

**OPEN RECORDS AND MEETINGS OPINION  
2008-O-11**

DATE ISSUED: June 6, 2008

ISSUED TO: Dickinson City Commission  
South Heart City Council

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Alan J. Reed, Managing Editor of the Dickinson Press, asking whether the Dickinson City Commission and the South Heart City Council violated the open meetings law when members of both governing bodies attended a presentation hosted and organized by representatives of the Great Northern Power Development, L.P., regarding the proposed coal gasification power plant near South Heart, North Dakota.

**FACTS PRESENTED**

On December 14, 2007, representatives of the Great Northern Power Development, L.P. ("GNP") gave a presentation at the Days Inn Grand Dakota Lodge in Dickinson, North Dakota, regarding the proposed coal gasification power plant in Stark County, near South Heart, North Dakota. Representatives of GNP contacted a number of government officials from the area via telephone and invited them to attend a luncheon where GNP would give a presentation about the proposed power plant. All five members of the Dickinson City Commission ("Dickinson") were invited to attend the presentation and all five members actually attended.<sup>1</sup>

Three of the five members of the South Heart City Council ("South Heart") were invited to attend the presentation and all three of those members also attended.<sup>2</sup> Prior to the presentation, neither Dickinson nor South Heart held any discussions regarding who would attend. Neither Dickinson nor South Heart provided notice of the presentation and minutes were not prepared.

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<sup>1</sup> The members of the Dickinson City Commission are Rhonda Dukart, Joe Frenzel, Dennis Johnson, Bill Reitmeier, and Carson Steiner.

<sup>2</sup> Floyd Hurt, Quain Kudrna, and Lori Wagner are the Council members that attended the gathering. Greg Krance and Chuck Andrus are also members of the South Heart City Council.

## ISSUE

Whether attendance of a quorum of the members of the Dickinson City Commission and the South Heart City Council at the December 14, 2007, presentation by Great Northern Power, L.P., constituted a “meeting” of each governing body that was required to be preceded by public notice.

## ANALYSIS

Public notice must be given in advance of all meetings of a public entity.<sup>3</sup> The governing body of a city is required to file a meeting notice with the city auditor, post the notice at the main office of the city, and post the notice at the location of the meeting on the day of the meeting.<sup>4</sup> Notice must also be provided to anyone requesting such information.<sup>5</sup> In the case of special meetings, notice must also be provided to the official newspaper of the public entity.<sup>6</sup> The governing body’s presiding officer has the responsibility of assuring that public notice is given at the same time as the governing body’s members are notified.<sup>7</sup>

For a gathering to be considered a “meeting”, two primary elements must be considered: whether a quorum was present and the topic of discussion.<sup>8</sup> A formal or informal gathering constitutes a meeting when a quorum<sup>9</sup> of the members of the governing body is present at the gathering regarding public business.<sup>10</sup> The term “meeting” does not apply to social gatherings, even if attended by a quorum of the members of a governing body, as long as public business is not considered or discussed.<sup>11</sup> “Public business” includes all stages of the decision-making process from information gathering to final action.<sup>12</sup> “Public business” is defined as:

[A]ll matters that relate or may foreseeably relate in any way to:

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<sup>3</sup> N.D.C.C. § 44-04-20(1).

<sup>4</sup> N.D.C.C. § 44-04-20(4).

<sup>5</sup> N.D.C.C. § 44-04-20(5).

<sup>6</sup> N.D.C.C. § 44-04-20(6).

<sup>7</sup> N.D.C.C. § 44-04-20(5).

<sup>8</sup> N.D.C.C. § 44-04-17.1(8)(a)(1); N.D.A.G. 98-O-05; N.D.A.G. 2007-O-08.

<sup>9</sup> A “quorum” means one-half or more of the members of the governing body, or any smaller number if sufficient for a governing body to transact business on behalf of the public entity. N.D.C.C. § 44-04-17.1(14).

<sup>10</sup> N.D.C.C. § 44-04-17.1(8)(a)(1).

<sup>11</sup> N.D.C.C. § 44-04-17.1(8)(b); N.D.A.G. 98-O-05; N.D.A.G. 99-O-09.

<sup>12</sup> N.D.A.G. 96-F-09; N.D.A.G. 98-O-08.

OPEN RECORDS AND MEETINGS OPINION 2008-O-11

June 6, 2008

Page 3

- a. The performance of the public entity's governmental functions, including any matter over which the public entity has supervision, control, jurisdiction, or advisory power; or
- b. The public entity's use of public funds.<sup>13</sup>

As stated in the facts, all of the members of the Dickinson Commission and a quorum of the South Heart City Council attended the presentation hosted by GNP. Thus, in both cases, a quorum was present. In past opinions this office has said:

When a quorum of the members of a governing body of a public entity attend the meeting of another group, and the group's discussion pertains to the public business of the governing body, the attendance of the members of the governing body is a "meeting." N.D.A.G. 98-O-08; N.D.A.G. 1996-F-09. This conclusion applies even if the commissioners merely listen and do not participate in the meeting.<sup>14</sup>

In addition to a attendance by a quorum, to meet the definition of "meeting," public business must be discussed.<sup>15</sup> Both Dickinson and South Heart responded that the information received at the presentation did not relate to the business of their respective governing bodies. Dickinson explained that the "Commission does not have supervision, control, jurisdiction, or advisory power over the proposed coal gasification plant or the area where the plant is to be located."<sup>16</sup> South Heart indicated that the council members "received no information at the gathering related to business of the council."<sup>17</sup>

When this same meeting was examined in the recent opinion to the Stark County Commission and the Stark County Zoning Board, the "public business" was obvious because an upcoming rezoning request by GNP was to be considered by the Zoning Board and the Commission.<sup>18</sup> Here, neither Dickinson nor South Heart had pending actions before them regarding GNP. However, an upcoming agenda item is not necessary to meet the definition of "public business." As defined above, public business includes "all matters that . . . may foreseeably relate in any way to the performance of the public entity's governmental functions."<sup>19</sup>

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

<sup>14</sup> N.D.A.G. 98-O-18.

