

**OPEN RECORDS AND MEETINGS OPINION  
2014-O-05**

DATE ISSUED: May 15, 2014

ISSUED TO: Devils Lake 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 John Kuntz asking whether the Devils Lake City Commission violated the open meetings law by holding a meeting not open to the public.

**FACTS PRESENTED**

On February 18, 2014, the Devils Lake City Commission (Commission) held a regularly scheduled meeting, and as part of the meeting, discussed payment to John Kuntz for relocation expenses incurred as part of condemnation proceedings.<sup>1</sup> The city and Kuntz are currently involved in two condemnation legal proceedings in which the city is acquiring land from Kuntz for a flood control project and an airport runway expansion.<sup>2</sup> As part of the proceedings, Kuntz is allowed to submit relocation expenses to the city for review and payment.<sup>3</sup> At the meeting on February 18, 2014, the Commission was reviewing such submitted expenses for payment.<sup>4</sup> The Commission expressed concerns about the lack of supporting documentation for some of the expenses and wished to table the issue to gather information before authorizing payment.<sup>5</sup> Although no formal motion was made, pursuant to the consensus of the Commission, an "ad hoc committee" was formed to review the costs and supporting documentation, and the committee was requested to come back to the Commission with recommendations.<sup>6</sup>

---

<sup>1</sup> Letter from J. Thomas Traynor, Jr., Devils Lake City Att'y, to Sandra Voller, Asst. Att'y Gen. (Apr. 1, 2014); see also Minutes, Devils Lake City Comm'n (Feb. 18, 2014).

<sup>2</sup> Letter from J. Thomas Traynor, Jr., Devils Lake City Att'y, to Sandra Voller, Asst. Att'y Gen. (Apr. 1, 2014).

<sup>3</sup> Id.

<sup>4</sup> Minutes, Devils Lake City Comm'n (Feb. 18, 2014).

<sup>5</sup> Id.

<sup>6</sup> Id.

The committee was made up of eight people, including two commissioners<sup>7</sup>, and met on March 5, 2014.<sup>8</sup> Kuntz was told the meeting was not open to the public by the City Auditor's office and the meeting was not noticed.<sup>9</sup> At the meeting, the committee discussed various issues including the submitted relocation expenses and lawsuits the city is involved in regarding its condemnation proceedings.<sup>10</sup>

### ISSUE

Whether the Devils Lake City Commission violated N.D.C.C. § 44-04-20 by failing to give notice of a March 5, 2014, special meeting that included two city commissioners.

### ANALYSIS

The Commission is a governing body of a public entity.<sup>11</sup> All meetings of a public entity must be open to the public unless otherwise specifically provided by law.<sup>12</sup> A "meeting" is defined as a "formal or informal gathering or a work session...of [a] quorum of the members of the governing body of a public entity regarding public business."<sup>13</sup> A "governing body" includes any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.<sup>14</sup> Under this definition, a committee that is delegated authority to perform any function on behalf of a governing body, including fact gathering, reporting, or recommending action,

---

<sup>7</sup> The Devils Lake City Commission is a five-member commission.

<sup>8</sup> Letter from J. Thomas Traynor, Jr., Devils Lake City Att'y, to Sandra Voller, Asst. Att'y Gen. (Apr. 1, 2014); see also Minutes, "ad hoc" comm. (Mar. 5, 2014). Members of the ad hoc committee include Richard Johnson, mayor and city commissioner; Craig Stromme, city commissioner and the city's representative on the Devils Lake Municipal Airport Authority; Tom Traynor, Devils Lake city attorney; Terry Johnston, city administrator; Gary Martinson, city assessor; John Nord, airport manager; Jim Kienast, chair of the Airport Authority; and Terry Fasteen of Kadmas Lee & Jackson – appointed by the City to represent the Airport Authority and act as the Kuntz's relocation advisor and negotiator.

<sup>9</sup> Letter from J. Thomas Traynor, Jr., Devils Lake City Att'y, to Sandra Voller, Asst. Att'y Gen. (Apr. 1, 2014).

<sup>10</sup> Id. see also Minutes, "ad hoc" comm. (March 5, 2014).

<sup>11</sup> N.D.C.C. § 44-04-17.1(13)(b).

<sup>12</sup> N.D.C.C. § 44-04-19

<sup>13</sup> N.D.C.C. § 44-04-17.1(9)(a)(1).

<sup>14</sup> N.D.C.C. § 44-04-17.1(6).

as well as taking action, is subject to the state's open meetings law.<sup>15</sup> Committees of a governing body have the same notice requirements as the governing body because they are subject to the open meetings law.<sup>16</sup>

The Commission gives various reasons for not noticing the March 5, 2014, meeting. The Commission claims that the committee was not subject to open meetings law because the "committee was not delegated to perform any function on behalf of the governing body, nor was the committee created by action of the City Commission" but was only formed by "consensus of the Commission."<sup>17</sup> A governing body does not need to make a formal motion to create a committee subject to open meetings law. Rather, if the governing body of a public entity consents or otherwise delegates authority to a group of people to perform any function<sup>18</sup> on behalf of the governing body, a committee is formed.<sup>19</sup> The Commission tabled the relocation expense issue with the consensus that an ad hoc committee would be formed to review the submitted expenses and provide a recommendation to the Commission.<sup>20</sup> This consensus and delegation of its public business created a committee subject to open meetings law.<sup>21</sup>

The Commission also claims the committee was not subject to open meetings law because a quorum of the Commission was not on the committee or at the meeting.<sup>22</sup> A committee subject to open meetings law can be formed by any group of people "regardless of membership."<sup>23</sup> The Commission delegated the task of reviewing reimbursement requests to a group of people. The fact that there was not a majority of

---

<sup>15</sup> N.D.A.G. 2009-O-12; see also N.D.A.G. 2009-O-05 and N.D.A.G. 2007-O-13.

