

**OPEN RECORDS AND MEETINGS OPINION  
2018-O-14**

DATE ISSUED: July 19, 2018

ISSUED TO: City of Lincoln

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Lance Hagen asking whether the Lincoln City Council violated N.D.C.C. § 44-04-19.2 by taking "final action" during executive sessions.

**FACTS PRESENTED**

The Lincoln City Council held special meetings on March 6 and April 11, 2018. At each meeting, the City Council held executive sessions for attorney consultation pursuant to N.D.C.C. § 44-04-19.1 to discuss developments in two cases against the city: *Lincoln Land Development, LLP v. City of Lincoln* and *Great Western, LLC, et. al. vs. City of Lincoln*.<sup>1</sup>

**ISSUES**

1. Whether the City Council violated N.D.C.C. § 44-04-19.2 by taking "final action" during an executive session at its March 6, 2018, special meeting.<sup>2</sup>
2. Whether the City Council violated N.D.C.C. § 44-04-19.2 by taking "final action" during an executive session at its April 11, 2018, special meeting.

**ANALYSIS**

Final action on a topic discussed during an executive session must occur during the open portion of the meeting unless otherwise required by law to be taken during the

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<sup>1</sup> Minutes, Lincoln City Council (Mar. 6, 2018); Minutes, Lincoln City Council (Apr. 6, 2018).

<sup>2</sup> Mr. Hagen limited his question to whether final action was taken and not to the validity of the executive sessions.

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executive session.<sup>3</sup> “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.”<sup>4</sup> 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.”<sup>5</sup>

The North Dakota Supreme Court explained that the purpose of the open records law is “to provide the public with the right and the means of informing itself of 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.”<sup>6</sup> Likewise, the purpose of requiring final action to be taken during the open portion of a public meeting is to allow the public to see how its representatives vote on matters of public business.<sup>7</sup>

In applying the Supreme Court’s decision and reasoning, this office recently issued an opinion finding that the Fargo City Commission violated open meetings law when it passed a motion during an executive session to accept a formal buyout offer regarding property.<sup>8</sup> Although the commission argued that during the time of the executive session no agreement was signed and so further negotiations could take place, the vote taken during the executive session was the only time the commission voted to approve the amount of public money it would be spending to resolve the issue. The vote taken during the executive session authorized the negotiators to settle the negotiations and enter into a purchase agreement for the property. Therefore, the action taken by the commission was “final action.” By voting on the purchase price in executive session, the public had no way of knowing how the commissioners voted to spend a significant amount of public funds.

If a governing body provides guidance to a negotiator which, if revealed in public, would undermine future negotiations and result in adverse fiscal effects, then it is considered “guidance” under N.D.C.C. § 44-04-19.2.<sup>9</sup> Likewise, it is only considered “guidance” under N.D.C.C. § 44-04-19.1, “attorney consultation,” if the discussion would reveal

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<sup>3</sup> N.D.C.C. § 44-04-19.2(2)(e).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* See also N.D.A.G. 2015-O-16; N.D.A.G. 2015-O-15; N.D.A.G. 2013-O-02; N.D.A.G. 2009-O-09; N.D.A.G. 2007-O-11.

<sup>6</sup> *Forum Publ’g Co. v. City of Fargo*, 391 N.W.2d 169, 172 (N.D. 1986) (citing *Grand Forks Herald, Inc. v. Lyons*, 101 N.W.2d 543 (N.D. 1960)).

<sup>7</sup> N.D.A.G. 2016-O-22.

<sup>8</sup> N.D.A.G. 2016-O-22. A purchase agreement was executed the same day as the meeting in which the executive session was held.

<sup>9</sup> N.D.A.G. 2018-O-08; N.D.A.G. 2015-O-15; N.D.A.G. 2005-O-18.

attorney work product, litigation strategy, or legal risks, strengths, and weaknesses that would have an adverse fiscal effect on the public entity if conducted in public.<sup>10</sup> However, when a governing body makes a unilateral decision without options for further negotiations, or authorizes a negotiator to finish negotiations and enter into a final agreement without further approval from the governing body, it goes beyond “guidance” and is considered “final action.”<sup>11</sup>

The audio recordings of the executive sessions were reviewed by this office.

