<sup>19</sup> N.D.C.C. § 44-04-21.1(2).

<sup>20</sup> Id.