

November 21, 2010

STATE OF SOUTH DAKOTA

OPEN MEETING COMMISSION

IN THE MATTER OF OPEN	]	
MEETING COMPLAINT 10-02,	]	FINDINGS OF FACT, CONCLUSIONS
INDIAN HILLS SANITARY	]	OF LAW AND REPRIMAND
DISTRICT	]	

The Complaint in the above entitled matter was referred to the Open Meeting Commission (OMC) by the Meade County States Attorney under SDCL 1-25-6; the State's Attorney having received a notarized complaint made under oath by Gary Garner, a citizen of Meade County.

The Garner Complaint contains a summary of allegations relating to open meetings as well as the preparation of budget requests, mill levies, voting issues, and designation of its legal newspaper. (Record at 19). The State's Attorney directed the OMC to Garner's summary, at paragraphs 2,3, and 4 and also asked the OMC to address posting of meeting notices. (Record at 11). As it is required to do, the OMC will address only those allegations referred by the State's Attorney. In fact, even if the State's Attorney had referred the other allegations to the OMC it would lack authority to address them since they do not directly pertain to SDCL ch. 1-25, the Open Meetings Law.

The open meeting allegations boil down to two issues. The first is that the Indian Hills Sanitary District Board of Trustees met one or more times between October 15, 2008 and October 25, 2009 without proper notice. (Record at 11, 19). The second is that the Board of Trustees did not post the agenda for its 2009

annual meeting and did not conduct the meeting on the date required under SDCL 34A-5-20. (Record at 11, 19).

As set forth below, a reprimand is warranted.

FINDINGS OF FACT

1. It is undisputed that Indian Hills Sanitary District constitutes a political subdivision of the State of South Dakota under SDCL 34A-5-14 and is therefore subject to SDCL 1-25-1. According to its Bylaws (Record at 6) the Board of Trustees consists of three members. During the period in question they were Rick Rathert, Robert Dyczek and Lyle Larson (Record at 15).

2. The first allegation (paragraphs 2-3 of the Garner Summary) asserts that the Indian Hills Sanitary District Board of Trustees met one or more times between October 15, 2008 and October 25, 2009 without proper notice. (Record at 19). Garner presented several exhibits.

3. Garner Exhibit 2 is a July 13, 2009 letter from the Indian Hills Sanitation District Board of Trustees to Mr. Garner stating that the “Board is aggressively trying to address” road issues and that a paving committee would be contacting Garner. (Record at 22). Exhibit 3 is a letter from the Board of Trustees to all members of the District. (Record at 23). This document, dated July 16, 2009, states that the Trustees had “explored, investigated and researched several options to upgrade the road” in question. (Record at 23) While this statement does not refer to specific meetings, it does show that the Trustees were jointly considering road maintenance and repair issues. (Record at 23-24).

4. Garner Exhibit 5 is a letter distributed by trustees Rick Rathert and Robert Dyczek on July 26, 2009 at a concerned citizens’ meeting which was not

called by the Board of Trustees. (Record at 28-33). The letter contains several statements made on behalf of the Board of Trustees which, when read as a whole (and together with Exhibits 2 and 3), indicates that the Board had previously met to address several claims raised by residents concerning road maintenance and paving. The letter does not specifically indicate when the Board of Trustees met prior to July 26.

5. The meeting on July 26 is also an issue. According to the filed information this meeting was not called by the Board of Trustees. (Record at 28-33). It was, however, attended by a quorum of the Board of Trustees (Trustees Rather and Dyzcek) and clearly addressed official business. (Record at 93). When a quorum intends to attend such a meeting to discuss official business, it should prepare and post an agenda showing that they are attending the meeting called by others and listing the items to be discussed. The Board members obviously knew the purpose of the meeting; they distributed a 4 page handout at the meeting. (Record at 28-33). It is undisputed that no agenda was prepared or posted and that at least two of the members of the Board of Trustees attended and discussed official business.

