

SOUTH DAKOTA OPEN MEETINGS COMMISSION

TELECONFERENCE MEETING

MINUTES OF MEETING

October 23, 2020

Members participating via teleconference: Mark Reedstrom, Grant County State's Attorney (Chair); Cassie Wendt, Butte County State's Attorney; Alexis Tracy, Clay County State's Attorney; and Katelynn Hoffman, Turner County State's Attorney. Steve Blair and Jenna McFarlane, Office of the Attorney General, assisted the Commission. Emily Sovell, Sully County State's Attorney (Co-Chair) was absent.

Chair Reedstrom called the meeting to order at approximately 9:30 a.m. Ms. Tracy moved to approve the proposed agenda; Ms. Wendt seconded. A roll call vote was held: Ms. Hoffman, Ms. Tracy, Ms. Wendt, and Mr. Reedstrom all voted aye.

A time was provided for public comment as required by SDCL 1-25-1; no member of the public provided comment to the Commission.

The following is a summary (not verbatim) of the matters discussed.

December 5, 2019 minutes

Ms. Tracy moved to approve the draft minutes of the December 5, 2019, meeting. Ms. Wendt seconded. A roll call vote was held: Ms. Tracy, Ms. Wendt, and Mr. Reedstrom all voted aye. Ms. Hoffman abstained.

In the Matter of Open Meeting Complaint 20-01, Board of Trustees for the City of Ward

Mr. Tom Kampmann appeared as the Complainant. Steve Britzman appeared as counsel on behalf of the Board of Trustees for the City of Ward.

Mr. Kampmann stated that the Board of Trustees for the City of Ward were looking for a bid for snow removal. As seen in the minutes of the Board of Trustees' November 4, 2019 meeting, the Board approved one of its members to call Stoltzfus Farms, who in the past did snow removal in the City of Ward, to see if Stoltzfus Farms was interested in doing snow removal for the City again.

Mr. Kampmann acknowledged that the Board member did call Stoltzfus Farms but was asked to come in person to discuss the matters. Instead of the Board

member going by himself for the meeting, a quorum of Board members went without providing public notice of the meeting at Stoltzfus Farms.

Mr. Kampmann claimed that Stoltzfus Farms was awarded the contract for the snow removal on Friday, November 8, 2019, after the November 4 meeting was held. The City Clerk again asked the Board if a special meeting was needed. To which the Board said no the only people allowed to clean snow in this town was Stoltzfus Farms. Mr. Kampmann informed the Commission that this information can be found in the e-mail provided with the Complaint.

Mr. Kampmann concluded he was concerned because Ward is a small town and it does not make it okay to hold quorums without a meeting to just get their hands slapped. Mr. Kampmann felt that if the Board only got a hand slap then other South Dakota township boards, school boards, city officials including Sioux Falls might cross the state line in Minnesota or Iowa and have a plan together for what the vote counts might be before appearing in front of the public to take action. Which Mr. Kampmann alleges occurred when they awarded the contract to Stoltzfus Farms on November 8 but did not take official action until the December meeting.

Responding for the Board of Trustees, Mr. Britzman stated that forty-eight people lived in the City of Ward according to the 2010 census, which would make the City a class 3 municipality. Mr. Britzman asserted that the last full paragraph of SDCL 1-25-1 indicates if a quorum of township supervisors, road district trustees, or trustees for municipality of the third class meet solely for purposes of implementing previously publicly-adopted policy, carrying out ministerial functions of that township, district or municipality, or undertaking a factual investigation of conditions related to public safety, the meeting is not subject to the provisions of this chapter. Mr. Britzman indicated that section of the statute formed the basis for the City's position that there was no open meeting law violation.

Mr. Britzman informed the Commission that he felt that under SDCL 9-30-2 the City had a duty and the authorization to regulate public streets when it comes to snow removal. In this case, bids had been advertised for snow removal services for the 2019-2020 winter and no bids had been received as indicated in the November 4, 2019 Board of Trustee minutes.

Mr. Britzman noted that SDCL 5-18A-5(9) provides that if, after advertising for bids, no bids are received, the purchasing agency may negotiate a contract for the purchase of the supplies, services, or public improvement projects at the most advantageous price, if the specifications of the original bid are met.

Mr. Britzman stated the he felt that if the City of Ward was a bigger city, they would have a highway superintendent that could have attempted to locate a contractor to do the snow removal.

