

**ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 98-O-23**

DATE ISSUED: November 9, 1998

ISSUED TO: Howard Swanson, Grand Forks City Attorney

CITIZEN'S REQUEST FOR OPINION

On August 4, 1998, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Jerry Youngberg asking whether Grand Forks Homes, Inc., violated N.D.C.C. § 44-04-19 by holding an executive session without invoking any applicable exception to that statute. On August 10, 1998, this office received a similar request from Jerry Waletzko alleging the same violation.

FACTS PRESENTED

On July 29, 1998, Mr. Youngberg and Mr. Waletzko were asked to leave for a part of a meeting of the board of directors of Grand Forks Homes, Inc., a North Dakota nonprofit corporation formed in 1971 by a group of churches in Grand Forks. Grand Forks Homes is currently developing an affordable housing project in Grand Forks as replacement housing for families displaced by the 1997 flood. The two subdivisions being developed are called Congressional One and Congressional Two. Mr. Waletzko and Mr. Youngberg, who are both realtors, were asked to leave the portion of the Grand Forks Homes' Board meeting during which the Board discussed its listing contracts with various realtors to sell the homes in Congressional One and Two.¹

Grand Forks Homes has several ties to the City of Grand Forks, including the Department of Urban Development and the Grand Forks Housing Authority. First, the Grand Forks Housing Authority has provided management services to Grand Forks Homes since the corporation was formed in 1971. According to both the City and Grand Forks Homes, these management services have not been provided for free, but are paid for by Grand Forks Homes under agreements with the Grand Forks Housing Authority.

Second, the City purchased the land on which Congressional One and Two are being developed for \$4.1 million, and sold the land to Grand Forks Homes for \$12,000 an

¹ If Grand Forks Homes is a public entity, it is very likely that this portion of the meeting could have been closed under the open meetings exception in N.D.C.C. § 44-04-19.1(7) for contract negotiation strategy sessions if the procedural steps in N.D.C.C. § 44-04-19.2 had been followed and public notice provided under N.D.C.C. § 44-04-20.

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acre.² In a telephone conversation with a staff attorney in this office, city officials indicated that the price paid by Grand Forks Homes per acre for undeveloped residential land was consistent with current market prices considering Grand Forks Homes' agreement to make the necessary internal improvements at its own expense rather than have those expenses charged to the property as special assessments.

Third, the City has issued housing facility revenue bonds on behalf of Grand Forks Homes. The City has indicated that it has no financial obligation under the bonds.

Fourth, the City gave some Community Development Block Grant (CDBG) money to Grand Forks Homes to support the housing project. Most recently, the City Council allocated additional City funds to the Grand Forks Job Development Authority (JDA) for a possible loan to Grand Forks Homes.

Finally, the Grand Forks Housing Authority is listed as a co-borrower of funds, along with Grand Forks Homes, from the Federal National Mortgage Association (Fannie Mae).

ISSUE

Whether Grand Forks Homes is a "public entity" subject to the state open records and meetings laws.

ANALYSIS

All records and meetings of a "public entity" are required to be open to the public unless otherwise specifically provided by law. N.D.C.C. §§ 44-04-18, 44-04-19. This office recently summarized the ways in which a nonprofit corporation may be subject to the open records and meetings laws:

1. The organization is delegated authority by a governing body of a public entity. See N.D.C.C. § 44-04-17.1(6) (definition of "governing body").
2. The organization is created or recognized by state law, or by an action of a political subdivision, to exercise public authority or perform a governmental function. See N.D.C.C. § 44-04-17.1(12)(a) (definition of "public entity").

² The City's purchase consisted of approximately 122 acres, some of which was commercial property that was re-zoned to residential before being sold to Grand Forks Homes.

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3. The organization is supported in whole or in part by public funds or is expending public funds. See N.D.C.C. § 44-04-17.1(9), (12)(c) (definitions of "organization or agency supported in whole or in part by public funds" and "public entity").
4. The organization is an agent or agency of a public entity performing a governmental function on behalf of a public entity [or] having possession or custody of records of the public entity. See N.D.C.C. § 44-04-17.1(12), (15) (definitions of "public entity" and "record").

N.D.A.G. 98-O-21.

In the situation presented here, the Grand Forks City Attorney has indicated that the City has not created Grand Forks Homes or authorized the corporation to perform a governmental function on the City's behalf, and that Grand Forks Homes has not been delegated authority from either the Grand Forks City Council or the Grand Forks Housing Authority Board of Directors. Thus, whether Grand Forks Homes is a public entity depends on whether it is 1) supported in whole or in part by public funds or 2) recognized by the City of Grand Forks or the Grand Forks Housing Authority to perform a governmental function.