6. Garner also asserts that a bid tabulation (Exhibit 9) shows that the Trustees met to take bids on a paving project. (Record at 59). This tabulation shows only that the bids were let on August 12, 2009, but does not, in itself, show that a quorum of the Board of Trustees was present at the bidletting.

7. The submitted material also includes a September 17, 2009 email from one of the Board of Trustees to legal counsel stating, among other things,

that “the Board of Trustees had a meeting last night in preparation of our annual members meeting next Tuesday.” (Record at 193).

8. While it is not clear how many times the Board of Trustees met, the various documents sent out to the members of the district demonstrate that the Board did, in fact, meet to address road maintenance at least once prior to July 16. Further, there was an “informal” meeting on July 26, 2009 and a “pre-meeting” on September 16, 2009.

9. The fact that meetings occurred does not automatically demonstrate that they improper. To warrant a finding that they were improper, the evidence must also show that the meetings were not public under SDCL 1-25-1 or the agenda was not properly posted as required by SDCL 1-25-1.1.

10. The investigatory materials in the record include no evidence that any public notices or agendas were issued or posted for any meetings conducted by the Board of Trustees during the period from the October 2008 annual meeting through September 16, 2009.

11. On June 3, 2010, the Board of Trustees submitted a letter to the OMC in response to the Garner complaint. (Record at 253). While it did not specifically acknowledge the failure to comply with the Open Meeting Law, it stated that the Board had changed its practices in the last year. The Board asserts that it now uses a public mailbox location and posts the agendas 24 hours in advance of all meetings of the Board of Trustees. Although not stated, this change apparently occurred after the instances involved here. The Board of Trustees provided no agendas or indication that any notice had actually been posted for the meetings during the period from the October 2008 annual meeting through September 16,

2009. The OMC necessarily concludes that the change in practices occurred after this period.

12. Garner also alleges that that the Board of Trustees met on Tuesday September 22, 2009 and did not properly announce their meeting. (Record at 19, paragraph 4). He claims the notice was not properly made under SDCL 1-25-1.1. Based on a letter he filed with the OMC (Record at 55), a poster was placed at the entrance to the subdivision. This is apparently the public mailbox location referenced in the Board of Trustees letter (Record at 53). An agenda was also prepared. (Record at 54). However, Garner asserts that the agenda was distributed at the annual meeting on September 22 (Record at 54), inferring that the agenda itself was not posted. The State's Attorney's letter of referral also states that while notice of the annual meeting was likely posted at the entrance to the subdivision, the proposed agenda was apparently not posted. (Record at 11). Although the Board of Trustees do not admit to this allegation, they do not refute it or provide any evidence to the contrary.

13. As part of his allegations regarding the September 22 meeting, Garner alleges that the Board of Trustees met on the wrong date in light of SDCL 34A-5-20, which requires annual meetings to be held on a Tuesday in the month following their anniversary date. (Record at 19). The anniversary date of this sanitary district is September 12 so the proper date for an annual meeting for the election of officers would be in a Tuesday in October. This Board lacks authority to issue a reprimand for that issue. The Meeting Laws does not address holding meetings on the wrong date; this is a separate matter pertaining to sanitary district laws.

14. In addition to the foregoing dates, the Garner letter (Record at 19) also refers to possible violations during October 2009. That may be the case. Even without reviewing those matters, however, there is sufficient evidence to find that the Board of Trustees did, in fact, engage in a pattern of repeatedly violating the Open Meeting Law.

15. Finally, the June 3, 2010 letter from the Board of Trustees to the OMC states that they had used a local newsletter as a means to provide notice of meetings rather than posting notice. (Record at 253). However, posting the notice prominently at the principal place of business is required even when emails or other newsletters are also used as a courtesy or in compliance with the organization's general practice or bylaws. Posting is even required for meetings where a notice or agenda must also be published in legal newspapers under other state laws.

