

ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 99-O-01

DATE ISSUED: February 22, 1999

ISSUED TO: Howard Swanson, Grand Forks City Attorney

CITIZEN'S REQUEST FOR OPINION

On December 21, 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 and 44-04-19.2 by holding an executive session on topics which were not authorized by law to be discussed in an executive session and without complying with required statutory procedures.

FACTS PRESENTED

The board of directors for Grand Forks Homes, Inc. (Board) met on December 16, 1998. During that meeting, the Board met in executive session to consider the renewal of its real estate listing agreements with area realtors to sell the homes in its Congressional One and Congressional Two housing subdivisions. The executive session was listed on the agenda for the meeting. After reconvening the open portion of the meeting following the executive session, the Board voted to request support from the City of Grand Forks for hiring a consultant to develop a marketing plan. Mr. Youngberg believes the Board's action after the executive session indicates that its discussion during the executive session went beyond the announced topic of discussing the listing agreements. Mr. Youngberg also complains that individuals who are not members of the Board were allowed to attend the executive session. Officials from the Grand Forks Department of Urban Development, the attorney for Grand Forks Homes, the secretary of Grand Forks Homes, a court reporter, and a person who was tape-recording the meeting attended the executive session. The minutes of the meeting, including minutes of the executive session, and the tape recording of the executive session have been received and reviewed by this office.

ISSUES

1. Whether the executive session of the board of directors of Grand Forks Homes, Inc., was limited to topics for which an executive session may be held.
2. Whether it was proper for the board of directors of Grand Forks Homes, Inc., to allow individuals who were not members of the Board to attend the executive session.

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ANALYSES

Issue One:

This office has previously concluded that Grand Forks Homes, Inc., is a public entity because it is supported by public funds and is recognized by a resolution of a political subdivision. N.D.A.G. 98-O-23. Therefore, a meeting of the board of directors of Grand Forks Homes, Inc. (Board) regarding the Congressional One and Congressional Two housing subdivisions or other items of public business must be open to the public unless the Board is specifically authorized to hold an executive session. Id.; N.D.C.C. § 44-04-19.

The Board's legal authority for holding an executive session is N.D.C.C. § 44-04-19.1(7), which states:

A governing body may hold an executive session under section 44-04-19.2 to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding litigation, adversarial administrative proceedings, or contracts, which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future. An executive session may be held under this subsection only when an open meeting would have an adverse fiscal effect on the bargaining or litigating position of the public entity.

A meeting may not be closed simply because a contract is being discussed. As the last sentence of subsection 7 indicates, a negotiation strategy or instruction session may be closed only if allowing the other party to the negotiation to listen to the discussion would result in increased costs to the public entity.

This office has reviewed the recording and minutes of the executive session. The executive session began with a general discussion of alternative ideas to help sell the homes in Congressional One and Two. The listing agreements were mentioned, but only in passing; the focus of the conversation was on marketing ideas independent from the listing agreements. The middle of the executive session pertained to how those alternative ideas affected the question of whether to renew the existing listing agreements. This portion of the executive session started with a request for clarification by Kent Anderson and ended with Dick Jackson withdrawing his motion, which was seconded by Jerome Hoepfner. The executive session concluded by returning to the subject of alternative ways to improve home sales in Congressional One and Two.

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After listening to the recording and reading the minutes of the executive session, one can see how the Board's bargaining position on renewing its contracts with the realtors could be negatively impacted if the realtors were allowed to listen to the Board's discussion regarding the listing agreements. One can also see how the need for a marketing plan and renegotiating the listing agreements are related issues. However, as summarized in the paragraph above, only the middle of the executive session pertained to negotiating strategy or instructions; the rest of the executive session pertained to ways the Board could increase interest in the homes. Furthermore, the Board's bargaining position regarding the listing agreements would not be negatively impacted by discussing the marketing plan in the open. Therefore, it is my opinion the Board improperly closed part of its executive session.

Issue Two:

The phrase "executive session" includes both a "confidential meeting" and a "closed meeting" as those phrases are defined in N.D.C.C. § 44-04-17.1. N.D.C.C. § 44-04-17.1(4). A "closed meeting" is a meeting, or part of a meeting, which in the discretion of the public entity may either be open or closed to the public. N.D.C.C. § 44-04-17.1(1). A public entity has discretion whether to hold an executive session to discuss negotiation strategy or provide negotiation instructions. N.D.C.C. § 44-04-19.1(7). Therefore, any executive session held under subsection 7 of N.D.C.C. § 44-04-19.1 is a "closed meeting."

"[A]ny person necessary to carry out or further the purposes of a closed meeting may be admitted [to the closed meeting]." N.D.C.C. § 44-04-17.1(1). The group of individuals, other than the members of the Board, who attended the executive session consisted of city employees or officials under contract to serve as staff for Grand Forks Homes, Grand Forks Homes' attorney, a court reporter, and one other person who was recording the executive session as required under N.D.C.C. § 44-04-19.2. Given the subject matter of the executive session, it was both proper and reasonable for the Board to allow these individuals to attend the portion of the meeting which was properly held in executive session.

CONCLUSIONS

1. It is my opinion that the executive session held by the Board on December 16, except the middle portion specifically pertaining to the listing agreements (starting with a request for clarification by Kent Anderson and ending with Dick Jackson withdrawing his motion, which was seconded by Jerome Hoepfner), did not involve subjects for which an executive session may be held, and therefore violated N.D.C.C. § 44-04-19.

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2. It is my opinion that it was proper for the Board to allow the individuals described in this opinion to attend the part of the meeting which was properly held in executive session.

STEPS NEEDED TO REMEDY VIOLATION

The Board must disclose, as an open record, the recording and any minutes or transcription of the executive session, except for the middle portion specifically pertaining to the listing agreements (starting with a request for clarification by Kent Anderson and ending with Dick Jackson withdrawing his motion, which was seconded by Jerome Hoepfner), to Mr. Youngberg and to any other member of the public upon request.

Failure to disclose the records 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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