

**OPEN RECORDS AND MEETINGS OPINION
2011-O-14**

DATE ISSUED: September 23, 2011

ISSUED TO: Churchs Ferry City Council
Churchs Ferry Tax Equalization Board

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Barry Mawby asking whether the Churchs Ferry City Council (Council) and the Churchs Ferry Tax Equalization Board violated N.D.C.C. §§ 44-04-19 and 44-04-20 by failing to properly notice meetings and whether the Council held an illegal executive session.

FACTS PRESENTED

According to the 2010 census, Churchs Ferry has eleven residents.¹ The City Council meets on the second Monday of each month at 7 p.m. Meetings are held in the City Hall from April through October and at the mayor's home November through March. All meeting notices are posted on the window in the door of City Hall, two or three weeks in advance of the meeting. The notice for the regular council meeting held in April provided the following:

April 11, 2011
City Council Meeting Agenda
Approval of Minutes
Bills
Old Business
New Business

A meeting of the Tax Equalization Board was held April 26, 2011, at 7 pm at City Hall. The Tax Equalization Board is comprised of the Council, the mayor, the assessor and the city auditor. Notice of the meeting was published in the Devil's Lake Journal for two weeks.

During the May 9, 2011, regular meeting, the Council held an executive session. Although the meeting was held at its normal date and time, no notice was posted for the May meeting.

¹ Churchs Ferry is listed as an incorporated city.

ISSUES

1. Whether the Council's notice and agenda for the April regular meeting met the requirements of N.D.C.C. § 44-04-20.
2. Whether the April Tax Equalization Board meeting and the Council's regular May meeting were noticed in substantial compliance with N.D.C.C. § 44-04-20.
3. Whether the Council's executive session held during the Council's regular May meeting was authorized by law.

ANALYSIS

Issue one

A meeting notice must include the "date, time, and location of the meeting and, if practicable, the topics to be considered."² This list of topics is also referred to as the agenda.³ At a regular meeting, "a departure from, or an addition to, the agenda at a meeting, does not affect the validity of the meeting or the actions taken" at the meeting.⁴ The meeting agenda for a regular meeting can be amended on the day of the meeting or during the meeting.⁵ From the time a regular meeting is convened until the meeting is adjourned, a governing body is free to discuss any item of public business regarding the entity.⁶

Mr. Mawby complains that the April meeting notice only lists "old business" and "new business" rather than providing a detailed agenda. As I have explained, in the case of regular meetings use of such general phrases on an agenda may be acceptable.⁷ For instance, the city of Nome posted similar notices and agendas for its regular June and July meetings in 2010.⁸ Even though I found the phrases "old business" and "new business" to be sparse, they were acceptable because the notices were for regular meetings and because the auditor was unaware of any specific topics the Council anticipated discussing at the meetings when she posted the notices.⁹ If Nome's Council

² N.D.C.C. § 44-04-20(2); N.D.A.G. 2010-O-12.

³ N.D.A.G. 2010-O-12.

⁴ N.D.C.C. § 44-04-20(2); N.D.A.G. 2010-O-12; N.D.A.G. 2003-O-07.

⁵ N.D.A.G. 2010-O-12; N.D.A.G. 2003-O-07; N.D.A.G. 2001-O-15; N.D.A.G. 98-O-21.

⁶ N.D.A.G. 2010-O-12.

⁷ See N.D.A.G. 2010-O-12.

⁸ Id.

⁹ See N.D.A.G. 2010-O-12.

had anticipated the discussion of specific topics when the notices were prepared, those specific items would have had to be included in the notices.¹⁰

Likewise here, according to the mayor of Churchs Ferry, when the auditor drafted and posted the notice for the April regular meeting, she was unaware of any specific topics the Council anticipated discussing at the meeting.¹¹ Thus, it is my opinion that the notice substantially complied with N.D.C.C. § 44-04-20.

