

**OPEN RECORDS AND MEETINGS OPINION
2008-O-10**

DATE ISSUED: May 2, 2008

ISSUED TO: Stark County Commission
Stark County Zoning Board

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Mark Trechock, Staff Director of the Dakota Resource Council, asking whether the Stark County Commission and the Stark County Zoning Board violated the open meetings law when members of both governing bodies attended a presentation hosted and organized by representatives of the Great Northern Power Development, L.P., regarding the proposed coal gasification power plant near South Heart, North Dakota.

FACTS PRESENTED

On December 14, 2007, representatives of the Great Northern Power Development, L.P. ("GNP") gave a presentation at the Days Inn Grand Dakota Lodge in Dickinson, North Dakota, regarding the proposed coal gasification power plant in Stark County, near South Heart, North Dakota. Representatives of GNP contacted a number of government officials from the community via telephone and invited them to attend a luncheon where GNP would give a presentation about the proposed power plant. All five members of the Stark County Commission ("Commission") were invited to attend the presentation.¹ Four members of the Commission attended the presentation.²

Three members of the Stark County Zoning Board ("Zoning Board") also attended the presentation.³ The Zoning Board has eight members.⁴ Prior to the presentation,

¹ The members of the Stark County Commission are Russell Hoff, George Nodland, Chet Willer, Duane Wolf, and Ken Zander.

² Ken Zander did not attend the gathering.

³ Joe Frenzel, Russell Hoff and George Nodland are the Zoning Board members that attended the gathering. Russell Hoff and George Nodland are also members of the Stark County Commission.

neither the Commission nor the Zoning Board held any discussions regarding who would attend. The presentation related to Commission and Zoning Board issues because both governing bodies would hear a request from GNP to rezone the property from agricultural to industrial. Neither the Commission nor the Zoning Board provided notice prior to attending the presentation and minutes were not prepared.

ISSUES

1. Whether attendance of a quorum of the members of the Stark County Commission at the December 14, 2007, presentation by GNP constituted a “meeting” that was required to be preceded by public notice.
2. Whether attendance by members of the Stark County Zoning Board at the December 14, 2007, presentation by GNP constituted a “meeting” that was required to be preceded by public notice.

ANALYSES

Issue One

Public notice must be given in advance of all meetings of a public entity.⁵ The Commission is required to file a meeting notice with the county auditor, post the notice at the main office of the county, and post the notice at the location of the meeting on the day of the meeting.⁶ Notice must also be provided to anyone requesting such information.⁷ In the case of special meetings, notice must also be provided to the official newspaper of the public entity.⁸ 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.⁹

For a gathering to be considered a “meeting”, two primary elements must be considered: whether a quorum was present and the topic of discussion.¹⁰ A formal or

⁴ The members of the Stark County Zoning Board are Frank Emch, Joe Frenzel, Duane Grundhauser, Ronald Hauck, Russell Hoff, Leo V. Kuntz, Sue Larson, and George Nodland.

⁵ N.D.C.C. § 44-04-20(1).

⁶ N.D.C.C. § 44-04-20(4).

⁷ N.D.C.C. § 44-04-20(5).

⁸ N.D.C.C. § 44-04-20(6).

⁹ N.D.C.C. § 44-04-20(5).

¹⁰ N.D.C.C. § 44-04-17.1(8)(a)(1); N.D.A.G. 98-O-05; N.D.A.G. 2007-O-08.

