

**OPEN RECORDS AND MEETINGS OPINION  
2012-O-06**

DATE ISSUED: May 18, 2012

ISSUED TO: Mandan School Board

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Susan Beehler asking whether the Mandan School Board (Board) violated the open meetings law by holding meetings without the public notice required by law.

**FACTS PRESENTED**

Issue one

At a Board meeting on December 5, 2011, the Board authorized the Mandan Public School District (District) to purchase property for a new school in the Lakewood Subdivision of Mandan, North Dakota. The materials available to the Board indicated the cost of the property would be \$433,321 plus any remaining special assessment costs on the property. On December 16, 2011, the District entered into a purchase agreement for the property for a total purchase price of \$600,000, rather than the \$433,321 mentioned at the meeting. The purchase price was set forth in the purchase agreement as follows:

A.	Tax arrearages paid to Morton County	\$100,123.50
B.	Future specials assumed by the Buyer	\$166,679.68
C.	Net to Seller	<u>\$333,196.82</u>
	Total consideration paid by Buyer	\$600,000.00

Issue two

On January 10, 2012, the District's Finance Committee held a publicly noticed meeting.<sup>1</sup> The Finance Committee's membership consists of two of the nine Board members, six school employees, and four members of the community. At the January 10, 2012, meeting, however, a total of seven Board members attended the committee meeting.

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<sup>1</sup> The Finance Committee was created by the school district to fulfill the requirements of N.D.C.C. § 15.1-07-26 which requires school boards to invite the public to participate in a planning process that addresses the effects of projected three to five year demographics on the district.

The Board did not post its own meeting notice regarding its attendance at the Finance Committee meeting.

Issue three:

In January, Susan Beehler asked the District to provide notice to her of any public forums held by the school board relating to a proposed bond issue. On January 19, 2012, KFYZ radio contacted Mandan School Board President Kirsten Baesler and asked her to be a guest on a radio show to talk about an elementary school bond issue. President Baesler asked another Board member and a member of the school administrative staff to participate in the radio show with her. Ms. Beehler heard President Baesler speaking during the radio show on January 24, 2012.

ISSUES

1. Whether the Board authorized additional funds to purchase property for a new elementary school during a meeting held with no public notice.
2. Whether attendance by a quorum of the Board at the January 10, 2012, Finance Committee meeting constituted a "meeting" of the Board that was required to be preceded by public notice.
3. Whether the appearance of two Board members on a radio talk show was a "meeting" of which Ms. Beehler was entitled to personal notice pursuant to N.D.C.C. § 44-04-20(5).

ANALYSIS

Issue one

Public notice must be given in advance of all meetings of a public entity.<sup>2</sup> A school board is required to file a meeting notice with the county auditor or post a meeting notice on its website, post the notice at the principal school district office, and post the notice at the location of the meeting on the day of the meeting.<sup>3</sup> In the case of special meetings, notice must also be provided to the public entity's official newspaper and any representatives of the news media which have requested to be so notified.<sup>4</sup>

As previously stated, the \$600,000 amount listed on the purchase agreement signed December 16, 2011, was higher than the \$433,321 figure approved by the Board during its December 5, 2011, meeting. Ms. Beehler alleges that the Board must have held a

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<sup>2</sup> N.D.C.C. § 44-04-20(1).

<sup>3</sup> N.D.C.C. § 44-04-20(4).

<sup>4</sup> N.D.C.C. § 44-04-20(6).

secret meeting between December 5 and December 16 where it authorized additional funds.

The Board denies holding a secret meeting and explains that it did not have to approve additional funding for the project. At the December 5 meeting, the Board voted to accept "Option 3" which listed the "total cash purchase" as \$433,321.<sup>5</sup> However, in the presentation by Superintendent Volesky and the materials he provided to the Board, it was disclosed that any option chosen by the Board would include the assumption of future special tax assessments on the property.<sup>6</sup> The purchase agreement indicates that \$166,679.68 was designated for "Future Specials Assumed by Buyer" which, when subtracted from \$600,000, equals \$433,321. Thus, the Board authorized the District to assume the cost of any future property special assessments when it chose "Option 3" at the December 5, 2011, meeting.

In any opinion issued under N.D.C.C. § 44-04-21.1, "the attorney general shall base the opinion on the facts given by the public entity."<sup>7</sup> Accordingly, under the circumstances presented, it is my opinion the Board did not hold a meeting in violation of N.D.C.C. §§ 44-04-19 and 44-04-20.

#### Issue two

All meetings of the board of a public school district are required to be open to the public and preceded by public notice in substantial compliance with N.D.C.C. § 44-04-20.<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> "Public business" means:

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

- 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

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<sup>5</sup> Minutes, Mandan Sch. Bd. (Dec. 5, 2011).

<sup>6</sup> Id.

<sup>7</sup> N.D.C.C. § 44-04-21.1(1).

<sup>8</sup> N.D.C.C. § 44-04-19; N.D.C.C. § 44-04-20. See N.D.C.C. § 44-04-21.2(2)("[a]ny action that is a product of a violation of section 44-04-19, 44-04-20, or 44-04-21 is voidable by a court in a civil action").