The phrase "organization or agency supported in whole or in part by public funds" means:

[A]n organization or agency in any form which has received public funds exceeding the fair market value of any goods or services given in exchange for the public funds, whether through grants, membership dues, fees, or any other payment. An exchange must be conclusively presumed to be for fair market value, and does not constitute support by public funds, when an organization or agency receives a benefit under any authorized economic development program.

N.D.C.C. § 44-04-17.1(9) (emphasis added). "Public funds" means "funds received from the state or any political subdivision of the state," N.D.C.C. § 44-04-17.1(13), which would not include funds provided directly from the federal government to the organization.

An organization is not supported by public funds, under the statutory definition in N.D.C.C. § 44-04-17.1(9), if the funds the organization has received were provided in exchange for goods or services having an equivalent fair market value. Here, Grand

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Forks Homes has paid fair market value for the management services and residential land it received from the City and the Grand Forks Housing Authority. Similarly, the responsibility to pay off the bonds issued by the City belongs to Grand Forks Homes, and in case of default, the City would not be responsible for paying off the debt. See, e.g., N.D.C.C. § 40-57-15 (revenue bonds are not general obligation of the municipality that issued the bonds); Blankenship v. Brazos Higher Educ. Auth., Inc., 975 S.W.2d 353, 360-61 (Tex. App. 1998) (sale of revenue bonds does not constitute support by public funds).

The CDBG money and proposed loan from the JDA are slightly different. Although the original source of the CDBG money was the federal government, the money was received from the City, and therefore was "public funds" under N.D.C.C. § 44-04-17.1(13). Nevertheless, the definition of "supported in whole or in part by public funds" specifically excludes grants received under an authorized economic development program. N.D.C.C. § 44-04-17.1(9). I agree with the position of Grand Forks Homes that the CDBG grants are made under an authorized economic development program and therefore do not constitute "support" under N.D.C.C. § 44-04-17.1(9). The same conclusion applies to the proposed loan from the JDA. See, e.g., N.D.C.C. ch. 40-57.4 (city job development authorities).

The transaction involving Grand Forks Homes which looks most like support by public funds is the Grand Forks Housing Authority's co-signing of an unsecured loan from Fannie Mae. The phrase "public funds" is generally defined to mean money or negotiable instruments belonging to the government or in the hands of public officials. Droste v. Kerner, 217 N.E.2d 73 (Ill. 1966); Black's Law Dictionary 1229 (6th ed. 1990). See also N.D.C.C. § 21-04-01(5); Adams County Record v. Greater North Dakota Ass'n, 529 N.W.2d 830 (N.D. 1995) (GNDA). Here, no cash has been paid to Fannie Mae on behalf of Grand Forks Homes by the Grand Forks Housing Authority; the Grand Forks Housing Authority has simply co-signed a loan. However, the definition of "public funds" in N.D.C.C. § 44-04-17.1(13) refers to "funds" received from the state or a political subdivision of the state. The term "funds" has a broader meaning than money, and can include cash and property of every kind. Black's Law Dictionary 673.

The issue of whether donations of real property or other non-cash property constitute support by public funds was addressed in Sebastian County Chapter of the American Red Cross v. Weatherford, 846 S.W.2d 641 (Ark. 1993). In that case, a city leased public property to a private corporation for one dollar per year, which the corporation admitted was a form of support. A majority of the court concluded that leasing public property for significantly less than fair market value was not support by "public funds," a phrase which the court held was limited to "moneys belonging to the government." Id. at 644-45. One judge dissented, noting that the plain meaning of the term "funds" was

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not limited to cash, and that there was no functional difference between donating cash to a corporation and donating other property or assets with an equivalent cash value to the same corporation. Id. at 646. In either case, there is a subsidy to a private corporation which causes a reduction in public funds. Id.

The differing opinions in Sebastian County demonstrate that the term "funds" in N.D.C.C. § 44-04-17.1(13) is ambiguous.³ When interpreting an ambiguous term in a statute, it is appropriate to consider the purpose of the statute, the consequences of a particular construction, and other laws on the same subject. N.D.C.C. § 1-02-39; Kim-Go v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694 (N.D. 1990).

The general purpose of the open records and meetings laws is to provide the public with the right and the means to determine how public funds are spent and how government business is conducted. GNDA, 529 N.W.2d 833. The open records and meetings laws should be construed liberally in favor of this purpose, and exceptions to those laws must be specific. N.D.C.C. §§ 1-02-01, 44-04-18, 44-04-19; Hovet v. Hebron Public School Dist., 419 N.W.2d 189 (N.D. 1988). It would thwart the broad purpose of the open records and meetings laws, and yield absurd results, to conclude that "supported . . . by public funds" in N.D.C.C. § 44-04-17.1(9) applies to cash payments but not to donations of valuable property or other assets with an equivalent cash value. As the dissent observed in Sebastian County, there is no significant difference between support through payments of cash and support through donations of other assets. 846 S.W.2d at 646.