<sup>15</sup> N.D.C.C. § 44-04-17.1(8)(a)(1).

<sup>16</sup> Letter from Matthew R. Kolling to Lori S. Mickelson, March 26, 2008.

<sup>17</sup> Letter from Mayor Floyd Hurt to Attorney General Wayne Stenehjem, March 25, 2008.

<sup>18</sup> N.D.A.G. 2008-O-10.

<sup>19</sup> N.D.C.C. § 44-04-17.1(11) (emphasis added).

OPEN RECORDS AND MEETINGS OPINION 2008-O-11

June 6, 2008

Page 4

In a past opinion, this office has explained that “[c]ity business includes any matter that could foreseeably be brought before the city council in the context of its responsibilities to the public or over which the council has the potential to determine the outcome.”<sup>20</sup> The information shared at the December 14, 2007, presentation was valuable to Dickinson and South Heart because of the probable impact associated with the proposed plant being located in the region. Information shared by GNP at the presentation included the personnel requirements for both the construction and production phases of the plant and the likely economic impact of the proposed plant on the area, including ancillary job creation, the plant’s payroll, necessary housing, and increased service needs of all kinds, both private and governmental.<sup>21</sup> It is estimated that 200 plus permanent workers will be needed for the plant.<sup>22</sup> This alone could have a significant effect on both Dickinson and South Heart due to the infrastructure needs associated with an increased population, including housing, schools, roads, taxes, landfill needs, and other issues related to the health and safety of the community. All of these matters could foreseeably be brought before the governing bodies of Dickinson and South Heart and thus relate to the public business of both. Therefore, although neither Dickinson nor South Heart had issues regarding GNP pending at the time of the meeting, the presentation exposed them to facts and statements from GNP that could be used by either governing body in future decision-making.<sup>23</sup>

This was not a situation where the commissioners were taken by surprise when public business was discussed without warning at a luncheon. Although a lunch was served, both Dickinson and South Heart understood that they were being invited to a presentation by GNP to share information about the proposed coal gasification plant to be located in Stark County, near South Heart, North Dakota.<sup>24</sup> Nothing indicates that GNP was intending to host a purely social gathering. The nature of the presentation they were invited to made it reasonable to expect that other members of the respective governing bodies would also be invited. If it was reasonable to suspect beforehand that a quorum would attend the presentation, public notice should have been provided when the members learned of the gathering.<sup>25</sup> It is therefore my opinion that attendance of a quorum of the Dickinson City Commission and the South Heart City Council at the GNP presentation was a “meeting” of each governing body, required to be open to the public

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<sup>20</sup> N.D.A.G. 96-F-09 (citing N.D.A.G. Letter to Atkinson (Mar. 5, 1976); St. Cloud Newspapers v. Dist. 742 Cmty. Schools, 332 N.W.2d 1, 6 (Minn. 1983); State ex rel. Badke v. Village Board, 494 N.W.2d 408, 418 (Wis. 1993)).

<sup>21</sup> Meeting minutes of the Stark County Commission, April 1, 2008.

<sup>22</sup> Stefanie Briggs, *Economic Impact is Brought to the Table*, Dickinson Press, February 24, 2008, at A3.

<sup>23</sup> See N.D.A.G. 98-O-08 (citing State ex rel. Badke v. Village Board, 494 N.W.2d 408, 415 (Wis. 1993)).

<sup>24</sup> Letter from Matthew R. Kolling to Lori S. Mickelson, March 26, 2008; Letter from Mayor Floyd Hurt to Attorney General Wayne Stenehjem, March 25, 2008.

<sup>25</sup> N.D.A.G. 2005-O-07; N.D.A.G. 98-O-10.

under N.D.C.C. § 44-04-19, preceded by public notice in compliance with N.D.C.C. § 44-04-20, and followed by minutes in compliance with N.D.C.C. § 44-04-21.

### CONCLUSION

Attendance of a quorum of the members of the Dickinson City Commission and the South Heart City Council at the December 14, 2007, presentation by Great Northern Power, L.P., constituted a “meeting” of each the Dickinson City Commission and the South Heart City Council, required to be preceded by public notice.

### STEPS NEEDED TO REMEDY VIOLATION

In cases such as this, where a governing body attends a meeting without public notice, generally the governing body must recreate the meeting and create minutes of the meeting. Although neither Dickinson nor South Heart “recreated” the December 14, 2007, presentation, GNP held a town meeting in both Dickinson and South Heart where the public was provided the same information that had been presented by GNP at the December 14, 2007, meeting. Therefore, steps have already been taken that mitigate the failure of Dickinson and South Heart to notice the December 14, 2007, presentation and I will not require GNP to present the same information again. However, both Dickinson and South Heart must create minutes of the December 14, 2007, presentation and make the minutes available to the Dickinson Press and to any member of the public, upon request, free of charge.

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 under N.D.C.C. § 44-04-21.2.<sup>26</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>27</sup>

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<sup>26</sup> N.D.C.C. §44-04-21.1(2).

<sup>27</sup> Id.