

**OPEN RECORDS AND MEETINGS OPINION
2016-O-02**

DATE ISSUED: January 13, 2016

ISSUED TO: Langdon 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 Lori Peterson, publisher of Cavalier County Republican, asking whether the Langdon City Commission violated N.D.C.C. §§ 44-04-20 and 44-04-19.2 by failing to properly post notice and holding unauthorized executive sessions.

FACTS PRESENTED

The Langdon City Commission holds regular meetings on the second and fourth Monday of every month at 6:00 pm at City Hall.¹ A regular meeting was scheduled for May 26, 2015, and noticed to begin at 6:00 pm.² Included in the notice was a reference to a consultation with Kent Ritterman of Moore Engineering.³ However, in order to accommodate the consultant's schedule, the Commission met at 5:00 p.m. with Mr. Ritterman, but did not provide any notice of the early meeting.⁴ The Commission then met for its regular meeting at 6:00 p.m. During the regular meeting, the Commission held an executive session to discuss property assessments of 2014.⁵

The Commission held another regular meeting on June 8, 2015.⁶ The agenda for the June 8 meeting includes a reference to an "Executive Session-Mel Carsen."⁷ During the meeting, the Commission, along with its attorney, proceeded into an executive session to discuss a petition for reassessment of city properties.

¹ Letter from Cameron Sillers, Langdon City Att'y, to Att'y Gen.'s office (July 22, 2015).

² Notice, Langdon City Comm'n (May 26, 2015).

³ Id.

⁴ Letter from Cameron Sillers, Langdon City Att'y, to Att'y Gen.'s office (July 22, 2015).

⁵ Id.

⁶ Notice, Langdon City Comm'n (June 8, 2015).

⁷ Id.

OPEN RECORDS AND MEETINGS OPINION 2016-O-02

January 13, 2016

Page 2

Lori Peterson, publisher for Cavalier County Republican, alleges the May 26, 2015, meeting with Moore Engineering was improper because the Commission did not provide notice that it would be meeting prior to its regular meeting. Ms. Peterson also alleges the executive sessions held during the May 26 and June 8, 2015, meetings were improper and the public was not given sufficient notice of the topics and legal authority for the sessions.

ISSUES

1. Whether the Commission's meeting with Moore Engineering before its May 26, 2015, regularly scheduled meeting violated open meeting laws.
2. Whether the May 26, 2015, executive session complied with open meeting laws and was authorized by law.
3. Whether the June 8, 2015, executive session complied with open meeting laws and was authorized by law.

ANALYSIS

Issue One

"Unless otherwise provided by law, public notice must be given in advance of all meetings of a public entity."⁸ The Commission posted notice of its May 26, 2015, regular meeting to begin at 6:00 pm but did not post notice of the Moore Engineering consultation which took place before the regular meeting.⁹ The Commission violated open meeting laws when it failed to post notice of this meeting as required by N.D.C.C. § 44-04-20.

Issue Two

All meetings of a public entity must be open to the public unless an executive session is specifically authorized by law.¹⁰ Even if an executive session is authorized, N.D.C.C. § 44-04-19 requires certain procedures be followed before proceeding into an executive session.

⁸ N.D.C.C. § 44-04-20.

⁹ The Commission recognizes the May 26, 2015, meeting with Moore Engineering was improper because no notice was provided. Letter from Cameron Sillers, Langdon City Att'y, to Att'y Gen.'s office (July 22, 2015).

¹⁰ N.D.C.C. § 44-04-19.

The Commission acknowledges that it did not follow proper procedure before entering into an executive session during the May 26, 2015, meeting, and that the executive session to discuss the 2014 property assessments was not authorized by law.¹¹ It was therefore a violation of open meetings law when the Commission held an unauthorized executive session during its May 26, 2015, regular meeting.¹²

Issue Three

The Commission held an executive session for “attorney consultation” during its regular meeting on June 8, 2015.

Executive session: notice

Public notice must be given in advance of all meetings of a public entity which must include the date, time, location of the meeting, topics to be considered, and the “general subject matter of any executive sessions expected to be held during the meeting.”¹³ The Commission’s June 8, 2015, regular meeting notice contains the following agenda item: “Executive Session – Mel Carsen.”¹⁴ The Commission knew at the time the notice was prepared that it would be entering into an executive session with its property assessor, Mel Carson, for an attorney consultation to discuss a petition for reassessment, signed by ten property owners, filed with the Cavalier County Commissioners.¹⁵ The vague reference to “Mel Carsen” was insufficient to properly identify the reason for the executive session to be held during the June 8, 2015, regular meeting.

Executive session: procedure

A governing body may hold an executive session for an “attorney consultation.”¹⁶ Before proceeding into an executive session, the governing body must announce,

¹¹ Letter from Cameron Sillers, Langdon City Att’y, to Att’y Gen.’s office (July 22, 2015). Att’y Sillers provides that he has spoken with the Commission since this meeting to discuss the Commission’s obligations and responsibilities under open meeting laws.

