

**OPEN RECORDS AND MEETINGS OPINION
2013-O-13**

DATE ISSUED: August 14, 2013

ISSUED TO: City of Mandan - Mandan 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 Wayne Papke asking whether the Mandan City Commission violated N.D.C.C. § 44-04-19 by holding an executive session that was not authorized by law.

FACTS PRESENTED

The Mandan City Commission (Commission) held a special meeting on June 4, 2013, to discuss a possible joint powers agreement with the Mandan Park District (Park District) involving contributions from the Visitor's Fund the Commission administers for a project proposed by the Park District. The project proposed by the Park District involved bringing a YMCA center to the Mandan area (YMCA project).¹ The Park District requested funding assistance from the Visitor's Fund to aid in the acquisition of property for the YMCA project.²

During the June 4, 2013, special meeting, the Commission and Park District entered into executive session pursuant to "North Dakota Century Code Section 44-04-19.1(9) to discuss contract negotiations that may have an adverse fiscal effect on the bargaining position of the public entity as it relates to potential expenditures from the visitor's fund."³ The executive session lasted approximately 26 minutes and was attended by the Mandan City Commissioners, City Administrator Jim Neubauer, City Attorney Malcolm Brown, Mandan Park Board President Jason Arenz, Parks and

¹ See Minutes, Mandan City Comm'n (June 18, 2013).

² Id. The Commission has the authority to expend the Visitor's Fund "to promote, encourage, and attract visitors to come to the city and to use the travel and tourism facilities within the city and its extraterritorial jurisdiction." Mandan Mun. Code Section 3-02-02

³ See Revised Special Meeting Minutes, Mandan City Comm'n (June 4, 2013). The requester did not ask about the sufficiency of the executive session announcement.

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Recreation Director Cole Higlin and the attorney for the Park District, Arlyn Ruff.⁴ The executive session was recorded, in compliance with N.D.C.C. § 44-04-19.2(5), and reviewed by this office. Mr. Wayne Papke alleges that the June 4, 2013, executive session was not authorized by law because the sources of funding at issue were public in nature.

ISSUE

Whether the executive session held on June 4, 2013, by the Mandan City Commission, was authorized by law.

ANALYSIS

The Commission is a governing body of a public entity subject to open record and meeting laws.⁵ All meetings of the governing body of a public entity must be open to the public unless otherwise specifically provided by law.⁶ A governing body may hold an executive session to discuss negotiation strategy or provide negotiation instructions to its attorney or other negotiators regarding current contract negotiations if discussing the strategy or instruction in an open meeting would adversely affect the bargaining position of the entity.⁷

The executive session held during the June 4, 2013, meeting involved negotiation strategy regarding the use of the Commission's Visitor's Fund for the acquisition of property for the YMCA project. The recording of the executive session reveals discussions related to what the Commission was willing to offer as a contribution, negotiation strategy of approaching potential sellers and land owners with the requested funds, and the strengths and weaknesses of the Park District's negotiation position with various land owners.⁸ These discussions, if held in public, specifically if the information was available to the possible land owners of the potential properties related to the project, could have caused an adverse fiscal effect on the bargaining position of the Commission and Park District.⁹ Therefore, it is my opinion that the Commission did not

⁴ See Special Meeting Minutes, Mandan City Comm'n (June 4, 2013).

⁵ See N.D. Const. art. XI, §§ 5 & 6; N.D.C.C. § 44-04-17.1(12)(a); N.D.A.G. 2013-O-06.

⁶ N.D.C.C. § 44-04-19.

⁷ N.D.C.C. § 44-04-19.1(9); N.D.A.G. 2009-O-09; N.D.A.G. 2007-O-11.

⁸ During the executive session there were incidental discussions of the Park District's negotiation history with land owners but the discussions were in the context of developing strategy for the pending negotiation. N.D.A.G. 2005-O-18.

⁹ This office has explained that an executive session held for a negotiation is authorized only if allowing the other party to the negotiation to listen to the discussion would result in increased costs to the public entity. N.D.C.C. § 44-04-19.1(9); N.D.A.G. 2009-O-09; N.D.A.G. 2005-O-18; N.D.A.G. 2000-O-05.

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violate N.D.C.C. § 44-04-19 because the June 4, 2013, executive session was authorized by N.D.C.C. § 44-04-19.1(9).

CONCLUSION

The executive session held on June 4, 2013, by the Mandan City Commission was authorized by law.

Wayne Stenehjem
Attorney General

slv/vkk