In previous years, snow removal had been performed by Stoltzfus Farms. A Board member was instructed at the November 4 meeting of the Board to call Stoltzfus Farms to see if they would be interested in contracting for snow removal again. Mr. Britzman stated Stoltzfus Farms asked the Board member to come to their location in person to discuss concerns they had in regard to the snow removal. The Board member, instead of having to relay any information received from Stoltzfus Farms back to the other Board members, felt it would be best if all Board members attended the meeting at Stoltzfus Farms.

Mr. Britzman acknowledged that more than a quorum of Board members were present at Stoltzfus farm but suggested the type of discussion was preliminary to entering into an agreement with regarding snow removal, as well as, fulfilling the ministerial tasks that a highway superintendent would do in a larger city. Mr. Britzman felt this matter was like the Open Meetings Commission decision related to the Kulm Township Board of Supervisors issued on November 3, 2017.

Mr. Britzman stated in order for the Board to get Stoltzfus Farms to agree to provide snow removal services the City needed to meet the terms of Stoltzfus Farms. Ultimately the Board asked Stoltzfus Farms to provide snow removal in the interim before a contract was approved, which Stoltzfus Farms agreed to.

Mr. Britzman continued that the December 3, 2019, Board minutes indicate that three council members went to Stoltzfus Farms to meet with them about the snow removal contract. A motion was made and seconded to approve the snow removal contract with Stoltzfus Farms at \$125 per an hour. Mr. Britzman felt that did not constitute a violation of SDCL 1-25-1 because in order to get the snow removal done in the City the contractor required a meeting with a Board member and so everyone would have adequate information all three Board members went together.

Mr. Britzman concluded by asserting that not having a snow removal contractor by November created a public safety issue. Mr. Britzman believed that snow removal is a ministerial function and noted that the contract for snow removal was approved at a formal meeting. In the interim, the Board was able to convince the contractor to engage in snow removal prior to receiving the contract and believed the Board satisfied the exception to the open meeting requirement.

Chair Reedstrom stated it was undisputed that a quorum met and discussed public business outside of a public meeting and without properly noticing or posting an agenda. Chair Reedstrom focused on the exception in SDCL 1-25-1 that talks about municipalities of the third-class meeting to carry out

ministerial functions and engaging in factual investigations regarding conditions related to public safety.

Chair Reedstrom asked Mr. Britzman if it was the City's position that engaging in contract negotiations with a contractor which obviously involves public funds is a ministerial function of the municipality? Mr. Britzman stated he believed it is, and that type of task – negotiating with or hearing complaints from a contractor – would be duties of any municipal employee that was working to negotiating bids or attempting to solicit bids when no bids were received. That type of activity would be the same as a highway superintendent and because it's a third-class municipality and there are not employees to fulfill those ministerial tasks, so the Board of Trustees had to.

Chair Reedstrom indicated that he felt the Board was making more of a factual investigation into the matter to convince the contractor to accept the contract since there were no bids and asked Mr. Britzman if he would like to expand on that issue at all. Mr. Britzman agreed, and asserted that the Board's actions qualified as a factual investigation related to public safety because the Board needed to know the reason why Stoltzfus Farms was not willing to continue to provide snow removal services for the City of Ward. Mr. Britzman acknowledged that it could have been done by one Board member and relayed back to the others, but there was an urgency to the matter because no bids for snow removal had been received.

Chair Reedstrom noted it certainly was not necessary for all three Board members to attend the meeting with Stoltzfus Farms, and it probably would've been better if one Board member had gone. However, due to the statutory exception it may not make a difference. Mr. Britzman agreed and stated the City would not be doing that in the future.

Ms. Tracy inquired if there was an imminent projected snow fall for the City of Ward and if it was projected to happen before the next meeting of the Board. Mr. Britzman replied yes and since it was before the next meeting that was what prompted the concern of the Board to address snow removal before the next meeting. Ms. Tracy asked if the City would agree that the more prudent thing would have been to invite the contractor to come to the meeting or publishing a notice for a special meeting if there was a quorum present. Mr. Britzman agreed.

In rebuttal Mr. Kampmann stated that the City started advertising in September for bids for snow removal. When the City did not get bids, they re-advertised with modified conditions. Still nobody replied, and Mr. Kampmann felt the City messed around for two months trying to get a snow removal bid to the point that he volunteered to remove his own snow to keep his business open. Mr. Kampmann claimed that is when the Board decided to send a member out to talk to Stoltzfus Farms.