### **Issue One**

During the March 6, 2018, executive session, the City Council received advice from its attorney about whether to appeal the judgment filed in *Lincoln Land Dev., LLP v. City of Lincoln*, Bur. Co. Civil No. 08-2015-CV-00348. The City Council passed a motion to file an appeal in the case. The City Council also received advice from its attorney regarding a possible settlement of *Great Western, LLC, et al. v. City of Lincoln*, Bur. Co. Civil No. 08-2015-CV-00347. The City Council authorized its negotiator to negotiate within an approved settlement amount with a deadline for acceptance. The City Council did not make any statement, pass a motion, or publicly vote after reconvening in the open session.

The motion passed to appeal the decision in the *Lincoln Land Dev.* case during the March 6, 2018, executive session was “final action” of the City Council. The decision to appeal went beyond guidance given to its attorney as it was a unilateral decision by the City Council related to public business.<sup>12</sup> The public has a right to know how the members of its City Council voted on a matter of public business which would ultimately involve use of public funds.<sup>13</sup>

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<sup>10</sup> N.D.C.C. § 44-04-19.1(5) (definition of “attorney consultation”), (6) (definition of “attorney work product”).

<sup>11</sup> N.D.A.G. 2018-O-08; N.D.A.G. 2016-O-22; N.D.A.G. 2014-O-09; N.D.A.G. 2005-O-21; N.D.A.G. 2004-O-22.

<sup>12</sup> The City Council could have made a generic motion in public without revealing any litigation strategy. See N.D.A.G. 2000-O-04 (a generic motion that did not reveal any confidential information could have been made and therefore it was improper to take final action during the executive session).

<sup>13</sup> N.D.A.G. 2016-O-22 (recognizing that without a public vote on the settlement agreement, the public has no means of knowing how its elected representatives voted on matters of spending public funds); N.D.A.G. 2016-O-02 (collective decision on how to move forward with tax assessment was not guidance given to attorney but final action).

The guidance given to the attorney, however, for further negotiations in the *Great Western* case falls into the exception of N.D.C.C. § 44-04-19.2. The City Council provided authority and instructions for further negotiations that if made in public would undermine future negotiations.

## **Issue Two**

During the April 11, 2018, executive session, the City Council again discussed the *Lincoln Land Dev.* case and whether to move forward with the appeal. A motion to withdraw from the appeal was defeated. The City Council ultimately passed motions to file an objection to the Writ of Execution, to publish an Appeal Statement to the public, and appoint the mayor as spokesperson regarding the litigation.

The City Council also discussed the *Great Western* case and authorized its attorney to engage in further negotiations, providing guidance on settlement terms. After reconvening the public meeting, the City Council announced that it would file an objection to the Writ of Execution and would publish an Appeal Statement regarding the *Lincoln Land Dev.* case. No public motions were made and no public votes were taken on either case.

No guidance was given by the City Council to its attorney on matters of attorney advice, or risks, strengths, and weaknesses of the *Lincoln Land Dev.* action. The motion to withdraw from the appeal should have been taken in the open portion of the meeting. The public has a right to know what decisions are being made by their City Council on matters of public business involving public funds. Likewise, the decisions to file an objection, issue a public statement, and appoint a spokesperson, were unilateral decisions made by the City Council considered to be “final action.” Although the statement was ultimately published and the public was informed that the City Council would be filing an objection to the Writ of Execution, the public did not know the results of the votes taken in executive session by individual members of the City Council on these matters.

The guidance given to the negotiator, however, for further negotiations regarding the *Great Western* case again falls into the exception of N.D.C.C. § 44-04-19.2. The City Council provided authority and instructions for further negotiations that if held in public would have undermined future negotiations.

## **CONCLUSIONS**

1. The motion made by the City Council during the March 6, 2018, executive session to file an appeal in *Lincoln Land Dev., LLP vs. City of Lincoln* was considered “final action” that should have been taken during the open portion of

the meeting; however, the guidance given to negotiators in *Great Western, LLC, et al. vs. City of Lincoln* was not considered “final action” and was properly made in executive session.

2. The motions made by the City Council during the April 11, 2018, executive session to withdraw from the appeal, object to the Writ of Execution, issue a public statement, and appoint a spokesperson in *Lincoln Land Dev., LLP vs. City of Lincoln* were considered “final actions” that should have been taken during the open portions of the meeting; however, the guidance given to negotiators in *Great Western, LLC, et al. vs. City of Lincoln* was not “final action” and was properly made in executive session.

#### STEPS NEEDED TO REMEDY VIOLATION

The City Council must update its meeting minutes to include who made and seconded the motions and the results of the recorded roll call votes for each final action outlined above.

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>14</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>15</sup>

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cc: Lance Hagen (via email only)

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<sup>14</sup> N.D.C.C. § 44-04-21.1(2).

<sup>15</sup> *Id.*