

**OPEN RECORDS AND MEETINGS OPINION
2008-O-13**

DATE ISSUED: June 23, 2008

ISSUED TO: Traill County Water Resource District

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Roger Anderson asking whether the Traill County Water Resource District violated N.D.C.C. §§ 44-04-19 and 44-04-20 by holding a meeting without a notice.

FACTS PRESENTED

On April 1, 2008, the Traill County Water Resource District conducted a public hearing relating to the establishment of a drainage project under N.D.C.C. ch. 61-21.¹ All affected landowners had the right to appear before the Board at this hearing and express their opinions or offer evidence about the drainage project.² After the completion of the hearing, landowners who were to be assessed for the project were given an opportunity to vote on the petition to establish the project in accordance with N.D.C.C. §§ 61-21-14 and 61-21-16. The deadline for submission of votes was April 11, 2008, at 4:00 p.m.

On April 2, 2008, a meeting was held at the Traill County courthouse meeting room, wherein all members of the Traill County Water Board ("Board") were present.³ In addition to other attendees, Chad Engel, an engineer from Moore Engineering who assisted in preparing the plans and specifications for the drainage project, was also present. No notice was posted or filed for the meeting.

The Board states that the meeting occurred because on April 2, Curt Reimer, one of the petitioners who sought the construction of the drainage project, contacted Board

¹ This office has no authority under the open records law to address issues under N.D.C.C. ch. 61-21, such as the sufficiency of the drainage petition, whether there were flaws in the assessment vote, or whether the water board improperly made concessions or changes to the drainage project to landowners who objected to the assessment.

² N.D.C.C. § 61-21-13.

³ At the time of the meeting, the board members were Kyle Meyer, Jason Siegert, Joel Halvorson, Gary Thompson, and Steve Thoreson.

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member Kyle Meyer to request that he arrange a meeting with the project engineer, Mr. Engel, regarding the engineering plans for the project. Mr. Meyer also contacted one or two additional Board members and advised them that they may want to attend the meeting. To Mr. Meyer's surprise, all of the Board members were present at the meeting, in addition to a number of other individuals.⁴

The Board states that a gathering was held on April 2 and Mr. Engel provided specifics of his engineering plans and specifications for the proposed drainage project. Apparently, the same information was provided during the April 1 public hearing the day before, but "in more generalized terms." No action was taken or considered by the Board, no notes or minutes were taken nor was there a recording of the April 2 gathering.

ISSUE

Whether the Traill County Water Board violated the open meetings law and notice requirements when it met on April 2, 2008, without providing notice of the meeting to the public or media.

ANALYSIS

The Traill County Water Resource District ("Water District") is a political subdivision⁵ and is therefore a public entity subject to the open meetings laws.⁶ The Water District's board is also a public entity.⁷ When a quorum⁸ of the members of a governing body⁹ of a public entity gathers, either informally or formally, regarding public business,¹⁰ the

⁴ Gary Peterson, Curt Reimber, Darrel Oanes, Arlen Oanes, and Kevin Paulsrud.

⁵ N.D.C.C. § 44-04-17.1(10); Burlington Northern and Santa Fe Ry. Co. v. Benson County, 618 N.W.2d 155, 157 (N.D. 2000).

⁶ N.D.C.C. § 44-04-17.1(12)(b).

⁷ Id.

⁸ The term "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).

⁹ The word "governing body" means "the multimember body responsible for making a collective decision on behalf of a public entity. 'Governing body' also includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body." N.D.C.C. § 44-04-17.1(6).

¹⁰ As used in N.D.C.C. ch. 44-04, the term "public business" means "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

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gathering is a meeting.¹¹ Meetings must be open to the public,¹² preceded by sufficient public notice,¹³ and summarized in sufficient minutes.¹⁴ Not every gathering, however, constitutes a meeting; chance or social gatherings are not meetings as long as public business is not considered or discussed.¹⁵

Attorney General's opinions under N.D.C.C. § 44-04-21.1 must be based on the facts given by the public entity.¹⁶ As this section indicates, the opinion process under N.D.C.C. § 44-04-21.1 is designed to address disputed questions of law in a given factual situation rather than resolve factual disputes. In this instance, there is no dispute that a quorum of the Board was present at the April 2 meeting. Thus, the remaining issues are whether the meeting was a chance or social gathering and whether public business was discussed.

The Board does not contend that this meeting was a chance gathering. The meeting was arranged by a member of the Board, Kyle Meyer. Although Mr. Meyer did not expect the entire Board to be present at the meeting, the entire Board, a quorum, was present. Despite the fact the attendance of a quorum of the Board may not have been expected, the meeting was not a chance social gathering.

The Board presented two arguments that the meeting should not be considered a meeting under N.D.C.C. § 44-04-17.1(8). The Board first argues that the Board members were only passive listeners of the engineering data that was being described by the engineer for the project, which had already been generally described at the April 1 meeting. And, "the Water Board could take no action on this information"¹⁷ The Board also argues that this meeting should be distinguished from past opinions issued by this office addressing past illegal meetings because those meetings were a prelude to reasonably foreseeable subsequent action by the public entity. The Board

b. The public entity's use of public funds."