In GNDA, the majority and concurring opinions both observed the similarity between "support" by public funds under the open records and meetings laws and "donations" of public funds under article X, section 18 of the North Dakota Constitution. 529 N.W.2d at 835, 839. Both provisions are aimed at ensuring accountability for the use of public funds. In addition, a public entity cannot give "support" to a private corporation for purposes of the open records and meetings laws unless the payment serves an appropriate public purpose under article X, section 18. GNDA, 529 N.W.2d at 836 n.1.

Article X, section 18 prohibits the state and its political subdivisions from loaning funds, extending their credit, or making donations to a private corporation except for reasonable support of the poor or in connection with an internal improvement or an industry, enterprise, or business. See generally Gripentrog v. City of Wahpeton, 126 N.W.2d 230 (N.D. 1964). Under this constitutional provision, transactions with Grand Forks Homes at fair market value are permitted, but the Grand Forks Housing Authority

³ The plain meaning of the term payment in N.D.C.C. § 44-04-17.1(9) also is not limited to money, but includes delivery of other property or assets. Black's Law Dictionary 1129.

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is prohibited from co-signing a loan from Fannie Mae to Grand Forks Homes unless the Authority's credit is being extended pursuant to an authorized enterprise. See N.D.A.G. 93-L-129 (political subdivision may not guarantee loan to private corporation unless pursuant to an authorized industry, business, or enterprise). Although it is unknown at this time whether Grand Forks Homes will default on the loan, and whether the assets of the Grand Forks Housing Authority will be obligated to pay off the debt, the fact remains that the credit of a public entity is a valuable asset which in this case has been given away for free.

Based on the broad purpose of the open records and meetings laws, the consequences of the two possible interpretations of the term "funds," and the interaction of the open records and meetings laws with article X, section 18 of the North Dakota Constitution, it is my opinion that the definition of "public funds" in N.D.C.C. § 44-04-17.1(13) includes cash and any other assets or property which have a significant economic value.⁴ It is my further opinion that a corporation is "supported . . . by public funds" under N.D.C.C. § 44-04-17.1(13), and therefore subject to the open records and meetings laws, if it has received cash or other valuable assets that would be prohibited under article X, section 18 unless made for reasonable support of the poor or in connection with an authorized internal improvement, business, industry, or enterprise. Because the Grand Forks Housing Authority's co-signing the loan to Grand Forks Homes is a donation under article X, section 18, it also constitutes support by public funds under N.D.C.C. § 44-04-17.1(9).

There is an additional basis for concluding that Grand Forks Homes is a "public entity." As discussed earlier in this opinion, the definition of "public entity" includes entities recognized by a resolution of a political subdivision to perform a governmental function. N.D.C.C. § 44-04-17.1(12)(b). Here, the resolution passed by the Grand Forks Housing Authority Board to co-sign the loan from Fannie Mae states that "the Housing Authority of the City of Grand Forks North Dakota and Grand Forks Homes, Inc., a North Dakota Non-profit Organization, are collaborating on the development and construction of new homes in a developing subdivision located within the City limits of the City of Grand Forks North Dakota." It is my opinion that this resolution recognizes Grand Forks Homes as performing a governmental function, i.e. developing Congressional One and Two in collaboration with the Grand Forks Housing Authority.

⁴ This conclusion would not apply to de minimis contributions of property or assets, such as occasional use of a public meeting room. In such a case, although the contribution would be for the general support of the organization, the contribution would have little or no economic value and the trivial amount of support would not justify exposing all the financial records of a private corporation to public scrutiny. N.D.C.C. § 31-11-05(24) ("[t]he law disregards trifles"); Saefke v. VandeWalle, 279 N.W.2d 415 (N.D. 1979); N.D.A.G. 96-F-12 ("trivial" uses of state property not prohibited).

CONCLUSION

It is my opinion that Grand Forks Homes, Inc. is a "public entity" subject to the state open records and meetings laws because it is supported in part by public funds and is recognized by a resolution of a political subdivision as performing a governmental function. Therefore, Grand Forks Homes, Inc. violated N.D.C.C. § 44-04-19, the open meetings law, by holding an executive session without invoking any applicable exception to that statute.

STEPS NEEDED TO REMEDY VIOLATION

The Board must hold a new meeting, preceded by public notice in compliance with N.D.C.C. § 44-04-20, during which it must recreate its discussion during the executive session on July 29 in either an open meeting, or in an executive session that is specifically authorized by law, recorded on audio or video tape, and otherwise held in compliance with the procedures in N.D.C.C. § 44-04-19.2.

Failure to issue a notice of a meeting or take other corrective measures as 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. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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