

**OPEN RECORDS AND MEETINGS OPINION
2005-O-20**

DATE ISSUED: December 5, 2005

ISSUED TO: Minto Special Assessment Commission

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Ms. Sue Tibert asking whether the Minto Special Assessment Commission violated N.D.C.C. § 44-04-20 by failing to give proper notice of two special meetings held on August 26 and 27, 2005, and N.D.C.C. § 44-04-18 by failing to give her husband, Mark Tibert, a copy of the August 27 meeting notice.

FACTS PRESENTED

The Special Assessment Commission ("Commission") was created pursuant to N.D.C.C. § 40-23-01 and consists of three members of the community; Richard Kilichowski, Kurt Kelly, and Dale Boeddedker. It held two special meetings at the end of August. The first was held Friday night, August 26 at 8 p.m. (Friday meeting) and the other was held Saturday afternoon, August 27 at 1:00 p.m. (Saturday meeting). The Commission was trying to complete its assessment work so that the assessments could be provided to the local newspaper for publication in early September.

The decision to hold a meeting on Friday was made late Thursday evening, August 25. Notice of the Friday meeting was posted at the main office (the auditor's office) at approximately 8:30 a.m. Friday morning, filed with the city auditor, and posted on the door outside the water plant where the meeting was held.

The decision to meet again at 1:00 p.m. on Saturday was made shortly after midnight during the Friday meeting, so notice of the Saturday meeting was posted at approximately 12:20 a.m. at the water plant. Notice of the Saturday meeting was not posted at the auditor's office, or filed with the city auditor because the building and the office are closed on Saturday. Neither notice was given to the local newspaper. Notices were also not sent to the requestor's husband, Mark Tibert or his brother Melvin Tibert. The Commission denies that it received either a written or verbal request from Mark or Melvin Tibert to be notified of all Commission meetings.

At the Friday meeting, Brad Narloch, a city council member, posted on the door outside the water plant, a notice for the Saturday meeting. Mark Tibert, who was attending the

OPEN RECORDS AND MEETINGS OPINION 2005-O-20

December 5, 2005

Page 2

Friday meeting, asked Mr. Narloch for a copy of the Saturday meeting notice. Mr. Narloch did not provide Mr. Tibert with a copy of the notice.

Ms. Tibert alleges that the Council intentionally did not provide proper notice for these meetings to keep citizens from attending. To support her claim, she points out that the Friday night meeting was scheduled during an out-of-town football game and that the notice's were not posted on Minto's Community Access Television channel or the city's electronic billboard as is the usual custom for regular meetings of the city council.

ISSUES

1. Whether notices of the August 26 and 27, 2005 meetings substantially complied with N.D.C.C. § 44-04-20.
2. Whether the Commission violated N.D.C.C. § 44-04-20 by failing to give notice of its meetings to individuals who requested to receive notice.
3. Whether the Commission violated N.D.C.C. § 44-04-18 by refusing to give a copy of the notice of its August 27 meeting to Mark Tibert.

ANALYSIS

Issue One

Public notice must be provided in advance of all meetings governed by the open meetings law unless otherwise provided by law.¹ The notice must be posted at the public entity's main office, if any, and filed, in the case of a city, with the city auditor, and given to anyone requesting such information.² On the day of the meeting, the notice must be posted at the location of the meeting.³ In the case of a special meeting, the public entity's official newspaper and any other members of the media who have requested notice must be notified.⁴ The governing body's presiding officer is responsible for assuring that "public notice is given at the same time [the] governing body's members are notified, and that this notice is available to anyone requesting such information."⁵

In the case of the Friday meeting, the notice was posted at the main office (the auditor's office) early Friday morning, filed with the city auditor, and posted on the door of the

¹ N.D.C.C. § 44-04-20(1).

² N.D.C.C. § 44-04-20(4), (5); N.D.A.G. 2003-O-13.

³ N.D.C.C. § 44-04-20(4).

⁴ N.D.C.C. § 44-04-20(6).

⁵ N.D.C.C. § 44-04-20(5); See N.D.A.G. 2004-O-09.

OPEN RECORDS AND MEETINGS OPINION 2005-O-20

December 5, 2005

Page 3

water plant on the day of the meeting. Notice of the Friday meeting was not given to the city's official newspaper.

With respect to the Saturday meeting, a notice was posted Friday after midnight (or 12:20 a.m. Saturday morning) at the location of the meeting as soon as members of the Commission determined a second meeting was needed. The notice was not posted at the main office or filed with the city auditor because neither the auditor's office nor the office building where the office is located is open on the weekends. A copy of the notice for Saturday's meeting was not given to the city's official newspaper.

Emergency and special meetings may be called on short notice.⁶ Notifying the official newspaper in cases where meetings are called on short notice is of particular importance because it compensates for the possibility that the public may not be aware of the special or emergency meeting.⁷ In this case, the city's official newspaper was not notified of either the Friday or Saturday meeting.

