

SOUTH DAKOTA OPEN MEETING COMMISSION

MINUTES OF MEETING

August 1, 2011

Sioux Falls City Library-Main Branch-200 N. Main Ave.

Members present: Mark Reedstrom, Grant County State's Attorney (Chairman); Glenn Brenner, Pennington County State's Attorney; Lisa Rothschadl, Bon Homme County State's Attorney; Emily Sovell, Sully County State's Attorney. Members absent: John Steele, Aurora County State's Attorney. Diane Best assisted the Commission.

The meeting was called to order at 1:01.

Matter of Open Meeting Complaint 11-03, Lincoln Township.

Diane Best stated that Lincoln Township previously sent in a letter indicating it would not be present and asking that the matter be considered based on the written submissions.

Kelly Kenser testified that he had not received notice of meetings held by Lincoln Township and that the township had been hostile to his requests. He further testified that the meetings were held in a private dwelling and he was not given access to the dwelling to look and see if notices were posted.

The Board deliberated. Chairman Reedstrom stated that Lincoln had acknowledged that a violation occurred. Sovell stated that a reprimand is warranted.

Brenner stated that where a meeting is held is not subject to review by the OMC, but the township ought to look into holding the meeting at a public place. Brenner then moved to issue a reprimand as drafted by Board counsel.

Rothschadl suggested that Mr. Kenser would need to contact his local legislator on the meeting place issue. Sovell stated that other small public bodies have adopted bylaws requiring that they post their agendas in the county courthouse.

Rothschadl seconded the motion to adopt findings reprimanding the township.

All members present voted in favor of the motion.

Matter of Open Meeting Complaint 11-04, Silver Creek Township (Mark Snedeker and Robert Davis)

Don Peterson testified that his rights were violated because Silver Creek Township trenched a ditch across a township road and flooded his land. He testified that he called Mark Snedeker and Robert Davis and both denied that a meeting occurred. Although they get together for maintenance, they denied a meeting was held.

He further stated that the road was still dug up and a culvert had not been installed.

Chairman Reedstrom stated that the allegation is made that a meeting had been held regarding the culvert with no public notice given 24 hours in advance. Rothschadl asked if Silver Creek township meetings are generally posted. Mr. Peterson stated that the annual meeting is properly called. But the meetings involved here were not made public.

Mark Snedeker testified that based on his information from the association of towns and townships, two members of a township board may meet for purposes of undertaking maintenance activities of less than \$2500 without conducting an official meeting of the township. He relied on the Township Association Manual.

As to the flooding issue, Snedeker stated that instead of water going over the road and tearing up the road, the township handled it by cutting through the road. He stated that the Peterson land would have been flooded regardless of the township action. He also recited to a statement from a recent township association newsletter stating that townships have the right to install culverts to maintain drainage through waterways. Sanborn County has no drainage board to ask. He further stated that water was draining through a natural drainage that would have been in place if the road had not been there. Road closed signs have been installed.

Robert Davis testified that the township needs to make periodic decisions on issues like gravelling roads and two township board members must get together in order to do business efficiently. He stated that two supervisors have the right to conduct the business and as stated within the booklet. If that is not appropriate then all the others [townships] are not doing the right thing either.

Other meetings are conducted throughout the year.

Chairman Reedstrom asked if the situation here was an emergency.

Davis stated that the road work did not have to happen immediately. He noted that a convenience factor was involved and it was necessary to handle business this way to get regular road maintenance done.

Peterson responded that he was denied the ability to come to a meeting.

The OMC deliberated. Sovell and Brenner recommended postponing a decision. Brenner stated that making a decision right away was not necessary since the issue does not involve an emergency.

Chairman Reedstrom stated that he understands the frustration and it would be burdensome to meet every time simple decision is to be made. On the other hand, the definition of a public body is when a quorum meets and conducts official business. Two members of a township board are a quorum.

Sovell stated that the township handbook should be obtained and reviewed prior to decision-making. She moved to defer the issue until the next meeting.

Brenner seconded the motion.

Reedstrom requested submission of the manual used for townships. Diane agreed to obtain one for this purpose.

All members present voted in favor. The OMC will take final action on this matter at its next meeting in November.

Matter of Open Meeting Complaint 11-01, City of Parkston and Parkston Board of Adjustment.

Attorney Paul Tschetter appeared on behalf of the Complainant, Jim Weiss. He stated that this matter involves two meetings held on February 11, 2010 and November 9, 2010.

Tschetter stated that Jim Weiss was previously part of city government, so the city had cast blame on him, but his past actions were not relevant to the issue of whether the open meeting law had been violated as set out in the complaint.

Tschetter stated that Count I of the complaint was clear. The meeting of the Parkston Planning and Zoning board (P&Z) was held on February 11. It was not a special or rescheduled meeting. A quorum was present. No notice was made.

Count II pertained to a meeting of the Parkston Board of Adjustment (Bd. of Adjustment) on November 9, 2011. This was an appeal from the P&Z decision. P&Z members were present. Tschetter stated that the Bd. of Adjustment held an executive session. He stated that he could tell what the rationale was for the executive session since it was not stated in the motion, but the context

indicated that the meeting was for discussions with counsel. He stated that a quorum of the P & Z members went into executive session with the Bd. of Adjustment. He stated that the P&Z should have provided public notice that it would go into executive session with the Bd. of Adjustment. He recognized that the law provides that one body can attend the meeting of another without providing notice, but in this case the P&Z didn't just attend; they also went into executive session with the Bd. of Adjustment.

