

9/29/06

STATE OF SOUTH DAKOTA

OPEN MEETINGS COMMISSION

IN THE MATTER OF OPEN MEETING)	FINDINGS OF FACT,
COMPLAINT 06-01,)	CONCLUSIONS OF LAW AND
MELROSE TOWNSHIP)	FINDING OF NO VIOLATION

Vincent A. Foley, Commission Chair

INTRODUCTION

This matter comes before the Commission upon referral from Grant County State's Attorney Mark Reedstrom on the complaint of Melrose Township resident Jerald Zubke. Mr. Zubke complains that violations of the open meetings law occurred at a meeting of the Board on March 7, 2006. The two meetings involved issues surrounding the appropriate tax levy assessed by the Township. Circuit Court Judge Robert L. Timm, in Zubke v. Melrose Township, (Grant County Civ. No. 06-96) addressed that dispute. This Commission considers only whether violations of the open meeting statutes occurred on complaints properly submitted to the State's Attorney.*

* The Commission notes that the submission by the Complainant went beyond the complaint submitted to the Grant County State's Attorney. Under the statutory scheme of the open meetings law, this Commission may only consider matters referred to it by the respective State's Attorney. Here, Mr. Reedstrom submitted only that which had been presented to him. We cannot consider anything beyond that which was initially submitted to the State's Attorney, and then referred to the Commission. This requirement is jurisdictional and while important and interesting issues may be presented, we may not consider them at
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Melrose Township lies in the area of Grant County where the Coteau Des Prairie falls into the Whetstone Valley. Because of that topography, some of the residents feel that a reserve is an important tool should weather factors lead to road washouts. Others have an honest disagreement and feel the reserve should be less. Nonetheless, March 7, 2006, the Township Supervisors voted to reduce the Township's mill levy. Upon further consideration of the impact of the property tax freeze statute on the reduction, an effort was made to reverse the decision. These efforts included the circulation of a petition to reconsider the action of the Township to reduce the levy. The petition circulation process was carried out by two of the township supervisors on at least one occasion at the same time and place. The Melrose Township Board of Supervisors consists of three members.

March 16, 2006, a meeting of the supervisors was held. Mr. Zubke was informed of the meeting. He arrived at the location and was told that he could not enter immediately as the Board was in telephone conference with their attorney. When the supervisors later attempted to call Mr. Zubke into the meeting

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this time. Accordingly, we have not addressed whether the meeting was properly noticed, whether other meetings violated the open meetings statute, and whether the circulation of the petition by quorum constituted a public meeting.

he had left the meeting location. They then entered into a formal open meeting.

March 22, 2006, Mr. Zubke filed a complaint with the Grant County State's Attorney Mark Reedstrom. Although not specifically addressed in the Complaint, the issue referred to this Commission by Mr. Reedstrom is whether the matters discussed in executive session were proper matters for executive session. Mr. Zubke subsequently filed suit in Circuit Court in Grant County on the tax levy issue.

DISCUSSION AND CONCLUSION

Zubke contends that while the open meetings law permits executive sessions to consult with an attorney on litigation, it does not permit executive session conferences with an attorney on parliamentary matters such as reconsideration of a motion previously passed. As we noted in the Town of Herrick (Case No. 05-01) issued on July 11, 2005, the law requires open discussion of issues in public forum, and that exceptions are limited in scope. Here no dispute exists that an official meeting occurred and that an executive session discussion with an attorney revolved around the parliamentary steps necessary to reverse that decision. The sole question before this Commission is whether a discussion with an attorney by a public body seeking legal advice is appropriate if no lawsuit has been filed.

SDCL 1-25-2 provides in part:

Executive or closed meetings may be held for the sole purposes of. . . (3) Consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation or contractual matters.

However, this provision does not allow all conversations with an attorney to be held in executive session. Instead, as noted in Herrick, the exception is limited in scope. We read (3) to allow communications, either orally or in writing, to be in executive session only when it involves proposed litigation, pending litigation or contractual matters. In this case, the issue turns on what constitutes proposed litigation.

An attorney's function is not only to handle a lawsuit filed, but to also provide advice to prevent violations of the law. Prevention of those violations protects the body from liability arising from the violation itself. Here, Melrose Township sought advice to consider the propriety of action sought by the petition. A variety of issues could have faced the Township based on the decisions made on March 16, 2006. Each of those issues, and related violations could have given rise to litigation. The advice of counsel to take measured steps allows any body to take action to protect itself. It is not only litigation already proposed by others as an attack that is a permitted topic, but also litigation that is proposed as a possibility by a board's own attorney. To hold otherwise could result in nonsensical findings that a board may only discuss

with their own attorney issues that the attorney has identified as problems that need to be addressed to protect the public, or avoid liability, in public session. The end result would be that every entity or person except a public board could exercise the attorney-client privilege.

This Board finds that no violation of the open meeting laws occurred on the issue of whether the subject of the executive session exceeds the scope of SDCL 1-25-2(3).

Commissioners BECK, BRENNER, STEELE and ROTHSCADL concur.