Regarding the Saturday meeting, if complying with the notice requirements is impossible for reasons beyond the control of a public entity, such as a building being locked, steps should be taken as soon as possible to rectify any defects.⁸ Public notice can be provided after a meeting, and still be in substantial compliance with N.D.C.C. § 44-04-20, if providing advance notice of the meeting is not reasonable. The Commission should have posted the notice of the Saturday meeting at the main office (the auditor's office) and filed it with the city auditor on Monday so that, at the very least, the public would be notified that a meeting took place over the weekend. Also, the Commission did not notify the City's official newspaper of the meeting, as required by law for emergency or special meetings.

Ms. Tibert points out that the Commission could have put notice of the Friday and Saturday meetings on the Minto community access television channel or the City's electronic billboard, as the City does to provide additional notice of regular city council meetings. Although the Commission is not legally required to provide notice beyond what is required by statute, public entities are encouraged to use additional methods of notice if they are useful in providing notice of meetings to the public.

The Commission made efforts to comply with the notice requirements for the Friday and Saturday meetings, however, because the city's official newspaper was not given notice of either meeting and notice of the Saturday meeting was not posted at the main office

⁶ See N.D.A.G. 2004-O-09 and N.D.A.G. 2003-O-07.

⁷ See N.D.A.G. 2003-O-07.

⁸ See N.D.A.G. 98-O-13 (when a special meeting was arranged on Sunday, auditor should have posted a notice immediately when the courthouse opened Monday morning); see also N.D.A.G. 98-O-10.

OPEN RECORDS AND MEETINGS OPINION 2005-O-20

December 5, 2005

Page 4

or filed with the City auditor, it is my opinion the Commission violated N.D.C.C. § 44-04-20

Issue Two

A governing body must provide notice of a meeting to any person requesting notice at the same time other members of the governing body are given notice.⁹

Ms. Tibert asserts that the Minto City Council failed to provide individual notice of the Friday and Saturday Commission meetings to Mark and Melvin Tibert after they made a request to receive this information during two separate Minto City Council meetings. Two tapes of Council meetings were submitted by Ms. Tibert as evidence of the request. Although the tapes contain some reference to special assessments, neither tape contains any identifiable, specific request for notice. In addition, the Commission and the City Council are two separate public entities. Requests for individual notice of Commission meetings should be made to the Commission.

In this case, the Council, the Commission, and the city auditor do not recall receiving a request from Mark or Melvin Tibert requesting individual notice of Commission meetings. In an opinion under the open meetings law, I am obligated to base my opinion on the facts as stated by the public entity.¹⁰ Therefore, it is my opinion that the Commission did not violate N.D.C.C. § 44-04-20(5) by failing to give notice of the Friday and Saturday meetings to a Mark or Melvin Tibert.

Issue Three

All records of a public entity are open and accessible to the public unless otherwise specifically provided by law.¹¹ Thus, the notice of a public meeting is a public record, which must be provided to anyone requesting a copy of the notice.¹²

In this case, Mark Tibert made an explicit oral request to Brad Narloch for a copy of the one-page notice of the Commission's Saturday meeting, which was refused. Although Mr. Narloch was a member of the city council rather than a Commission member, he was posting the notice on behalf of the Commission and he should have seen that efforts were made to get a copy of the notice to Mr. Tibert. Accordingly, it is my opinion that the Commission violated N.D.C.C. § 44-04-18(2) when it refused to provide a copy of the notice of the Saturday meeting to Mark Tibert.

⁹ N.D.C.C. § 44-04-20(5); N.D.A.G. 2004-O-09.

¹⁰ N.D.C.C. § 44-04-21.1(1).

¹¹ N.D.C.C. § 44-04-18(1).

¹² N.D.C.C. § 44-04-18; see N.D.A.G. 2004-O-07 (school district should have provided access to or a copy of a motion immediately at its meeting).

CONCLUSIONS

1. The Commission violated the law by failing to provide proper notice of two special meetings in with N.D.C.C. § 44-04-20.
2. The Commission did not violate N.D.C.C. § 44-04-20 by failing to give individual notices of its meetings to Melvin or Mark Tibert.
3. The Commission violated N.D.C.C. § 44-04-18 by refusing to give a copy of the notice of the Saturday meeting to Mark Tibert.

STEPS NEEDED TO REMEDY VIOLATIONS

The Commission must provide copies of the notices of the Special Assessment Commission meetings of August 26 and August 27, 2005, to the official newspaper and copies of these notices must be filed with the city auditor. Also a copy of the notice of the August 27 meeting and a copy of the minutes of both the August 26 and August 27 meetings must be posted outside the auditor's office for one week and provided to the official newspaper. Finally, a copy of the notice and minutes of each meeting must be provided to the requester at no charge.

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. § 44-04-21.2.¹³ It may also result in personal liability for the person or persons responsible for the noncompliance.¹⁴

Wayne Stenehjem
Attorney General

Assisted by: Michael J. Mullen
Assistant Attorney General
mjm/vkk

¹³ N.D.C.C. §44-04-21.1(2).

¹⁴ Id.