¹² The Commission failed to include the executive session in its notice but the session was added to the agenda during the regular meeting. N.D.C.C. § 44-04-20 (meeting notices must include notice of any executive session expected to be held during the meeting at the time the notice is prepared).

¹³ N.D.C.C. § 44-04-20(1), (2).

¹⁴ Notice, Langdon City Comm’n (June 8, 2015).

¹⁵ See Letter from Cameron Sillers, Langdon City Att’y, to Att’y Gen.’s office (July 22, 2015).

¹⁶ N.D.C.C. § 44-04-19.1(2), (5).

OPEN RECORDS AND MEETINGS OPINION 2016-O-02

January 13, 2016

Page 4

during the open portion of the meeting, both the topic or topics it will be considering and the legal authority for holding the executive session on those topics.¹⁷ A governing body must pass a motion by recorded roll call vote to hold an executive session for attorney consultation.¹⁸

Before proceeding into the executive session during the June 8, 2015, regular meeting, Langdon City Attorney Cameron Sillers read from a prepared form provided by the Office of Attorney General.¹⁹ In following the executive session format provided by the form, Sillers announced that the authority for closing the executive session was attorney consultation pursuant to N.D.C.C. § 44-04-19.1 in anticipation of an adversarial proceeding with the State Tax Equalization Board regarding reassessment of city property.²⁰ The Commission made a motion and entered into the executive session.²¹

Opinions issued by this office must be based on the facts given by the public entity. Based on the information provided, the Commission followed the proper procedure required by N.D.C.C. § 44-04-19.2 before proceeding into the executive session during its June 8, 2015, regular meeting.

Executive session: legal authority

A governing body may hold an executive session for “attorney consultation” pursuant to N.D.C.C. § 44-04-19.1(2) and (5) when the governing body is seeking or receiving the attorney’s advice regarding pending or reasonably predictable civil or criminal litigation or adversarial administrative proceedings.²² The use of the phrase “reasonably

¹⁷ N.D.C.C. § 44-04-19.2(2)(b). To satisfy this requirement, a governing body is not required to reveal closed or confidential information, but must provide sufficient information about the topic and purpose of the executive session that would keep the public apprised of the legally sufficient reason for holding the executive session.

¹⁸ N.D.C.C. § 44-04-19.1(2)(a).

¹⁹ Letter from Cameron Sillers, Langdon City Att’y, to Att’y Gen.’s office (July 22, 2015); see also Email from Cameron Sillers, Langdon City Att’y, to Sandra DePountis, Asst. Att’y Gen. (July 30, 2015, 10:40 AM). This “Sample Form for Closing Executive Sessions” is a form provided by the Att’y Gen. office that provides helpful language on how to properly close a meeting for an executive session and can be found on the Att’y Gen.’s website: <http://www.ag.nd.gov/OpenRecords/EXECUTIVESESSIONFORMAT.pdf>.

²⁰ Letter from Cameron Sillers, Langdon City Att’y, to Att’y Gen.’s office (July 22, 2015); see also Email from Cameron Sillers, Langdon City Att’y, to Sandra DePountis, Asst. Att’y Gen. (July 30, 2015, at 12:13pm).

²¹ Letter from Cameron Sillers, Langdon City Att’y, to Att’y Gen.’s office (July 22, 2015); see also Minutes, Langdon City Comm’n (June 8, 2015).

²² N.D.C.C. § 44-04-19.1(2), (5).

OPEN RECORDS AND MEETINGS OPINION 2016-O-02

January 13, 2016

Page 5

predictable” requires more than a simple possibility or fear of litigation, rather, there must be a realistic and tangible threat of litigation.²³

Prior to the June 8, 2015, regular meeting, a petition signed by ten property owners was presented to the Cavalier County Commissioners requesting a reassessment of property in Langdon.²⁴ Upon filing such a petition, N.D.C.C. § 57-14-08(1) provides that the Board of County Commissioners may order a new assessment of property. The new assessment would be conducted by the terms and conditions set forth by an order of the State Board of Equalization or Tax Commissioner.²⁵ According to N.D.C.C. § 57-14-08(1), the local governing body responsible for performing the new assessment, Langdon City Commission in this instance, can “petition the state board of equalization or tax commissioner for a modification of any or all of the order’s terms and conditions.”²⁶

The Commission voted to hold an executive session during the June 8, 2015, regular meeting for an attorney consultation regarding reasonably predictable adversarial administrative proceedings regarding the City’s options since the County was going to order the City of Langdon to reassess the property.²⁷ During the executive session, the Commission, along with its attorney, discussed defending the City’s existing property assessments and fighting the petition for reassessment. The Commission discussed the cost associated with doing a reassessment and the need to obtain an estimate as a further basis for reconsideration of a reassessment.²⁸

²³ N.D.A.G. 2015-O-10.

²⁴ Letter from Cameron Sillers, Langdon City Att’y, to Att’y Gen.’s office (July 22, 2015); see also Emails from Cameron Sillers, Langdon City Att’y, to Sandra DePountis, Asst. Att’y Gen. (July 30, 2015, 10:40 AM and 12:13 PM).