Mr. Kampmann concluded that he was concerned about encouraging more boards to follow suit if the exception proposed by Mr. Britzman was recognized.

Chair Reedstrom voiced that he heard Mr. Kampmann's concerns and indicated that the Commission only has the responsibility to determine whether or not an open meeting violation occurred and that the jurisdiction of the Commission is limited to issuing a public reprimand. Chair Reedstrom continued that he did not believe going out of state violated open meetings law in any fashion, but the argument had been made that the meeting that was held is not subject to the open meetings laws because the Board members were carrying out either a ministerial function or a factual investigation relating to public safety and was interested in Mr. Kampmann's response to those matters. Mr. Kampmann responded that he felt Stoltzfus Farms would have never moved snow if those three Board members would not have gone and met with them. Mr. Kampmann felt there were no safety concerns because the street coming through town is plowed by the County. Chair Reedstrom inquired if Mr. Kampmann disagreed that snow removal within the City is a condition related to public safety. Mr. Kampmann stated no he did not agree it was a public safety issue.

Ms. Tracy asked Mr. Kampmann if he disputed that there was an imminent snowstorm coming. Mr. Kampmann replied he didn't know if you would call it a snowstorm, but they did get some snow. Ms. Tracy inquired if the decision had been made at the November 4, 2019, meeting if he would agree that would not have been a violation. Mr. Kampmann stated that was correct. Mr. Tracy continued asking if one Board member had gone out to visit and then at the December 3 meeting discussed it further Mr. Kampmann would not have had a problem with them having gone with this other snow removal service instead of himself. Mr. Kampmann stated no he would not have had a problem. Ms. Tracy inquired if Mr. Kampmann would agree that there were factual inquiries into snow removal and Mr. Kampmann agreed.

Mr. Britzman felt that access to a residence by first responders, or difficulty in accessing a house in an emergency, certainly fell under a public safety concern. Mr. Britzman concluded that the Board's actions in meeting with Stoltzfus Farms did constitute a factual investigation because nobody had submitted a bid and they needed to find out the reasons why Stoltzfus Farms had not so the City could address those reasons.

The Commission went into deliberations.

Ms. Tracy stated that she was in agreement that there is a very narrow exception in this particular case, and that if the City of Ward wasn't a third-class municipality there would be a violation. She continued she felt with the imminent snow fall it was a public safety concern, especially if emergency

services were needed. Ms. Tracy indicated she was moved toward the situation falling under the exception as being a factual investigation into the conditions of public safety.

Chair Reedstrom felt if it was not for the SDCL 1-25-1 exception, this matter would be open and shut. Chair Reedstrom continued that due to the imminent snow fall, and snow removal itself being related to public safety, the City needed to figure out why no bids had been made. Chair Reedstrom indicated that so he felt this situation fell within the exception.

Ms. Wendt agreed, and in addition thought it was important to note that the Board started looking for bids in September and that gives credence to the public safety emergency that it was now November and no bids had been received. Ms. Wendt noted that she too felt that snowfall is a public safety concern and agreed it fell within the exception.

Ms. Hoffman stated that she agreed and noted the fact that Mr. Kampmann had admitted that he agreed the meeting with Stoltzfus Farms had been a factual inquiry about snow removal.

Ms. Tracy moved that there was no violation pursuant to the public safety exception. Ms. Wendt seconded. Roll call was made with Ms. Hoffman, Ms. Tracy, Ms. Wendt and Mr. Reedstrom voting aye.

In the Matter of Open Meeting Complaint 20-02, Belle Fourche City Council

Ms. Wendt recused herself from participating in this hearing due to the fact that her Deputy State's Attorney had been the one who conducted the investigation of the matter.

Mr. Mark Watson, with the Black Hills Pioneer, appeared as the Complainant. Dwight Gubbrud appeared as counsel on behalf of the Belle Fourche City Council.

Mr. Watson stated that in December of 2019 a special meeting of the City Council was held and during that meeting the Council went into executive session for contractual and public safety matters, citing SDCL 1-25-2(4) and 1-25-2(6), to discuss the Belle Fourche Area Community Center HVAC system. The reporter for the paper who normally covers the hearing could not make it to the meeting but watched the video posted on the City's website. That reporter then reached out the Mayor, the City attorney, and one of the Council members, and was informed that no contractual negotiations occurred during the executive session. The Mayor informed the reporter that anything related to contracts goes into executive session.

