

**OPEN RECORDS AND MEETINGS OPINION
2009-O-09**

DATE ISSUED: July 1, 2009

ISSUED TO: Mandan Board of Park Commissioners, President Tracy Porter

CITIZEN'S REQUEST FOR OPINION

This office received requests for an opinion under N.D.C.C § 44-04-21.1 from Wayne Papke and Susan Beehler asking whether the Mandan Board of Park Commissioners violated N.D.C.C. §§ 44-04-20, 44-04-19, and 44-04-19.2 by holding a meeting and an executive session without proper notice, by holding executive sessions that were not authorized by law, and by taking final action in executive session.

FACTS PRESENTED

The Mandan Board of Park Commissioners (Board) held a regular meeting on February 9, 2009, during which it held an executive session to discuss a contract to purchase Raging Rivers Water Park (Raging Rivers). The public notice for the meeting included a list of topics to be addressed at the meeting, one being "Enter into Executive Session (NDCC 44-04-19.1) for discussions of Raging Rivers Water Park." The meeting notice was provided to the Mandan city administrator's office for filing with the city auditor, posted at the Mandan Community Center where the Park Board holds its meetings, provided to the Mandan News and the Bismarck Tribune, posted on the Mandan Park Board website, and located outside the meeting room on the day of the meeting.

The executive session on February 9, 2009, lasted 30 minutes and was attended by Board President Tracy Porter; Board members Bruce Brucker, Wanda Knoll, and Jason Arenz; Director of Parks and Recreation Cole Higlin; accounting manager Darla Roggenbuck; and legal counsel Arlen Ruff. The executive session was tape recorded, in compliance with N.D.C.C. § 44-04-19.2(5).

The Board held a special meeting on February 11, 2009, during which the only agenda item was an executive session to discuss a counteroffer made by the sellers of Raging Rivers. The executive session was attended by Board President Tracy Porter, Board members Bruce Brucker, Wanda Knoll, and Jason Arenz, and Board Vice President Terry Kraft by speaker phone, Director Cole Higlin, accounting manager Darla Roggenbuck, and attorney Arlen Ruff.

The Board entered into executive session to strategize a response to the counteroffer. The Board re-entered into an open meeting and made a motion to propose a counteroffer. The Board re-entered executive session two more times during the course of the meeting to discuss subsequent counteroffers received from the seller. After each discussion of the new counteroffer in executive session the Board would enter into an open meeting, make a motion, and vote on how to respond to the seller's counteroffers. The seller accepted the third purchase offer, the negotiations ceased, and the Board adjourned. The executive session was electronically recorded in compliance with N.D.C.C. § 44-04-19.2(5) and has been reviewed by this office.

ISSUES

1. Whether the notice for the February 9, 2009, meeting substantially complied with N.D.C.C. § 44-04-20.
2. Whether the description of the executive session in the Board's February 9, 2009, meeting notice was in substantial compliance with N.D.C.C. § 44-04-20.
3. Whether the Board's executive sessions on February 9 and 11, 2009, were in violation of N.D.C.C. § 44-04-19.
4. Whether the Board violated N.D.C.C. § 44-04-19.2 by reaching a final decision in executive session during its February 11 special meeting.

ANALYSIS

Issue One

Ms. Beehler alleges that the notice of the Board's regular meeting held February 9, 2009, was insufficient because it failed to include the room number of the meeting room within the community center and was not published in the newspaper.

Unless otherwise provided by law, written public notice must be given in advance of all meetings of a public entity.¹ The notice must contain the date, time, and location of the meeting and, if practicable, the topics to be considered.² A notice for a regular meeting of a city-level governing body must be posted at the principal office of the governing body holding the meeting, at the location of the meeting on the day of the meeting, and filed with the city auditor.³ However, unless otherwise specified by law, resolution, or

¹ N.D.C.C. § 44-04-20(1); N.D.A.G. 2007-O-02; N.D.A.G. 2004-O-20.