<sup>9</sup> N.D.C.C. § 44-04-17.1(15). 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

<sup>10</sup> N.D.C.C. § 44-04-17.1(9)(a)(1).

- b. The public entity's use of public funds.

Ms. Beehler alleges that when seven of the nine Board members were present at the Finance Committee meeting, a quorum of the Board was present and because public business was discussed, the Board was required to issue a notice of a Board meeting.<sup>11</sup>

The Board did not post a notice that it would attend the January 10 Finance Committee meeting. Notice was not posted at the District office, filed with the Morton County Auditor, posted on the District's website, or posted at the location of the meeting.<sup>12</sup> The Board explains that it did include the January 10 Finance Committee meeting in a list of "Future Meeting Dates" in the Board's January 3, 2012, meeting agenda and that the Board members only attended the meeting as "concerned citizens".

As I have explained in past opinions, when a quorum of members of a governing body attends a meeting at which public business is discussed, the gathering is a meeting for which notice must be provided, even if the attendance of a quorum at the meeting is unplanned and unexpected.<sup>13</sup> If the presence of a quorum is a surprise, notice must be provided immediately after the meeting.<sup>14</sup>

It is clear from the minutes and the response to our office that the members represented themselves as Board members at the meeting and any member of the public would not be able to distinguish their private concerns from their role as Board members. Thus, it is my opinion that it was a meeting of the Board when a quorum attended the Finance Committee meeting and discussed public business. It is further my opinion that the Board failed to provide notice of the meeting in substantial compliance with N.D.C.C. § 44-04-20.

### Issue three

"The governing body's presiding officer has the responsibility of assuring that such public notice [of a meeting] is given at the same time as such governing body's members are notified, and that this notice is available to anyone requesting such information."<sup>15</sup> The duty to provide personal notice applies to notice of "meetings" as defined in N.D.C.C. § 44 04 17.1(9).

On January 9, 2012, Ms. Beehler emailed the following to the District:

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<sup>11</sup> Two Board members are on the Finance Committee.

<sup>12</sup> N.D.C.C. § 44-04-20.

<sup>13</sup> N.D.A.G. 2005-O-07; N.D.A.G. 98-O-18; N.D.A.G. 98-O-10; N.D.A.G. 98-O-08.

<sup>14</sup> N.D.A.G. 2005-O-07; N.D.A.G. 98-O-10.

<sup>15</sup> N.D.C.C. § 44-04-20(5) (emphasis added).

“I would also like to receive e-mail notice of any public forums or meetings that may be held where any discussion of a new school, school enrollment numbers are discussed or may be discussed.”<sup>16</sup>

She alleges that the Board violated the law by failing to provide her notice of Board President Baesler’s radio talk show appearance.

According to the District, it did not provide Ms. Beehler with notice of the radio talk show because the appearance was not attended by a quorum of the Board or by a committee of the Board so it was not a “meeting” subject to the notice requirements. The District explains that President Baesler, on her own, invited fellow board member, Dr. Rector and school Administrator Dr. Bitz, to join her after being contacted by a radio station.

In a 2007 opinion, I explained that a series of public forums had to be noticed as public meetings because a quorum or a committee of a county commission attended the public forums where public business was discussed.<sup>17</sup> Public forums are not public meetings that must be noticed pursuant to N.D.C.C. § 44-04-20 if no quorum or committee of a governing body is present.

President Baesler and Dr. Rector did not constitute a quorum of the Board and were not acting as a committee of the Board.<sup>18</sup> Thus, their appearance on the radio show was not a meeting that required public notice. It is my opinion, therefore, that the Board did not have an obligation to provide Ms. Beehler with public notice of the radio appearance, pursuant to N.D.C.C. § 44-04-20(5).

### CONCLUSIONS

1. There is no evidence that the Board held a meeting without providing public notice to authorize or approve additional funds to purchase land.
2. Attendance by a quorum of the Board at the January 10, 2012, Finance Committee meeting constituted a meeting of the full Board and was required to be preceded by public notice in substantial compliance with N.D.C.C. § 44-04-20.
3. Since the participation by two Board members on a radio show was not a meeting subject to the notice provisions of N.D.C.C. § 44-04-20, the Board was not obligated to provide Ms. Beehler with personal notice.

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<sup>16</sup> Email from Susan Beehler to Mandan Sch. Dist. (Jan. 9, 2012).

<sup>17</sup> N.D.A.G. 2007-O-08.

<sup>18</sup> In order for a committee to be created, there must be a delegation of authority by the governing body. See N.D.A.G. 2004-O-12.

#### STEPS NEEDED TO REMEDY VIOLATION

The Board must draft its own minutes of the January 10, 2012, meeting consistent with N.D.C.C. § 44-04-21(2) and provide them to Ms. Beehler 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>19</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>20</sup>

Wayne Stenehjem  
Attorney General

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<sup>19</sup> N.D.C.C. § 44-04-21.1(2).

<sup>20</sup> Id.