

**OPEN RECORDS AND MEETINGS OPINION
2007-O-15**

DATE ISSUED: December 5, 2007

ISSUED TO: City of Bottineau

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Tom Acheson and Myron Langehaug asking whether the Bottineau Street Committee held meetings that were not preceded by public notice in violation of the open meetings laws.

FACTS PRESENTED

On February 5, 2007, the Bottineau City Council ("Council") held a regular meeting during which it discussed the 2007 Street Project ("Street Project"). The Street Project is part of a ten year plan adopted by the city in 1997 for street paving in the city of Bottineau. The details of the Street Project were to be reviewed by the Street Committee, a subcommittee of the Council, and the Special Assessment Commission. The members of the Street Committee are Mayor Doug Marsden, Troy Marsden, and Ben Aufforth. The Special Assessment Commission was created pursuant to N.D.C.C. § 40-23-01 and consists of three members: Dennis Nickelson, Duane Christianson and Orlando Gorder, Jr.¹ The February 5, 2007, minutes of the Council indicate that engineer Matt Johnson² would be "meeting with the Street Committee and the Special Assessment Commission soon" to discuss the Street Project.

On March 19, 2007, the Street Committee and the Special Assessment Commission met at Wold Engineering to discuss the funding of the Street Project. At that meeting,

¹ The Special Assessment Commission is not a committee of the City Council, but is a separate public entity created by state law to apportion assessments according to the benefits each parcel of land receives. See N.D.A.G. 2005-O-20 and N.D.C.C. § 40-23-07.

² Matt Johnson of Wold Engineering is the engineer that was hired for the Street Project.

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the Street Committee and the Special Assessment Commission developed a funding formula that had the city paying 60 percent of the cost and the benefited property owner paying 40 percent of the cost (60/40 split).³ Notice of this meeting was not provided by either the Street Committee or the Special Assessment Commission and minutes were not prepared.

At a regular meeting on April 2, 2007, the Council heard the details of the formula to fund the Street Project.⁴ There was discussion among the council members as to why the proposed formula to fund the Street Project was a 60/40 split rather than the 70/30 split that was adopted for the 2003 portion of the Street Project.⁵ At a subsequent protest hearing held April 19, 2007, approximately 125 property owners attended to raise concerns about the Street Project, including the cost formula.

In April 2007, at the request of Tom Acheson and Myron Langehaug, Attorney Michael McIntee requested copies of minutes from the Street Committee and Special Assessment Commission meetings. Penny Nostdahl, the city auditor, advised Mr. McIntee that she was not informed of any meetings by the Street Committee or the Special Assessment Commission and was unaware of any minutes that were prepared.⁶ Mr. McIntee and his clients allege that no minutes were prepared because the Street Committee met in secret without public notice and that such meetings took place at the business place of Mayor Marsden.

ISSUE

Whether the Street Committee held meetings without providing public notice.

³ Meeting minutes of the Bottineau City Council, April 2, 2007.

⁴ Id.

⁵ Id.

⁶ April 27, 2007, letter to Attorney Michael McIntee from Penny J. Nostdahl, Bottineau city auditor.

ANALYSIS

The city of Bottineau is a public entity.⁷ Unless otherwise provided by law, meetings of a governing body of a public entity must be open to the public.⁸ While the City Council is the governing body of Bottineau, “[g]overning body” also includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.⁹

Committees created by a public entity's main governing body are also governing bodies and meetings held by those committees are subject to the open meetings laws.¹⁰ “Meeting” means a formal or informal gathering, whether in person or through electronic means such as a telephone¹¹ or video conference of a quorum¹² of the members of the governing body regarding public business.¹³

Public notice must be given in advance of all meetings of a public entity.¹⁴ The Council and its committees are required to file a meeting notice with the city auditor, post the notice at the main office of the city, and post the notice at the location of the meeting on the day of the meeting.¹⁵ Notice must also be provided to anyone requesting such information.¹⁶ In the case of special meetings, notice must also be provided to the

⁷ N.D.C.C. § 44-04-17.1(12)(b). The Special Assessment Commission is also a separate public entity subject to the notice requirements of N.D.C.C. § 44-04-20. N.D.A.G. 2005-O-20. However, since the requestors did not inquire about a violation by the Special Assessment Commission, an opinion is not being issued to the Special Assessment Commission.

⁸ N.D.C.C. § 44-04-19.

⁹ N.D.C.C. § 44-04-17.1(6).

¹⁰ N.D.A.G. 2005-O-03; N.D.A.G. 2003-O-13 (meeting of the employee relations committee of a city council); N.D.A.G. 2003-O-15 (meeting of a committee of an airport authority).

¹¹ It appears that on at least one occasion, the members of the Property Committee discussed public business through telephone calls to each other. Since the Property Committee consists of three members, any discussion of public business between two members constitutes a meeting that is subject to the requirements of the open meetings laws.

¹² A “quorum” means one-half or more of the members of the governing body, or any smaller number if sufficient for a governing body to transact business on behalf of the public entity. N.D.C.C. § 44-04-17.1(14).

¹³ N.D.C.C. § 44-04-17.1(8)(a).

¹⁴ N.D.C.C. § 44-04-20(1).

¹⁵ N.D.C.C. § 44-04-20(4).

¹⁶ N.D.C.C. § 44-04-20(5).

official newspaper of the public entity.¹⁷ The governing body's presiding officer has the responsibility of assuring that public notice is given at the same time as the governing body's members are notified.¹⁸

The Mayor admits that the March 19, 2007, meeting held by the Street Committee and Special Assessment Commission was not preceded by public notice. He explained that "not giving public notice was purely an oversight on my behalf. I did not realize that this had to be an open meeting, and I did not know this until after the meeting when all of the controversy started over the street project."¹⁹ Holding this meeting without public notice denied the property owners the opportunity to observe the decision making process.²⁰ Observing the process allows the public the opportunity to understand decisions made by the governing body, even if such decisions are controversial or unpopular. Therefore, it is my opinion that the Street Committee violated the open meetings law by failing to provide notice of the March 19, 2007, meeting.

The March 19, 2007, meeting was not held at Mayor Marsden's business, but was held at Wold Engineering. According to the Mayor, he did not hold any "secret meetings" at his place of business. In an opinion under the open meetings law, I am obligated to base my opinion on the facts as stated by the public entity.²¹

CONCLUSION

The Street Committee violated N.D.C.C. § 44-04-20 by not providing notice of the meeting on March 19, 2007.

STEPS NEEDED TO REMEDY VIOLATION

To remedy the lack of notice for the March 19, 2007, meeting, a notice listing the time, date, location and topics which were considered at that meeting must be posted at the Council's principal office, filed in the city auditor's office, and given to the official newspaper of the city of Bottineau and any other person who has requested to receive notices of Street Committee meetings. Minutes must also be created regarding the public business and discussions conducted at the March 19, 2007, meeting and must

¹⁷ N.D.C.C. § 44-04-20(6).

¹⁸ N.D.C.C. § 44-04-20(5).

¹⁹ August 7, 2007, letter to Office of Attorney General from Mayor Douglas Marsden.

²⁰ See N.D.A.G. 98-O-08 ("public business" includes all stages of the decision-making process).

²¹ N.D.C.C. § 44-04-21.1(1).

be provided at no cost to the requestors and any other person who requests copies of the 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 under N.D.C.C. § 44-04-21.2.²² It may also result in personal liability for the person or persons responsible for the noncompliance.²³

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²² N.D.C.C. § 44-04-21.1(2).

²³ Id.