OPEN RECORDS AND MEETINGS OPINION 2008-O-10

May 2, 2008

Page 3

informal gathering constitutes a meeting when a quorum¹¹ of the members of the governing body is present at the gathering regarding public business.¹² “Public business” is defined as:

All matters that relate or may foreseeably relate in any way to:

- a. the performance of the public entity’s governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or
- b. the public entity’s use of public funds.¹³

The term “meeting” does not apply to social gatherings, even if attended by a quorum of the members of a governing body, as long as public business is not considered or discussed.¹⁴

As stated in the facts, four out of five members of the Commission attended the presentation given by GNP, thus a quorum was present. In past opinions this office has said:

When a quorum of the members of a governing body of a public entity attend the meeting of another group, and the group’s discussion pertains to the public business of the governing body, the attendance of the members of the governing body is a “meeting.” This conclusion applies even if the commissioners merely listen and do not participate in the meeting.¹⁵

Although a lunch was served, the commissioners understood that they were being invited to a presentation by GNP to share information about the proposed coal gasification power plant to be located in Stark County, near South Heart, North Dakota.¹⁶ The presentation directly related to Commission business since the Commission would be hearing a request from GNP to rezone the property from agricultural to industrial. This was not a situation where the commissioners were taken by surprise when public business was spontaneously discussed without warning at a luncheon. Nothing indicates that GNP led the commissioners to believe they were

¹¹ 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).

¹² N.D.C.C. § 44-04-17.1(8)(a)(1).

¹³ N.D.C.C. § 44-04-17.1(11).

¹⁴ N.D.C.C. § 44-04-17.1(8)(b); N.D.A.G. 98-O-05; N.D.A.G. 99-O-09.

¹⁵ N.D.A.G. 98-O-08; N.D.A.G. 1996-F-09.

¹⁶ Letter from Tom Henning to Mary Kae Kelsch, January 23, 2008.

being invited to a purely social gathering. Due to the nature of the presentation they were invited to, it was reasonable to expect that other commissioners would also be invited. It is therefore my opinion that attendance of four of the five commissioners at the GNP presentation was a “meeting” of the Stark County Commission, required to be open to the public under N.D.C.C. § 44-04-19, preceded by public notice in compliance with N.D.C.C. § 44-04-20, and followed by minutes in compliance with N.D.C.C. § 44-04-21.

Issue Two

As indicated above in Issue One, for a gathering to be considered a “meeting”, a quorum of the members of the governing body must be present.¹⁷ The Zoning Board has eight members and only three attended the presentation. A gathering of less than a quorum may be an open meeting if the members were acting pursuant to authority delegated to them by a governing body.¹⁸ In the response provided to this office, the Zoning Board indicated that the members who attended the presentation were not instructed by the governing body to attend as a committee of the Zoning Board. Although the topic of the presentation was related to public business, without a quorum, a meeting of the Zoning Board did not occur and thus, it is my opinion that the Zoning Board did not violate the open meetings law.

CONCLUSIONS

1. Attendance of a quorum of the members of the Stark County Commission at the December 14, 2007, presentation by GNP constituted a “meeting” of the Stark County Commission, required to be preceded by public notice.
2. Attendance by less than a quorum of the Stark County Zoning Board at the December 14, 2007, presentation by GNP was not a “meeting” required to be preceded by public notice.

STEPS NEEDED TO REMEDY VIOLATION

In cases such as this, where a governing body attends a meeting without public notice, the governing body must recreate the meeting and create minutes of the meeting. The Commission “recreated” the December 14, 2007, meeting by having GNP present the same information at a Commission meeting on April 1, 2008. Therefore, the Commission has already taken steps to remedy its violation of the open meetings law.

¹⁷ N.D.C.C. § 44-04-17.1(8)(a)(1).

¹⁸ N.D.C.C. § 44-04-17.1(6); N.D.A.G. 2004-O-12; N.D.A.G. 2005-O-15.

OPEN RECORDS AND MEETINGS OPINION 2008-O-10

May 2, 2008

Page 5

The Commission must also make the minutes of the April 1, 2008, meeting available to the Dakota Resource Council and to any other member of the public, upon request, free of 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. § 44-04-21.2.¹⁹ It may also result in personal liability for the person or persons responsible for the noncompliance.²⁰

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¹⁹ N.D.C.C. §44-04-21.1(2).

²⁰ Id.