Mr. Watson felt the City interpreted the executive session exemption in the open meetings laws to broadly. Mr. Watson continued that SDCL 1-25-2(4) allows the City to go into closed session to prepare for contract negotiations or to negotiate with employees or employee representatives. However, the Pioneer's reporter was told no contract negotiations were held.

Mr. Watson continued that SDCL 1-27-1.5(8) listed a number of exemptions from public records including response plans, emergency management or response schedules, and public safety information that would create the substantial likelihood of endangering the public safety or property if disclosed. Mr. Watson stated SDCL 1-27-1.5(17) exempts the public disclosure of response plans, locations of sensitive items and safety reviews. Well they agree the HVAC system at the community center did need to be replaced in an emergency manner they did not believe it was a necessary enough reason to enter executive session.

Mr. Watson concluded that they did not believe that the City moved into executive session with malice, but felt the City was too liberal in its use of executive session. Mr. Watson indicated that part of his duty is holding local government accountable and that is why chose to file the complaint.

Responding for the Belle Fourche City Council, Dwight Gubbrud stated that that City of Belle Fourche owns and operates a large community center containing a theater, gymnasium, meeting rooms, racquet ball court, weight room, fitness room, and indoor pool. Most importantly, the facility is designated the emergency shelter for the community and is the location of the Butte County Office of Emergency Services.

Mr. Gubbrud pointed to Exhibit 7 of the documents provided to the Commission which was a letter from the contractor the City used to maintain the HVAC system. In the letter dated December 14, 2019, the contractor notified the City Council the HVAC system at the center was failing and was extremely dangerous for the people in the building as well as extremely hard on the equipment and building itself. The letter also stated that the current condition of the system constituted an urgent public health threat and noted there was a potential for a catastrophic event that would not only damage the building but could injure people within the building.

Mr. Gubbrud argued that SDCL 1-25-2(6) allows for executive session to discuss information listed under 1-27-1.5(8), and specifically information pertaining to the protection of public or private property and any person on or within public or private. Mr. Gubbrud asserted Exhibit 7 the letter, talked about an urgent public health threat, and because of that the Council was clearly able to meet in executive session to determine how to respond to that emergency and how the City planned to manage the emergency.

Mr. Gubbrud continued that SDCL 1-27-1.5(8)(g) related to any infrastructure record regarding any building or facility that would expose or create vulnerability through disclosure of the location, configuration or security or critical systems of the building. Mr. Gubbrud concluded that the Exhibit 7 letter constituted an infrastructure record and the Council was clearly able to meet in executive session to discuss this infrastructure record because it specifically talks about the security of the critical system at the emergency shelter.

Ms. Tracy inquired if Mr. Gubbrud would agree that contractual matters were not discussed. Mr. Gubbrud could not agree or disagree what was discussed, but it is possible that the Council decided that it may want to negotiate some resolution of this situation. Ms. Tracy asked Mr. Gubbrud if his argument was confined to 1-25-2(6) instead of 1-25-2(4), which Mr. Gubbrud stated he was not ready to abandon the contract negotiation provision, but it was clear to him that 1-25-2(6) applied to this situation.

Chair Reedstrom stated he did not feel as though 1-25-2(4) applied whatsoever. Chair Reedstrom noted that in a prior Open Meetings Commission decision, the South Dakota Science and Technology authority case, it was determined that the clauses of 1-25-2(4), "preparing for contract negotiations" and "negotiating with employees or employee representatives" are to be read together. It was determined that that to read 1-25-2(4) as allowing executive session to generally discuss contractual matters would open a hole in the open meetings laws.

Chair Reedstrom felt the focus needed to be on whether or not the meeting of the Council in executive session was an emergency management response or included public safety information that would create a substantial likelihood of endangering public safety or property if disclosed. Chair Reedstrom indicated that he could not see how discussing an emergency contract for repairs would create a danger to public safety or property.

Mr. Gubbrud stated the letter did not discuss a contract, but it informed the Council of the dangerous conditions present. Mr. Gubbrud continued that when reviewing infrastructure records there should be consideration over exposure or creating a vulnerability from the disclosure of the location or configuration of security systems, but that's the only section he felt would be under the vulnerability language.

