

**OPEN RECORDS AND MEETINGS OPINION
2013-O-02**

DATE ISSUED: January 10, 2013

ISSUED TO: Fargo City Commission

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Jonathan T. Garaas asking whether the Fargo City Commission violated N.D.C.C. § 44-04-19.2 by making final decisions in executive session.

FACTS PRESENTED

The Board of City Commissioners of the City of Fargo (Commission) held a regular meeting on April 16, 2012. During the meeting an executive session was held to discuss pending or threatened litigation by Linda Bellemare.¹ The Commission had received notice of a potential claim from Attorney Jonathan Garaas, on behalf of his client Linda Bellemare, by letter dated March 15, 2012. In this letter, Attorney Garaas conveyed two demands on behalf of his client; that the City of Fargo immediately terminate the setback moratorium in the Wild Rice River Estates subdivision that had been in place since July 13, 2009, and that the City of Fargo purchase lot thirteen, block one of Wild Rice River Estates for \$90,000.

The Commission discussed these demands with its legal counsel during executive session, and as a result of that discussion directed the City Attorney to respond to Attorney Garaas. The Commission did not vote during the executive session nor did it take any action regarding Ms. Bellemare's demands after the executive session was over. 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.

By letter dated April 17, 2012, Attorney Nancy J. Morris, on behalf of the City of Fargo advised Attorney Garaas that the Commission had met in executive session on April 16 regarding Ms. Bellemare's property and did not intend to purchase her lot or terminate the setback moratorium as requested.

¹ The executive session was also held to discuss threatened litigation by Sioux Equipment but that portion of the executive session is not the subject of this opinion.

ISSUE

Whether the Commission violated N.D.C.C. § 44-04-19.2 by reaching a final decision in executive session during its April 16, 2012, regular meeting.

ANALYSIS

Generally, any final action concerning the topics discussed or considered during an executive session must be taken at a meeting open to the public.² The definition of “final action” however, does not include:

“ . . . guidance given by members of the governing body to legal counsel or other negotiator in a closed attorney consultation or negotiation preparation session authorized in section 44-04-19.1.”³

The Commission indicates that it held the executive session to receive advice from its attorney regarding reasonably anticipated litigation by Ms. Bellemare regarding her property.⁴ The Commission explains that no vote was taken in executive session because it was providing guidance to legal counsel on how to respond to Mr. Garaas’ demand letter in the form of negotiation strategy.⁵

A review of the tape of the executive session confirms that no motion was made and no vote was taken. In the executive session, the Commission received advice from legal counsel regarding the two demands made in a letter sent by Mr. Garaas. The attorney provided advice to the Commission about the legal repercussions of the Commission’s responses to the demands.

The Commission chose not to take a vote on Ms. Bellemare’s first demand to terminate the current moratorium on building permits in the prospective floodway. All nonprocedural votes must be recorded roll call votes.⁶ A “nonprocedural” vote “includes all votes that pertain to the merits of the matter before the governing body.”⁷ As I explained in a 2005 opinion, however, a vote need not be held on all matters brought

² N.D.C.C. § 44-04-19.2.

³ N.D.C.C. § 44-04-19.2(2)(e).

⁴ Mr. Garaas limited his question to whether final action was taken and not to the validity of the executive session.

⁵ June 22, 2012, letter from Assistant City Attorney Nancy J. Morris to Assistant Attorney General Mary Kae Kelsch

⁶ N.D.C.C. § 44-04-21.

⁷ Id.

before a public entity.⁸ In that opinion, a citizen asked a city council to revisit and change a current policy.⁹ I explained that the city council can reject a request to revisit a current policy without taking a roll call vote.¹⁰ Likewise here, the Commission did not have to vote to retain a policy that had been in place since July 13, 2009.¹¹

The Commission gave instructions to its attorney to reject Ms. Bellemare's second demand that the Commission purchase her property for \$90,000. Section N.D.C.C. § 44-04-19.1(9) authorizes an executive session to provide negotiating instructions to an attorney and as referenced above, the guidance provided to an attorney regarding negotiation is not considered "final action."¹² Thus, no final action was taken by the Commission because none was necessary.

CONCLUSION

Based upon the foregoing, it is my opinion that the Commission did not take final action in executive session.

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Attorney General

mkk/vkk

⁸ N.D.A.G. 2005-O-01.

⁹ Id.

¹⁰ Id.

¹¹ See N.D.A.G. 2005-O-01.

¹² See N.D.C.C. § 44-04-19.2(2)(e).