16. The Trustee's letter appears to suggest the Board of Trustees generally made a good faith attempt at substantial compliance. Consistent with the OMC's past Findings, there is no "good intent" or "good faith" defense to open meeting allegations. Further, the facts regarding the newsletter do not show that there was substantial compliance. The Board of Trustee's statements are inconsistent with the Meade County Sheriff's report that the local newsletter *did not* publish such notices. (Record at 17). The Sheriff's report included issues of this newsletter during each of the months involved in this dispute and they show no such notices were published. (Record at 214-252). Ultimately, there was no substantial compliance or good faith defense to compliance with the Open Meeting Law.

17. Garner asserts that newspaper publication requirements were also not followed. Such newspaper publication requirements are a requirement of sanitary district laws in SDCL ch. 34A-5 and/or election laws in SDCL ch. 6-16. Both of these statutes require publication for meetings when officers will be elected and for other specific matters, but neither require publication for routine meetings. In addition, by-laws of various organizations may provide for publication for elections or even for routine meetings. Publication issues are not, however controlled by the Open Meeting Law in SDCL ch. 1-25.

CONCLUSIONS OF LAW

1. The Indian Hills Sanitary District is an entity subject to the provisions of the Open Meeting Law found at SDCL Chapter 1-25.

2. Under SDCL 1-25-1.1, the Board of Trustees for the Indian Hills Sanitary District is required to prepare and post notice of its meetings, with a proposed agenda, at least 24 hours prior to any meeting where a quorum will be present and official business will be discussed.

3. The Board of Trustees for the Indian Hills Sanitary District met at least once during the period from October 2008 to July 16, 2009 without posting an agenda 24 hours in advance as required under SDCL 1-25-1.1. Also, the Board of Trustees failed to post agendas 24 hours in advance for their “informal” meeting on July 26, 2009 and a “pre-meeting” on September 16, 2009.

4. Although the July 26, 2009 meeting involved a meeting called by another entity, a quorum of the Board of Trustees was present and official business was discussed. The OMC held in *Matter of Melrose Township* and again in *Matter of Roberts County*, that entities subject to the Open Meeting Law must

comply even when meetings are called by others. In *Melrose Township*, a quorum of a township board attended a county commission meeting to discuss official business, thereby violating then-existing law. SDCL 1-25-1 was later amended to state that “it is not an official meeting of one political subdivision or public body if its members provide information or attend the official meeting of another political subdivision or public body for which the notice requirements of § 25-1.1 have been met.” SDCL 1-25-1. The “informal meeting” involved here does not fit this new exception. In *Roberts County*, the OMC issued a reprimand when a quorum of a county commission attended a tour and the members were approached about official business during the tour. Even though they may not have known they would be approached, they should have avoided any official discussions whatsoever until a county commission meeting was properly called. The violation is even more clear here. A quorum of the Trustees attended the informal meeting specifically to discuss official business. This is a violation of the Open Meeting Law.

5. Likewise there is no exception to the Open Meeting Law for “pre-meetings” of a quorum of officers in advance of annual meetings.

6. Based on a preponderance of the evidence, the OMC finds that the Board of Trustees of the Indian Hills Sanitary District violated the Open Meeting Law by conducting one or more meetings without posting notice and agendas in advance of meetings as required by SDCL 1-25-1.1.

7. The Board of Trustees of the Indian Hills Sanitary District met on Tuesday September 22, 2009. While a notice was placed at the entrance to the

subdivision for this meeting, an agenda was not posted 24 hours in advance of the meeting as is required under SDCL 1-25-1.1.

8. The issues of good faith and/or purposeful conduct do not bear on the decision in this matter and the OMC makes no Findings of Fact or Conclusions of Law in that regard.

9. The Board of Trustees for the Indian Hills Sanitary District were repeatedly in violation of SDCL 1-25-1 and SDCL 1-25-1.1.

REPRIMAND

The Indian Hills Sanitary District Board of Trustees is hereby publicly reprimanded for repeated violations of the South Dakota Open Meetings Law during the period from October 2008 through September 22, 2009.

The foregoing decision is issued by Open Meetings Commission, Commissioners Reedstrom (Chairman), Brenner, Rothschadl, Sovell, and Steele.