

**OPEN RECORDS AND MEETINGS OPINION
2016-O-22**

DATE ISSUED: December 14, 2016

ISSUED TO: Fargo City Commission

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Dave Roepke, news director of The Forum, asking whether the Fargo City Commission violated N.D.C.C. § 44-04-19.2(2)(e) by taking final action in an executive session.

FACTS PRESENTED

The Fargo City Commission held a special meeting on June 1, 2016.¹ During the meeting, the Commission held an executive session to discuss the possible acquisition of a south Fargo property to make way for a flood protection project. The Commission closed the meeting for an attorney consultation and negotiation strategy and instruction session pursuant to N.D.C.C. § 44-04-19.1(2) and (9). The Commission proceeded into the executive session with its attorneys, the City Administrator, and City Engineer who were negotiating the acquisition. The executive session lasted approximately 20 minutes and, upon reconvening in open session, the Commission moved to adjourn the meeting, taking no further public action.²

Later that day, the City Administrator entered into a purchase agreement with the homeowners.³ The City issued a news release informing the public that it reached a settlement agreement with the homeowners and provided details regarding the terms of the agreement that same day.⁴

¹ Letter from Erik Johnson, Fargo City Att'y, to Att'y Gen.'s Office (June 22, 2016); see also Minutes, Special Meeting, Fargo City Comm'n (June 22, 2016).

² Letter from Erik Johnson, Fargo City Att'y, to Att'y Gen.'s Office (June 22, 2016); see also Minutes, Special Meeting, Fargo City Comm'n (June 22, 2016).

³ See Letter from Erik Johnson, Fargo City Att'y, to Att'y Gen.'s Office (June 22, 2016).

⁴ Id.; see also News Release, City of Fargo (June 1, 2016).

ISSUE

Whether the Commission violated N.D.C.C. § 44-04-19.2 by taking final action during an executive session at its June 1, 2016, special meeting.⁵

ANALYSIS

Generally, “[f]inal action concerning the topics discussed or considered during” an executive session must be made during the open portion of a public meeting, unless otherwise allowed by law.⁶ “Final action” is defined as “a collective decision or a collective commitment or promise to make a decision on any matter, including formation of a position or policy.”⁷ However, final action 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.”⁸

The audio recording of the executive session was reviewed by this office. During the executive session, the Commission discussed the formal offer proposed by the homeowners along with other options. Ultimately, the Commission passed a motion in the executive session accepting the formal offer, agreeing to pay the proposed \$839,235 buyout, and requiring the homeowners to vacate the property by the end of the year. Later that day, a purchase agreement was executed.⁹

The Commission argues that accepting the formal offer and agreeing to pay \$839,235 for the property was not “final action” because there was not an actual purchase agreement before the Commission for approval and additional terms of the purchase agreement were still being negotiated.¹⁰ I disagree. The vote taken in executive session was the only time the Commission voted to approve the amount offered and went beyond mere guidance given to a negotiator.¹¹ Without a public vote, the public

⁵ Mr. Roepke limited his question to whether final action was taken and not to the validity of the executive session. Email from Dave Roepke, News Dir., The Forum, to Att’y Gen.’s Office (June 3, 2016, 4:58 pm).

⁶ N.D.C.C. § 44-04-19.2(e).

⁷ Id.

⁸ Id.

⁹ See Purchase Agreement and June 1, 2016, Press Release: “City reaches settlement regarding historic Kinzler home.”

¹⁰ Letter from Erik Johnson, Fargo City Att’y, to Atty. Gen.’s Office (June 22, 2016).

¹¹ See generally, Minutes, Fargo City Comm’n (June 6, 2016). At the June 6, 2016 meeting, the Commission heard from its attorney that a purchase agreement was signed but only voted to “receive and file” that information. See also, Letter from Erik Johnson, Fargo City Att’y, to Att’y Gen.’s Office (June 22, 2016).

has no means of knowing how its elected representatives voted on matters of spending public money. This vote could have been taken in the open without revealing any negotiating strategy or specific instructions.¹²

The North Dakota Supreme Court explained that the purpose of the open records law was “to provide the public with the right and the means of informing itself on the conduct of the business in which the public has an interest, in order that the citizen and taxpayer might examine public records to determine whether public money is being properly spent.”¹³ Likewise, the purpose of the requirement in N.D.C.C. § 44-04-19.2(e) to take final action during the open portion of a public meeting is to provide a way for the public to see how its representatives have voted on matters of public concern.

Here, the only time the Commission took a roll call vote on whether to accept the offer by the property owners was in the executive session. The Commission did not reconvene at another time to take a public vote on the spending of public funds. The vote in the executive session was therefore the final action on the matter.¹⁴ Although the Commission was properly in executive session, it should have come out of executive session and taken a roll call vote on an appropriate motion during the open portion of the meeting.

CONCLUSION

The Commission violated open meetings law when it took final action during an executive session to accept an offer from property owners.

STEPS NEEDED TO REMEDY VIOLATION

The Commission must release the portion of the taped executive session during which a vote was taken and passed authorizing the City to accept the homeowner’s offer. The results of the roll call vote accepting the offer must be added to the meeting minutes.

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

¹² N.D.A.G. 2000-O-04 (roll call vote could have been taken without identifying student information). An example of an appropriate motion is “a motion to approve the formal offer by the homeowners and provide authorization to enter into the purchase agreement.”

¹³ Forum Pub. Co. v. City of Fargo, 391 N.W.2d 169, 172.

¹⁴ If the vote to accept the property owner’s offer was not final action, then it appears that the Commission has never approved the agreement.

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under N.D.C.C. § 44-04-21.2.¹⁵ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁶

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sld
cc: Dave Roepke (via email only)

¹⁵ N.D.C.C. § 44-04-21.1(2).

¹⁶ Id.