Issue two

“Unless otherwise provided by law, public notice must be given in advance” of every meeting of a governing body of a public entity.¹² The notice must include “the date, time, and location of the meeting and, where practicable, the topics to be considered.”¹³ The notice must be posted at the public entity’s main office, if any; filed with the city auditor for city-level bodies; and given to anyone requesting this information.¹⁴ Alternatively, a public entity may post notice on its website, if available.¹⁵ On the day of the meeting, the notice must be posted at the location of the meeting.¹⁶

Mr. Mawby alleges that the Council did not post notice of its regular May meeting. He also alleges that notice was not posted prior to the Tax Equalization Board meeting held in April.

Although the city usually posts notices on the city hall door, it admits that it failed to post notice of the May Council meeting. Thus, it is my opinion that the Council violated the open meetings law by failing to provide notice of its May meeting.

Notice of the tax equalization meeting was published in the Devils Lake Journal for two successive weeks prior to the meeting. It was published in the official county newspaper for two successive weeks prior to the meeting in accordance to N.D.C.C.

¹⁰ Id. The purpose of providing advanced notice of any anticipated topics is to provide information to interested members of the public in order that they may attend the meeting or take whatever other action they deem appropriate. See N.D.A.G. 2008-O-23.

¹¹ Opinions must be based “on the facts given by the public entity.” N.D.C.C. § 44-04-21.1(1). It is not surprising for cities with populations as small as Nome or Churchs Ferry to have very basic agendas for their regular meetings as opposed to larger cities where a greater population means additional issues.

¹² N.D.C.C. § 44-04-20(1).

¹³ N.D.C.C. § 44-04-20(2).

¹⁴ N.D.C.C. § 44-04-20(4) and (5).

¹⁵ N.D.C.C. § 44-04-20(4).

¹⁶ N.D.C.C. § 44-04-20(4).

§ 57-23-02.¹⁷ However, it was not posted at the location of the meeting or filed with the city auditor as required in N.D.C.C. § 44-04-20. The requirement to publish is in addition to the notice requirements in N.D.C.C. § 44-04-20.¹⁸ Consequently, it is my opinion that the notice for the Tax Equalization Board meeting was not posted in substantial compliance with N.D.C.C. § 44-04-20.

Issue three

All meetings of the governing body of a public entity must be open to the public unless otherwise specifically provided by law.¹⁹ A governing body may hold an executive session to discuss closed or confidential information or to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding litigation, adversarial administrative proceedings, or contracts.²⁰ An executive session that is authorized by law may be held if the governing body first convenes in an open session, announces in open session the topics to be discussed during the executive session and the legal authority to hold the executive session.²¹

The executive session was not electronically recorded as required under N.D.C.C. § 44-04-19.2, but minutes were taken and provided to this office. The minutes reveal that the Council did not follow the procedural requirements for holding an executive session. The Council did not identify the topics to be discussed or the legal authority to hold the executive session.²² During the executive session the Council discussed that an attorney had been hired to represent Churchs Ferry in a lawsuit against Barry and Holly Mawby and discussed the status of the court case. The Council did not discuss closed or confidential information or any negotiating strategy and it is my opinion that the discussion was improperly held in executive session.

CONCLUSIONS

1. The notice and agenda of the April meeting met the requirements of N.D.C.C. § 44-04-20.
2. The April Tax Equalization Board meeting and the Council's May meeting were not noticed in substantial compliance with N.D.C.C. § 44-04-20.

¹⁷ N.D.C.C. § 57-23-02. Meeting notices only have to be published if a statute specifically requires publication. N.D.A.G. 2009-O-18.

¹⁸ See generally, N.D.A.G. 2009-O-18.

¹⁹ N.D.C.C. § 44-04-19.

²⁰ N.D.C.C. § 44-04-19.2(1) and N.D.C.C. § 44-04-19.1(9).

²¹ N.D.C.C. § 44-04-19.2(2).

²² See N.D.C.C. § 44-04-19.2.

3. The Council's executive session held during the Council's regular May meeting was not authorized by law.

STEPS NEEDED TO REMEDY VIOLATIONS

Minutes from the April Tax Equalization meeting and the May City Council meeting must be provided to Mr. Mawby without charge.

The minutes from the executive session on May 9, 2011, must be provided to Mr. Mawby.

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. § 44-04-21.2.²³ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁴

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mkk/vkk

²³ N.D.C.C. § 44-04-21.1(2).

²⁴ Id.