N.D.C.C. § 44-04-17.1(11).

¹¹ N.D.C.C. § 44-04-17.1(8).

¹² N.D.C.C. § 44-04-19.

¹³ N.D.C.C. § 44-04-20.

¹⁴ N.D.C.C. § 44-04-21.

¹⁵ N.D.C.C. § 44-04-17.1(8)(b); see N.D.A.G. 2003-O-19 (social interactions of a quorum of board members at a public park and outside the Northwood community center were not meetings where no public business was discussed); N.D.A.G. 2002-O-07 (social gathering that consisted of a quorum of school board members at local bar after school board meeting was not a meeting under N.D.C.C. § 44-04-17.1(8) because no public business was discussed); N.D.A.G. 99-O-09.

¹⁶ N.D.C.C. § 44-04-21.1.

¹⁷ Letter from Daniel L. Gaustad, attorney for the Traill County Water Resource District to Assistant Attorney General Mary Kae Kelsch, dated June 9, 2008.

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claims that in this circumstance, it could not have taken any additional action regarding the assessment vote nor was it reasonably foreseeable that the Board would take action on the project.

This office has issued a number of opinions determining that informal gatherings, including informal social gatherings, where a quorum of a governing body attends and public information is discussed, are meetings: an on-site inspection by a water resource district board;¹⁸ attendance of city council members at the meeting of another public entity;¹⁹ attendance of members of a water board and its attorney at a 6 a.m. breakfast in a local restaurant;²⁰ a school board retreat;²¹ risk management training;²² school assemblies;²³ a meeting between a state agency and a county commission during an annual convention;²⁴ and, informational meetings presented by proposed industry.²⁵

The definition of meeting under N.D.C.C. § 44-04-17.1(8) covers all stages of the decision-making process, including information gathering.²⁶ Action, or any foreseeable action, by a governing body is not a prerequisite for determining that a gathering constitutes a “meeting.”²⁷ Here, an engineer presented information to a quorum of the Board and others present about a potential drainage project under the Board’s control.²⁸ This is clearly public business.²⁹ A gathering of a quorum of a board where public business is discussed is a meeting under N.D.C.C. § 44-04-17.1(8) even if board members are “passive” listeners and no board action on an assessment project is reasonably foreseeable.

Based upon the information provided by the Board, it is my opinion that the April 2 meeting was a “meeting” as defined by N.D.C.C. § 44-04-17.1(8), that public business was discussed as defined by N.D.C.C. § 44-04-17.1(11), that the meeting should have

¹⁸ N.D.A.G. 98-F-16.

¹⁹ N.D.A.G. 98-O-18.

²⁰ N.D.A.G. 98-O-11.

²¹ N.D.A.G. 2001-O-05.

²² N.D.A.G. 2004-O-02; see also N.D.A.G. 2004-O-08.

²³ N.D.A.G. 2005-O-14 (the purpose of the forums was for student input, as opposed to board decision-making, so the school board did not perceive any of the three student gatherings as being meetings governed by the open meetings law).

²⁴ N.D.A.G. 2007-O-08.

²⁵ N.D.A.G. 2008-O-10 and N.D.A.G. 2008-O-11.

²⁶ N.D.C.C. § 44-04-17.1(8); N.D.A.G. 98-F-16; N.D.A.G. 98-O-11; N.D.A.G. 98-O-08; N.D.A.G. 96-F-09.

²⁷ N.D.A.G. 98-O-16.

²⁸ See also N.D.C.C. ch. 61-16.1.

²⁹ See N.D.C.C. § 44-04-17.1(11).

been 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.

CONCLUSION

It is my opinion that the Traill County Water Board violated N.D.C.C. §§ 44-04-19 and 44-04-20 when they failed to provide notice of the meeting held on April 2, 2008, and prepare minutes for that meeting.³⁰

STEPS NEEDED TO REMEDY VIOLATION

The Board must prepare detailed minutes that meet the requirements of N.D.C.C. § 44-04-21 indicating what transpired at the April 2, 2008, meeting. The detailed minutes of this meeting must be made available to the general public and a free copy must be provided to Mr. Anderson.

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. § 44-04-21.2.³¹ It may also result in personal liability for the person or persons responsible for the noncompliance.³²

Wayne Stenehjem
Attorney General

Assisted by: Matthew Sagsveen
Assistant Attorney General

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³⁰ As previously noted, this office has no authority under the open records law to address issues relating to this meeting under N.D.C.C. ch. 61-21, including whether it was a second hearing under N.D.C.C. § 61-21-13 and whether the notice required by that section also applies to the April 2, 2008, meeting.

³¹ N.D.C.C. §44-04-21.1(2).

³² Id.