² N.D.C.C. § 44-04-20(2).

³ N.D.C.C. § 44-04-20(4).

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ordinance, or as decided by the public entity, notices required by N.D.C.C. § 44-04-20 need not be published.⁴

Here, notice was posted at the Board office which is located in the Mandan Community Center, provided to the city administrator's office for filing with the city auditor, and provided to the Mandan News and the Bismarck Tribune. On the day of the meeting, meeting notices with agendas were placed on a table at the entrance to the meeting room.

The date, time, location, and agenda were all included on the February 9 meeting notice. Specifically, the location was listed as the Mandan Community Center. According to Director Cole Higlin, Board meetings are held in one of the two available meeting rooms in the Community Center. The rooms are located within close proximity of each other and near the main entrances to the building. When a meeting is held, the room is marked by having a table outside the entrance with meeting notices there for the public.

A basic purpose of the requirement to post a meeting notice at the location of the meeting on the day of the meeting is so the public can easily identify where the meeting is being held. Although this could be done by including a specific room number, the law does not require it. By having the notices on a table outside the meeting room, the public could find the meeting room with little effort. Therefore, it is my opinion that the Board noticed the meeting in substantial compliance with N.D.C.C. § 44-04-20.

The February 9 meeting was a regular meeting, so the Board was required to give notice to its official newspaper only if the newspaper had specifically asked to be provided notice of those meetings.⁵ Here, two local newspapers were given notice of the meeting. As I have explained in prior opinions, the requirement to provide notice to a newspaper does not require publication by the newspaper.⁶ The Board was under no legal obligation to publish the notice of the February 9 meeting in the newspaper. Thus, it is my opinion that the Board did not violate the notice requirements of N.D.C.C. § 44-04-20.

Issue Two

Ms. Beehler alleges that the February 9, 2009, meeting notice inadequately described the Board's executive session. Ms. Beehler alleges that the description of the agenda

⁴ N.D.C.C. § 44-04-20(1).

⁵ See N.D.C.C. § 44-04-20(5) (notice must be provided to anyone requesting such information).

⁶ See N.D.C.C. § 44-04-20(1); N.D.A.G. 2003-O-20; N.D.A.G. 2003-O-13.

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item should have said “possible purchase of Raging Rivers” rather than just “discussions of Raging Rivers.”

A meeting notice must indicate whether the governing body expects to enter executive session as well as the “general subject matter” of the executive session.⁷ The description of the “general subject matter” of the executive session must be “sufficient to provide information about the topic or purpose of the executive session to a member of the public.”⁸

In 2003, a notice stating “Motion to go into Executive Session under NDCC 44-04-19.1” was found insufficient for failing to provide any information about the topic or purpose of the executive session to the public.⁹ Such a statement lacks any description whatsoever about the reason behind the executive session.

Here, the February 9 notice provides a general description of the anticipated executive session: “Enter into Executive Session (NDCC 44-04-19.1) for discussions of Raging Rivers Water Park.” The fact that Ms. Beehler would have preferred a different description does not render it inadequate. For example, in 2005, when a requester challenged a description of an executive session because he would have preferred “Kalinowski Employment Reconsideration” instead of “Kalinowski Employment Matter,” which was the general description in the notice, this office explained that the fact that greater detail could have been provided does not mean that it failed to comply with the minimum requirements in N.D.C.C. § 44-04-20(2).¹⁰

Therefore, it is my opinion that the Board’s general description of the topic for the executive sessions was in substantial compliance with the notice requirements of N.D.C.C. § 44-04-20.

Issue Three

Mr. Papke alleges that the executive sessions held on February 9 and 11, 2009, were not authorized by law. Both meetings were recorded pursuant to N.D.C.C. § 44-04-19.2(5) and reviewed by a member of my staff.

The February 9 executive session was held in response to a proposed contract to sell Raging Rivers that was presented by the sellers to the Board. The February 11 executive session was held to discuss a subsequent counteroffer from the sellers. Both executive sessions were held pursuant to the authority in N.D.C.C. § 44-04-19.1(9)

⁷ N.D.C.C. § 44-04-20(1) and (2).

