

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-O-12**

DATE ISSUED: June 9, 1998

ISSUED TO: Bismarck Public School Board President Melvin Fischer and District Superintendent Lowell Jensen

CITIZEN'S REQUEST FOR OPINION

On April 23, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Bismarck Tribune editor Tim Fought asking whether the Bismarck Public School Board violated N.D.C.C. § 44-04-19 by holding an executive session that went beyond the scope of "attorney consultation" or negotiation strategy as permitted under N.D.C.C. § 44-04-19.1.

FACTS PRESENTED

On March 26, 1998, the Bismarck Public School Board (Board) held a special meeting during which the Board met in an executive session to receive and consider legal advice regarding a potential eminent domain action by the Board to acquire all rights to the property on which the Hughes Middle School is located (Hughes property). The meeting was preceded by public notice indicating that the executive session would be held, and the minutes of the meeting indicate that the Board held the executive session pursuant to N.D.C.C. § 44-04-19.1.

According to a Bismarck Public School District (District) official, the meeting was recorded as required in N.D.C.C. § 44-04-19.2(5), but the recording was inadvertently erased when another meeting was recorded on the same tape a few weeks later. In lieu of the required recording, the Board responded to this office's inquiry with sworn affidavits regarding the meeting from Board President Melvin Fischer, Board Vice President Sonna Anderson, District Superintendent Lowell Jensen, District Business Manager Edwin Gerhardt, and Attorney Malcolm Brown.

Based on remarks and interviews following the March 26 meeting, Mr. Fought's opinion request suggests that the executive session "went well beyond a discussion of legal matters and included, at minimum, a discussion of potential uses of the current Hughes Building." In response, the Board admits that it discussed alternative uses for the Hughes property, but argues that its discussion of those uses "was related and relevant to the Board's consideration of whether eminent domain proceedings could be sustained and defended as a 'more necessary' public use of that property."

The Board indicates that the discussion at the March 26 executive session was largely repeated at the Board's April 13 meeting, which was open to the public.

ISSUE

Was the executive session of the Board during its March 26 meeting authorized by law and limited to the topics and legal authority announced during the open portion of the meeting.

ANALYSIS

"Meetings of a school district board are generally required to be open to the public, and an executive session may be held only if 'specifically required by law.'" N.D.A.G. 96-F-09, quoting N.D.C.C. § 44-04-19. The Board has relied on the open meetings exceptions in N.D.C.C. § 44-04-19.1 for "attorney consultation" and negotiation strategy sessions. Only one of these exceptions needs to apply for the executive session to be authorized.

Subsection 7 of N.D.C.C. § 44-04-19.1 authorizes the Board to hold an executive session "to discuss negotiating strategy or provide negotiating instructions to its attorney" regarding litigation which is reasonably likely to occur in the immediate future. "An executive session may be held under this subsection only when an open meeting would have an adverse fiscal effect on the bargaining or litigation position of the public entity." Id. From the affidavits, it appears that the Board's attorney merely updated the Board on the status of the negotiations with the heirs to the Hughes property, and the Board's discussion largely pertained to a potential eminent domain action rather than strategizing or instructing Mr. Brown on continued negotiation with the heirs. Therefore, without the benefit of a recording of the meeting, it is unlikely that the executive session was authorized as a negotiation strategy session.¹

The portion of a meeting during which "attorney consultation" occurs also may be closed to the public. N.D.C.C. § 44-04-19.1(2).

"Attorney consultation" means any discussion between a governing body and its attorney in instances in which the governing body seeks or receives the attorney's advice regarding and in anticipation of reasonably predictable civil or criminal litigation or adversarial administrative proceedings or concerning pending civil or criminal litigation or pending adversarial administrative proceedings. Mere presence or participation of

¹ There is no retention period specified for recordings of executive sessions under N.D.C.C. § 44-04-19.2(5). However, because a civil action may be brought any time within sixty days of the date a person knew or should have known of an alleged violation, N.D.C.C. § 44-04-21.2(2), a recording should be kept for at least sixty days. To ensure that a recording is not destroyed prematurely, this office has suggested a retention period of six months.

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an attorney at a meeting is not sufficient to constitute attorney consultation.

N.D.C.C. § 44-04-19.1(4).

The litigation considered by the Board during the March 26 executive session was an eminent domain action to acquire the Hughes property.² A school district is authorized to acquire property by eminent domain, N.D.C.C. § 15-29-08(6), using the procedures in N.D.C.C. ch. 32-15. See Bd. of Educ. of City of Minot v. Park Dist., 70 N.W.2d 899 (N.D. 1955). To succeed in an eminent domain action regarding property that is currently dedicated to a public use, like the Hughes property, the governmental entity bringing the action must establish that the property is being sought for a public use that is more necessary than the current public use of the property. N.D.C.C. §§ 32-15-04(3); 32-15-05(3). See also Bd. of Educ. of City of Minot, 70 N.W.2d at 906. These authorities indicate that an alternate, more-necessary use of the Hughes property was a key element in the eminent domain action considered by the Board at the March 26 meeting.

The affidavits provided to this office indicate that the Board was not simply discussing the best use of the Hughes property by the school district, but in fact was analyzing those potential uses with its attorney in the context of a specific eminent domain action being contemplated by the Board. Therefore, the Board's discussion of alternate uses of the Hughes property with its attorney is directly related to the eminent domain action considered by the Board and falls under the definition of "attorney consultation" in N.D.C.C. § 44-04-19.1(4).

CONCLUSION

It is my opinion that the March 26 executive session of the Board was authorized by law and limited to the topics and legal authority announced during the open portion of the meeting.

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ATTORNEY GENERAL

Assisted by: James C. Fleming
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² Mr. Fought does not challenge the Board's determination that an eminent domain action regarding the Hughes property was reasonably predictable. In fact, the Board decided at its April 13 meeting to bring an eminent domain action regarding the property.