Ms. Tracy asked whether the situation would apply to 1-27-1.5(8)(c)? Mr. Gubbrud answered yes, but the Council had not offered subsection (c) as a justification for the executive session. Ms. Tracy stated she was not sure if she was tracking the emergency management or response argument. Mr. Gubbrud stated he would again direct the Commissions attention to Exhibit 7 the letter.

Mr. Watson asserted in rebuttal that SDCL 1-27-1.5's first sentence was a very broad description and when looking at subsections (a) through (g) he took those sections as more strategic exemptions. Chair Reedstrom asked Mr. Watson what his argument for 1-27-1.5(8)(g) regarding blueprint, building plan, infrastructure record as it related to Exhibit 7 the contract. Mr. Watson wasn't sure if that letter was included in the public's packet for that meeting of the Council but questioned whether its disclosure would have created a vulnerability since it was widely known through Belle Fourche that the HVAC system was failing. Mr. Watson concluded that in his opinion 1-27-1.5(8)(a) through (g) should be interpreted in a narrow scope focused on protecting facilities from malicious people going out to attack vulnerabilities of facilities.

Mr. Gubbrud stated the Council had a lot of options to consider and submitted acknowledging to the public that there was this dangerous condition in an emergency facility discloses there is a vulnerability there and did not know what kind of unforeseen problems or security threats could be presented, but the statute authorized those discussions. The Council reviewed the information they received and figured out a plan to deal with the emergency to protect public property, protect people within the property and urged the Commission to find no violation.

Mr. Gubbrud concluded that when you have a contractor telling you that it's an urgent public health threat and an extremely dangerous condition for the people within the building he was not sure how it could be any clearer that this information could be reviewed in executive session because its information pertaining to the protection of the public and public property.

The Commission went into deliberations.

Ms. Tracy stated she felt that SDCL 1-25-2(4) was clearly not applicable. Ms. Tracy went on to indicate that when she thinks of emergency management, she thinks of an emergency management department and their response to specific events. She continued that given the fact that this was something the public was aware of in the community, and the letter did indicate maybe some type of proposal one could say that it was a contractual matter.

Chair Reedstrom stated SDCL 1-27-1.5(8) talks about information pertaining to the protection of the public or private property and it doesn't say limited to subsections (a) through (g), but just says "including." Chair Reedstrom continued that the Council clearly discussed information pertaining to the protection of the public or private property and under the different subdivisions it could fall under emergency management or response. Chair Reedstrom felt it also fell under 1-27-1.5(8)(b) as well, because Exhibit 7 discussed the building plan infrastructure. Chair Reedstrom concluded that he did not understand why the matter could not have been discussed during open session but

recognized that the statute allows them the opportunity to go into executive session to discuss these certain subject matters.

Ms. Hoffman noted that it's important to keep in mind that although we do want things done in open and out in the public the executive session is not a "shall," but a "may," so much like Chair Reedstrom stated this is something perhaps that could have been disclosed to the public. Ms. Hoffman believed that that executive session with the "may" language set forth in 1-27-1.5(8) was appropriate. Ms. Hoffman pointed out the fact the letter was received on December 14 and the meeting was held on December 16 indicated the information contained in the letter seemed emergent and something that needed to be brought up. Ms. Hoffman concluded that she felt the subsection could be read to include that reason.

Ms. Tracy moved that there was no violation pursuant to the exception of 1-25-2(6) incorporating 1-27-1.5(8). Ms. Hoffman seconded. Roll call was made with Ms. Hoffman, Ms. Tracy, and Mr. Reedstrom voting aye. Ms. Wendt abstained.

In the Matter of Open Meeting Complaint 20-03, Yankton County Commission

Mr. Todd Woods appeared as the Complainant. Deb Lillie appeared as counsel on behalf of the Yankton County Commission.

Ms. Tracy informed the parties that this matter had originally been referred to her by the Yankton County State's Attorney Office, but that she had responded indicating they would need to find someone else to review because she did not have the time to review. Ms. Tracy stated if either party preferred she recuse herself, she would do so, but felt she did not have a conflict. Neither Mr. Woods nor Ms. Lillie objected.

Mr. Woods stated SDCL 1-25-1 requires that official meetings of public bodies must be public, and notice is to be given of such meeting twenty-four hours in advance of the meeting and it also states openness in government is encourage.