⁸ N.D.A.G. 2007-O-11; N.D.A.G. 2004-O-19; see also N.D.A.G. 2005-O-04.

⁹ N.D.A.G. 2003-O-22.

¹⁰ N.D.A.G. 2005-O-04.

which authorizes a governing body to hold an executive session to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiators regarding current contract negotiations if discussing the strategy or instructions in an open meeting would adversely affect the bargaining position of the entity.¹¹

The recordings reveal that the executive sessions held on both days concerned the purchase of Raging Rivers by the park district and the discussions involved what the Board was willing to pay for the water park. Much of the discussion was led by the Board's negotiator, Cole Higlin, who provided the Board with information about the water park's potential for revenue.

Since the negotiation strategy the Board wished to pursue was based on the expectation that the revenue generated by the Raging Rivers property would ultimately fund its purchase, these comments were made in the context of the Board's negotiation strategy and related to the strengths and weaknesses of its negotiation position.¹² These discussions, if held in public, could have caused an adverse fiscal effect on the bargaining position of the Board. As this office has explained, an executive session held for the reason of negotiation is authorized "only if allowing the other party to the negotiation to listen to the discussion would result in increased costs to the public entity."¹³ Therefore, it is my opinion that the Board did not violate N.D.C.C. § 44-04-19 because its February 9 and 11, 2009, executive sessions were authorized by N.D.C.C. § 44-04-19.1(9).

Issue Four

Finally, Mr. Papke alleges that the Board made a final decision regarding the purchase of Raging Rivers during the February 11 executive session.

Generally, any final action concerning the topics discussed or considered during an executive session must be taken at a meeting open to the public.¹⁴ However, the definition of "final action" provides an exception for guidance given by members of a governing body to legal counsel or other negotiator in an executive session held for attorney consultation or negotiation preparation as authorized in N.D.C.C. § 44-04-19.1.¹⁵

¹¹ N.D.C.C. § 44-04-19.1(9); N.D.A.G. 2005-O-18.

¹² See N.D.A.G. 2000-O-09 (stating that brief updates of offers and counteroffers may be acceptable when made in the context of commenting on the strengths and weaknesses of a negotiating strategy).

¹³ N.D.A.G. 2000-O-05; N.D.A.G. 99-O-01.

¹⁴ N.D.C.C. § 44-04-19.2.

¹⁵ N.D.C.C. § 44-04-19.2(2)(e) (definition of final action).

As explained in "Issue Three," the executive session held during the February 11 special meeting was a negotiation preparation session authorized by N.D.C.C. § 44-04-19.1(9). Therefore, the Board was not required to take final action in the open portion of the meeting.¹⁶ However, both the recording and the minutes reveal that the Board came out of its executive session and made a motion to respond to the seller's counteroffer. By doing so, the Board's actions regarding the potential purchase of Raging Rivers should have been quite clear to any members of the public or media that chose to attend the meeting. Accordingly, it is my opinion that the Board did not violate N.D.C.C. § 44-04-19.2(2)(e).

CONCLUSIONS

1. The notice of the February 9, 2009, meeting substantially complied with N.D.C.C. § 44-04-20 and did not have to contain the meeting room number or be published in the newspaper.
2. The notice of the Board's February 9, 2009, meeting contained a general description of the executive session in substantial compliance with N.D.C.C. § 44-04-20.
3. The Mandan Parks and Recreation Board's executive sessions conducted on February 9 and 11, 2009, were authorized by N.D.C.C. § 44-04-19.1(9).
4. The Mandan Parks and Recreation Board did not take "final action" during the February 11, 2009, executive session and therefore did not violate N.D.C.C. § 44-04-19.2.

Wayne Stenehjem
Attorney General

djp/vkk

¹⁶ See N.D.C.C. § 44-04-19.2(2)(e) (definition of final action).