<sup>16</sup> N.D.A.G. 2009-O-12; see also N.D.C.C. § 44-04-20(1) ("public notice must be given in advance of all meetings of a public entity as defined in section 44-04-17.1").

<sup>17</sup> Letter from J. Thomas Traynor, Jr., Devils Lake City Att'y, to Sandra Voller, Asst. Att'y Gen. (Apr. 1, 2014).

<sup>18</sup> It is the public business and the function of the Commission to review the submitted reimbursement expenses. The Commission directed the committee to perform this function on its behalf.

<sup>19</sup> See N.D.A.G. 2013-O-12; see also N.D.C.C. § 44-04-17.1(6) (definition of "governing body").

<sup>20</sup> Minutes, Devils Lake City Comm'n (Feb. 18, 2014).

<sup>21</sup> N.D.C.C. § 44-04-17.1(6) (definition of "governing body"), (9) (definition of "meeting"), and (12) (definition of "public business").

<sup>22</sup> Letter from J. Thomas Traynor, Jr., Devils Lake City Att'y, to Sandra Voller, Asst. Att'y Gen. (Apr. 1, 2014).

<sup>23</sup> N.D.C.C. § 44-04-17.1(6) (definition of "governing body" includes "any group of persons, regardless of membership, acting collectively pursuant to authority delegated to that group by the governing body.").

OPEN RECORDS AND MEETINGS OPINION 2014-O-05

May 15, 2014

Page 4

Commission members on the committee does not exempt the group from the requirements of the open meetings law.

Next, the Commission alleges the March 5, 2014, meeting was not subject to open meetings law because actual and reasonably predictable litigation was discussed.<sup>24</sup> However, under open meetings law, there is a procedure that must be followed to close a meeting and enter into an executive session under N.D.C.C. § 44-04-19.2. The statute requires, among other things, that the governing body must first convene in a properly noticed open session, announce to the public the topics to be discussed during the executive session and the legal authority for closing the meeting, and the entity must record the executive session. None of these procedures were followed by the committee.<sup>25</sup>

Finally, the Commission argues that it satisfied the notice requirements of its municipal code and therefore did not violate the law when it failed to notice the March 5, 2014, special meeting. Devils Lake Municipal Code section 2.08.120 states that “[w]ritten notice of any special meeting shall be given to each commissioner, and the official newspaper of the city . . . unless the special meeting is declared at any other public meeting.”<sup>26</sup> The Commission alleges that at a meeting held by the Commission on March 3, 2014, it was announced that the committee would meet on March 5, 2014, and this fulfilled its notice requirements. Section 44-04-20, N.D.C.C., contains the notice

---

<sup>24</sup> Letter from J. Thomas Traynor, Jr., Devils Lake City Att’y, to Sandra Voller, Asst. Att’y Gen. (Apr. 1, 2014). This opinion does not address whether the committee’s discussions during the March 5, 2014, meeting fall under the definitions of “attorney consultation” as defined by N.D.C.C. § 44-04-19.1(2) and (5). Without a recording of the alleged executive session, as required by N.D.C.C. § 44-04-19.2(5), this office is unable to make a determination on whether the discussions were properly closed to the public.

<sup>25</sup> The Commission also argues that the Commission did not give the committee authority to take the action necessary to enter into an executive session and the procedure required by N.D.C.C. § 44-04-19.2 would be difficult to follow because there was no presiding officer appointed. These arguments are without merit. The Commission gave the committee authority to review the expenses and make recommendations. Whatever action needed to be taken on behalf of the committee to perform this delegated duty still needed to follow the law. It would be the committee’s responsibility to appoint the necessary officer to preside if need be.

<sup>26</sup> Devils Lake, N.D., Mun. Code ch. 2.08, § 120 (Ord. 739 (part), 1989).

requirements of all public entities for every special or regular meeting.<sup>27</sup> The section of municipal code the Commission refers to creates additional requirements for holding special meetings but does not replace the state's notice requirements for all public entities. Rather, the municipal code requirements work in tandem with the notice requirements of N.D.C.C. § 44-04-20. The Commission's failure to comply with the notice requirements of N.D.C.C. § 44-04-20 is a violation of law.

The ad hoc committee formed by the Commission at its regular meeting on February 18, 2014, was a committee subject to the open meetings law like any other governing body of a public entity. The Commission's failure to notice the committee meeting and to observe the proper procedure for holding an executive session, violated the open meetings law.

### CONCLUSION

The Devils Lake City Commission created a committee when it delegated part of its public business to a group of people and the open meetings law was violated when the committee met without notice and failed to observe the proper procedures for holding an executive session.

### STEPS NEEDED TO REMEDY VIOLATION

The Devils Lake City Commission must post a notice of the March 5, 2014, meeting, listing the time, date, location, and all topics which were considered at that meeting. The notice should be posted at the Commission's principal office, filed in the city auditor's office, and given to the official newspaper of the city and any other person who has requested notice of Commission meetings. The Commission must also create detailed minutes to address the public business and discussions conducted at the March 5, 2014, meeting, which must be provided at no cost to the requester and any other person who requests copies.

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

---

<sup>27</sup> N.D.C.C. § 44-04-20 requires all public entities to post notice "at the principal office of the governing body," "at the location of the meeting on the day of the meeting," and at the appropriate central location – for city-level bodies either with the city auditor or on the public entity's website. For a special meeting, notice must also be given to the public entity's official newspaper.

under N.D.C.C. § 44-04-21.2.<sup>28</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>29</sup>

Wayne Stenehjem  
Attorney General

slv/vkk

---

<sup>28</sup> N.D.C.C. § 44-04-21.1(2).

<sup>29</sup> Id.