Mr. Woods alleged that the published agenda was available online for the October 1, 2019, Yankton County Commission meeting and gave no mention or notice of item 11A to approve Resolution YC19-8 – that agenda item was added at the beginning of the meeting. The resolution was to approve an agreement with the Minnehaha County Mental Illness Board and was a continued item from a September 18, 2019 meeting.

Mr. Woods alleged that agenda item number 12 Appoint Acting Zoning Administrator did not adequately inform the public that there was going to be a transfer of powers regarding the zoning administrator. Mr. Woods asserted that it's the burden of the governing body to ensure that the public is informed

on all matters when granting or transferring power and authority. Mr. Woods felt like the public should not have to try to read between the lines or make assumptions of what is going to transpire at meetings and that a transfer of power and authority from one entity to another should have been disclosed on the published agenda.

Mr. Woods continued that the transfer of sovereign power should not be disregarded or taken lightly and should be fully disclosed to the public before any transfer happens. Mr. Woods asserted if proper notice had been given the public would have been able to have an opportunity to have their voices heard and when proper legal procedures are not followed this opens the county to litigation costing taxpayers.

Mr. Woods concluded that he addressed each violation with the County Commission allowing them the opportunity to correct their action. Mr. Woods asserted that failure to disclose the items discourages the public to interact with government and shows lack of transparency.

Ms. Lillie stated that prior to approval of the agenda at the October 1 Commission meeting, State's Attorney Klimisch realized that there was no agenda item to approve Resolution YC19-8 and added the item prior to approval of the final agenda. Ms. Lillie informed the Commissioners that the agenda item had been noticed for approval on the September 18, 2019 meeting, but because the documentation was not done at the time it was removed from that agenda was to be rescheduled to a later meeting. Ms. Lillie asserted that the County Commission did not need any action, discussion or input as it was just a resolution that they were asked to approve so that the Yankton Mental Illness Board could act as the Lincoln County Board for Mental Illness.

Ms. Lillie continued with the two other allegations stating the agenda item listed was to Appoint an Acting Zoning Administrator and a motion was made to do that. Ms. Lillie stated the proposed Acting Zoning Administrator had concerns about her ability to handle all questions that were coming into her office and requested to have a Commissioner help review and assist in day to day routine matters and complex zoning issues.

Ms. Lillie concluded the Commission gave notice that they were going to appoint an Acting Zoning Administrator, as well as, specifically what the Acting Zoning Administrators duties would be and any of the additional appointments were pursuant to the notice that was giving in the published agenda that the public had prior to the meeting.

Ms. Tracy asked if there had been a previous Planning and Zoning Administrator? Ms. Lillie stated there had been a previous administrator who was no longer employed with the County. Ms. Tracy followed up asking if the

duties of the Planning and Zoning Administrator would have been previously laid out? Ms. Lillie believed there was a description of what those duties were.

Mr. Woods in rebuttal stated Ms. Lillie was correct that agenda item 11A was added for approval at the beginning of the meeting. Mr. Woods commented that if the City Commission knew it was coming, they could add it to the agenda ahead of time to be proper and give proper notice. Mr. Woods felt if the documents didn't show up in a timely matter then that item should be removed from the agenda and a special meeting held with proper notice a few days later to accept that resolution.

Mr. Woods continued stating that the arguments of the County had basically admitted that the information concerning delegation of duties related to the planning and zoning administrator was not available to the public at the time of the meeting. Mr. Woods concluded that when the County transferred power it should have been delayed for another two weeks.

Ms. Wendt inquired if it was correct that agenda item 11A was added to the agenda prior to the County Commission meeting starting. Mr. Woods stated that was correct. Ms. Wendt asked Mr. Woods if he agreed that the County Commission has the right under the Open Meetings Laws to add agenda items prior to adopting the agenda? Mr. Woods agreed, but also indicated that it was his understanding that if you add an agenda item you cannot take action on that agenda item unless it's been published twenty-four hours in advance.

Chair Reedstrom noted that ability to add items to an agenda before a final approval was the very issue in *Molden v. Grant Duel School District* decision, where the Judge there decided items can be added before the final agenda is approved and acted on at that meeting. Ms. Wendt stated if she was reading it correctly it allowed not only for the addition of agenda items, but also to act upon those items at that same meeting and asked Chair Reedstrom if that was correct, to which he replied it was.

Mr. Woods commented if that is the case you could potentially have public bodies adding items to the agenda with no prior notice which would greatly affect the open meeting laws and the transparency. Mr. Reedstrom stated Mr. Woods comments were comments that were also of concern to prior Open Meeting Commission members, but the decision by the Judge was made and affirmed in the Supreme Court.