²⁵ N.D.C.C. § 57-14-08; see also N.D.C.C. § 57-01-02(7) (powers and duties of tax commissioner include the power to “require a new assessment of property in any county to be made in accordance with chapter 57-14, whenever that is deemed necessary”) and N.D.C.C. § 57-13-04 (powers and duties of State Board of Equalization include the power to review property assessments and “order a new assessment of any class of property, or of all the property, located within any political subdivision if, in its opinion, taxable property located within that subdivision...has been assessed unfairly or has not been assessed according to law.”)

²⁶ N.D.C.C. § 57-14-08(1)

²⁷ Letter from Cameron Sillers, Langdon City Att’y, to Att’y Gen.’s office (July 22, 2015); see also Emails from Cameron Sillers, Langdon City Att’y, to Sandra DePountis, Asst. Att’y Gen. (July 30, 2015, 10:40 AM and 12:13 PM).

²⁸ The Commission was hoping by providing such information, the County would not order the reassessment; however, if unsuccessful and a reassessment were ordered,

The executive session during the June 8, 2015, meeting was authorized because the Commission was consulting with its attorney regarding a reasonably predictable administrative proceeding.²⁹ At the time of the executive session, the petition for reassessment had already been filed with the Cavalier County Commission and the City Commission was seeking its attorney's advice on how to defend its existing assessments or, in the alternative, a possible petition for modification of an order of reassessment. The discussion held during the executive session fit within the definition of "attorney consultation" because the attorney discussed the City Commission's options and strategy for defending the assessments to the County Commission and Tax Equalization Board.

Executive session: final action

"Final action concerning the topics discussed or considered during" an executive session must be made during an open portion of a public meeting.³⁰ "Final action" is defined as "a collective decision or a collective commitment or promise to make a decision on any matter, including formation of a position or policy."³¹ However, final action does not include "guidance given by members of the governing body to legal counsel...in a closed attorney consultation...authorized in section 44-04-19.1."³²

A review of the recording of the June 8, 2015, executive session reveals that motions were made and votes were taken to authorize the city auditor to get cost estimates and estimated time frames from two companies that could do the assessments and to have the city assessor prepare a presentation on how to defend the existing assessment.

the Commission would petition for modification of such an order and discussed what terms and conditions the Commission would want in an order.

²⁹ The process for defending the assessments and what would ultimately lead to the City Commission petitioning to modify any order for reassessment fits into the definition of "adversarial administrative proceeding" defined under N.D.C.C. § 44-04-19.1(4). The City Commission is acting as a respondent to the landowner's complaint for assessment and the County Commission and Tax Equalization Board are the ultimate decision makers on whether to order, and under what terms and conditions, a reassessment on the property. North Dakota Century Code § 57-14-08 outlines the procedure for ordering a new assessment and N.D.C.C. §§ 57-13-04(7), (9) outline procedures for the Tax Equalization Board to take if the City does not comply with such an order and the appeal process a landowner may take for assessment and classification of the owner's property.

³⁰ N.D.C.C. § 44-04-19.2(2)(e).

³¹ Id.

³² Id.

These topics fit into the definition of “final action” because they were a collective decision on how to move forward on the tax assessments. This final action was not guidance given to the attorney and therefore, these motions and votes should have occurred during the open portion of the meeting. The Commission therefore violated open meeting laws when it took “final action” during its June 8, 2015, executive session.

CONCLUSIONS

1. The Commission violated open meeting laws when it failed to post notice of its meeting with Moore Engineering that occurred prior to its regular meeting on May 26, 2015.
2. The Commission violated open meeting laws when it held an unauthorized executive session during its May 26, 2015, regular meeting.
3. Although the Commission followed proper procedure before entering into an executive session on June 8, 2015, and such executive session was authorized under law as “attorney consultation,” the Commission violated open meeting laws when it failed to provide sufficient notice of the executive session and by taking final action during the executive session.

STEPS NEEDED TO REMEDY VIOLATIONS

The Commission has already prepared detailed minutes of its meeting with Moore Engineering on May 26, 2015. The minutes should be provided to Ms. Peterson, free of charge. The minutes should also be made available to anyone requesting them.

If the Commission has not already done so, a copy of the recording of the May 26, 2015, executive session must be provided to Ms. Peterson, free of charge. The recording and minutes of the executive session should be available for anyone requesting them.

The Commission must amend its June 8, 2015, meeting minutes to reflect the motions and votes taken during the executive session. The corrected meeting minutes should be provided to Ms. Peterson.

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

OPEN RECORDS AND MEETINGS OPINION 2016-O-02

January 13, 2016

Page 8

under N.D.C.C. § 44-04-21.2.³³ It may also result in personal liability for the person or persons responsible for the noncompliance.³⁴

Wayne Stenehjem
Attorney General

sld

cc: Lori Peterson (via email only)

³³ N.D.C.C. § 44-04-21.1(2).

³⁴ Id.