He further stated that the Bd. of Adjustment has authority to confer with its attorney or to discuss anticipated litigation, but in this case it invited a party to the appeal into its executive session.

He stated that City was convened as the Bd. of Adj. pursuant to SDCL 11-4-24.

Chairman Reedstrom asked whether Tschetter saw this as a situation where the Bd. of Adjustment went into executive session with one of the parties to an appeal. Isn't this a due process issue?

Tschetter stated that his client was unable to give his view on some of the matters that were apparently discussed. This is like a circuit court judge going into deliberations with appellate counsel.

Attorney Keith Goehring appeared on behalf of the City of Parkston. He stated that notice had been occurring according to the procedures set up by Weiss when he was with the city. There was an issue with not giving copies of the notice to the media. That has been cured.

Brenner asked whether anyone was representing the P&Z? Goehring indicated that he was representing the Bd. of Adjustment only. Diane Best indicated that she had sent all notices to the city Attorney—both entities were part of the city.

In response to questioning, Goehring stated that the Bd. of Adjustment was not trying to pull the wool over Jim Weiss eyes. That the P&Z had already made its decision when it attended the Bd. of Adjustment meeting and took no action at the Nov. meeting when it was in the executive session or otherwise. Including the P&Z in the executive session was to just give the fact that potential litigation would be filed against the city.

Brenner asked whether the Nov. 9 transcript of the public meeting portion of the meeting was accurate. Goehring agreed that it was.

Brenner asked about the reasons for going into executive session. Goehring stated that the executive session was to advise that the Bd. of Adjustment decision would likely be appealed by Weiss.

Reedstrom asked whether the discussion in executive session was limited to providing legal advice? Goerhing stated that it was. No factual matters were discussed in executive session other than what was already made publicly.

Paul Tschetter responded. He stated that the letters from the OMC regarding the OMC procedure went out to both the P&Z and the Bd. of Adjustment since they were sent to the city attorney.

He referred to the City of Martin case where the OMC stated that a lack of intent to violate the open meeting law does not bear on the issue of whether a reprimand should be issued and that such factors shouldn't be considered.

He further stated that Goerhing's statement relative to the executive session, quoting "everything that was said in there was also said in public" would do away with the executive session altogether—there is no reason to hold one to repeat information already public.

Reedstrom asked about Count II of the complaint. P&Z had a quorum. Did it really violate the public notice requirement? Wasn't the Bd. of Adjustment meeting noticed? Can't a P&Z attend the meeting of another board?

Tschetter stated that a P&Z can attend the meeting of another without public notice---Counts II and III are alternative grounds.

Tschetter acknowledged that the Bd. of Adjustment had properly called its meeting. Tschetter acknowledged that he was present and didn't object to the P&Z going into executive session with the Bd. of Adjustment when it occurred.

Deliberations were held.

Brenner stated that it is very rare there is criminal intent. The lack of intent to violate the open meeting laws is likely the reason the OMC gets the cases instead. Lack of intent does not avoid a reprimand though when a violation has occurred. He stated that Counts I, II, and III are all violations.

He stated that the executive session of the Bd. of Adjustment did not relate to advice of a lawyer if it was just factual. Further the P&Z can attend and just watch another meeting, but participating in official business may go too far.

Sovell stated that as to Count II there was no formal action by the P&Z. They should not be faulted for being invited by another body. The Nov. 9 meeting was properly noticed by the Bd. of Adjustment and the agenda was proper.

Reedstrom stated that it is not illegal were a 2<sup>nd</sup> entity attends a meeting of another, even to discuss issues. He referred to the Melrose Township case. He further referred to the Board of Regents case where the Board went into

discussion for legal advice and counsel was present during the meeting, but the meeting included other matters not requiring legal advice. Bringing the P&Z into the executive session may fit that category.

Brenner stated, with respect to Count II, that it is well within the statute for the P&Z to participate in another meeting, but not to go into executive session with that other body. If the city attorney goes into executive session for consideration of legal strategy, the pos, cons, and strategy and cost, then that is proper. But the P&Z was there.

Reedstrom stated that there is a violation of Counts 1 and 3, but not 2.

Sovell moved to issue a reprimand on Count I. Brenner seconded. All present voted in favor.

Sovell moved to find there was no violation of Count II. Reedstrom seconded. Reedstrom, Sovell, and Rothschadl voted in favor of the motion. Brenner voted against the motion and stated that he may write a written dissent.

Rothschadl voted to issue a reprimand on Count III. Sovell seconded. All present voted in favor.

Upon inquiry by Reedstrom, Diane asked for proposed findings from the parties. 45 days for Tschetter; 30 days thereafter for Goehring.

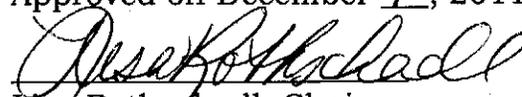
Minutes of April 21, 2011 meeting. Upon motion and second, the minutes of the April 21 meeting were voted upon and approved.

Proposed meeting. The Board members discussed holding its next meeting in November during the LECC conference and annual game feed. The dates are probably Nov 16-18. Rothschadl moved to meet in mid-November at a time arranged by Diane. Reedstrom seconded. All present voted in favor. Reedstrom noted that the November meeting should include an item on election of the Chair.

Adjournment.

Brenner moved to adjourn. Sovell seconded. All members present voted in favor. The OMC was adjourned at approximately 3:15 pm.

Approved on December 9, 2011



Lisa Rothschadl, Chair  
Open Meeting Commission