The Commission went into deliberations.

Chair Reedstrom felt there was no violation as to adding item 11A to the agenda felt it was proper. Chair Reedstrom continued stating item 12 he understood Mr. Woods position that it just states Appoint Acting Zoning Administrator and the public reading that would be advised that's what the

topic was, but the County Commission went further taking three actions. Chair Reedstrom stated, however, there was nothing in SDCL 1-25 that he could find that speaks to how specific an agenda item must be.

Ms. Wendt stated South Dakota statutes do not have clear set out requirements for an agenda and based on her research the purpose of an agenda is to provide the bare identification of itemized matters. Ms. Wendt believed that the only requirement South Dakota has regarding the agenda is that bare itemization. Chair Reedstrom stated he did not disagree.

Ms. Wendt made a motion that no violation occurred based upon the fact the agenda was amended pursuant to statutory authority and case law and that all of the discussions included in the agenda were properly noticed for the appointment of the zoning administrator. Ms. Hoffman seconded. Roll call was made with Ms. Hoffman, Ms. Tracy, Ms. Wendt and Mr. Reedstrom voting aye.

In the Matter of Open Meeting Complaint 20-04, Pierre City Commission

Mr. Blair informed the Commission that he received an e-mail during the prior proceedings from Mr. Caleb Gilkerson, the complainant, indicating that Mr. Gilkerson was ill and asking if this matter could be rescheduled. Chair Reedstrom stated it was his inclination to proceed and the other Commission members agreed.

Lindsey Riter-Rapp appeared as counsel on behalf of the Pierre City Commission.

Ms. Riter-Rapp stated that the City of Pierre posts its agenda for meetings at City Hall twenty-four hours prior to the City meeting, as well as e-mailing the City of Pierre employees and media contacts, and lastly the agenda is posted to the City of Pierre website as required by SDCL 1-25-1.1. Ms. Riter-Rapp explained for the April 7, 2020, meeting the City followed normal procedure by posting a physical copy of the agenda at City Hall, e-mailed the City employees and media, and the City attempted to post the agenda on the City website.

Ms. Riter-Rapp indicated that the City did make efforts to post the agenda on its website twenty-four hours in advance of the meeting, but unfortunately there was a technical error that occurred and as a result the agenda posted in draft form only. Ms. Riter-Rapp stated the City did not realize this had occurred until the following day and immediately posted the agenda to the website.

Ms. Riter-Rapp asserted the City takes these allegations very seriously. The City has made an effort to prevent the issue from occurring again by working extensively with their website host to investigate the error and fix any issues,

as well as, having a generated confirmation notification that confirms that the agenda has been published on the website.

Ms. Riter-Rapp concluded that unfortunately the agenda did not get posted on the website due to a technical error, but the City always makes an effort to ensure that the public has the knowledge relative to the meetings and the City is fully committed to complying with their obligations under state statute.

Ms. Tracy asked for clarification on the statement that a draft agenda was posted – whether the public could access and view the draft form of the agenda. Ms. Riter-Rapp stated the agenda posted in draft form, but it was not fully published on the City website and the public could not access or view the draft agenda.

Ms. Wendt indicated that she was viewing the situation as the city employee clicking the button to publish but the computer system didn't follow through and actually publish the agenda on the website. Ms. Riter-Rapp stated that the person attempted to post it on the website, but it did not publish and instead sat there and spun.

Chair Reedstrom inquired whether the City's website host had determined what went wrong with the website. Ms. Riter-Rapp acknowledged that they do not know what went wrong with the system. Chair Reedstrom asked if it was fair to say that what went wrong was more on the website host's end rather than the City's? Ms. Riter-Rapp stated she would characterize it as a technical issue. Ms. Riter-Rapp continued that the City employee now realizes that the agenda needs to be posted earlier in the day, and the employee needs to be vigilant about checking to make sure the agenda actually published on the website, but on this particular occasion the employee thought it had published.

The Commission went into deliberations.

Chair Reedstrom stated he believed it was an inadvertent, unintentional technical error and the City made efforts to do what the statute requires. That being said, SDCL 1-25-1.1 requires notice of the agenda to be posted on the website twenty-four hours in advance of the meeting and that did not occur in this case so there is a technical violation of the open meetings statutes.

Ms. Wendt stated she disagreed and indicated that she does not believe that the twenty-four-hour notice requirement of SDCL 1-25-1.1 applies to the publication or posting of the agenda on the website. Ms. Wendt believed the timeframe for posting on the website is upon dissemination of the notice of agenda.

Ms. Tracy indicated that struggled with the agenda not posting being a technical glitch and not human error.

Chair Reedstrom read the statute differently than Ms. Wendt and thought the twenty-four-hour notice applies to both posting on the website, the dissemination of the notice, and posting the notice at the courthouse or wherever the meeting was taking place.

Chair Reedstrom then switched gears inquiring whether the website could be deemed to not exist at the time of the attempted posting because the website wasn't working and was incapable for some technical reason of accomplishing the task?

Ms. Hoffman stated that she agreed with how Chair Reedstrom was interpreting the statute as posting to the website should be done within twenty-four hours. Ms. Hoffman questioned along the same lines as Chair Reedstrom, if there was absolutely no way to post it to the website, because the website was not functioning properly, can you allege that the website does not exist and all of the other portions of SDCL 1-25-1.1 have been complied with?

Ms. Wendt felt there was a strong argument that if the website was not assessible in the way it was in the past maybe it did not exist because it was not assessible to the City employee.

Ms. Tracy stated that she did not think that the website was actually down though because if a citizen would have gone to the website everything else was operational and working. Chair Reedstrom and Ms. Wendte affirmed that statement.

Chair Reedstrom stated the reason for the website notice requirement is because we live in that kind of world and people go to the internet to look at the agenda rather than marching down to the courthouse to look at the window.

Ms. Tracy looked at the letter from the City of Pierre dated September 30, 2020, where it stated City staff followed normal process to post the agenda, but it did not become visible for public viewing. Upon realization that a system error had occurred, staff immediately made a second attempt to post the agenda online which was successful. Ms. Tracy stated she was now more persuaded that it was a technical violation not in bad faith or intent, but an error nonetheless.

Ms. Hoffman stated she agreed with Ms. Tracy that based on the City's response it did not sound like the City had to get the computer software people involved to get the agenda posted and the City employee was able to do it right when the error was found.

Ms. Wendt made a motion to find that a technical violation occurred based upon the lack of posting on the website within the twenty-four hours of the

meeting and City of Pierre be reprimanded. Ms. Hoffman seconded. Roll call was made with Ms. Hoffman, Ms. Tracy, Ms. Wendt and Mr. Reedstrom voting aye.

Discussion regarding preparation of the minute

A discussion was had regarding preparation of the minutes of the Commission's meetings. South Dakota statues require the minutes to be posted within ten business days of the meeting. However, the statute allows any audio of the meeting to be posted within five business days in lieu of posting drafted minutes. Posting of any audio of the Commission's meetings was discussed, which would allow more time to be taken to prepare the draft minutes. Following the discussion of the Commission members it was decided that the audio would be posted within five business days to allow more time to prepare the minutes.

No motion was required.

Discussion regarding potential open meeting legislation

Mr. Blair informed the Commission that if they have proposals for legislation regarding the open meeting laws the Attorney General would consider bringing that legislation on the Commission's behalf.

No motion was required; this was an informational item.

Election of Commission Chair & Co-Chair

Ms. Tracy nominated Ms. Sovell as the Chair. Ms. Wendt seconded. Roll call was made with Ms. Hoffman, Ms. Tracy, Ms. Wendt and Chair Reedstrom voting aye. Ms. Sovell will serve as Chair starting January 1, 2021.

Ms. Wendt nominated Ms. Tracy as the Co-Chair. Ms. Hoffman seconded. Roll call was made with Ms. Hoffman, Ms. Wendt and Chair Reedstrom voting aye. Ms. Tracy abstained. Ms. Tracy will serve as the Co-Chair for the 2021 calendar year.

Scheduling future meetings

Discussion was held and it was determined that the next meeting will take place at 1:00 p.m. on December 18, 2020.

No motion was required.

Adjournment

A motion to adjourn was made by Ms. Wendt seconded by Ms. Tracy, at approximately 12:55 p.m. Roll call was made with Ms. Hoffman, Ms. Tracy, Ms. Wendt and Chair Reedstrom voting aye and the Commission adjourned.

Approved on December 31, 2020.



Mark Reedstrom, Chair
On behalf of the Open Meeting Commission