



Advisory Opinion 12-011

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2011). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

On April 16, 2012, the Information Policy Analysis Division (IPAD) received a letter dated April 11, 2012, from Wayne H. Swanson, an attorney, on behalf of “a number of clients.” In his letter, Mr. Swanson asked the Commissioner to issue an advisory opinion regarding the Middle Snake Tamarac Rivers Watershed District (MSTRWD) Board’s conduct under Minnesota Statutes, Chapter 13D, the Minnesota Open Meeting Law (OML).

IPAD, on behalf of the Commissioner, wrote to Roger Hille, President of the Board, in response to Mr. Swanson’s request. The purposes of this letter, dated April 23, 2012, were to inform him of Mr. Swanson’s request and to ask him to provide information or support for the Board’s position. On May 7, 2012, IPAD received a response, dated May 1, 2012, from Gerald W. Von Korff, attorney for the Board.

A summary of the facts as Mr. Swanson provided them follows. In his opinion request, Mr. Swanson wrote:

Viewers appointed by a watershed district or a county have statutory authority. Qualifications and duties are found in Minnesota Statutes 103E.305 and 103E.311. 103E.11 states, “The viewers, with or without the engineer, shall determine the benefits and damages to all property affected by the proposed drainage project and make a viewers’ report.”

Mr. Swanson referred to Advisory Opinion 08-007, and stated,

... the Commissioner has ruled in this similar situation that when statutory authority is given to a committee or group, the appointed committee or group is, in fact, subject to Minnesota’s Open Meeting Law. [And] ... the duties and responsibilities of viewers are clearly defined in Minnesota Statutes, Chapter 103E, as well as their statutory authority.

Issues:

Based on Mr. Swanson's opinion request, the Commissioner agreed to address the following issues:

1. Are meetings of the ditch "viewers," appointed by the Middle Snake Tamarac Rivers Watershed District (MSTRWD) Board of Managers pursuant to statutory authority, subject to Minnesota Statutes, Chapter 13D, the Minnesota Open Meeting Law (OML)?
2. Did the MSTRWD Board comply with Minnesota Statutes, section 13D.04, regarding notice of a meeting of the appointed ditch viewers held on February 28, 2012, and subsequent meetings of the viewers?

Discussion:

There is no dispute between the parties that the Middle Snake Tamarac Rivers Watershed District Board is subject to the Open Meeting Law.

Issue 1. Are meetings of the ditch viewers, appointed by the Middle Snake Tamarac Rivers Watershed District (MSTRWD) Board of Managers pursuant to statutory authority, subject to Minnesota Statutes, Chapter 13D, the Minnesota Open Meeting Law (OML)?

According to Minnesota Statutes, section 13D.01, subdivision 1, the OML applies to:

All meetings, including executive sessions

...

(c) of any

(1) committee,

(2) subcommittee,

...

of a public body;

In his comments to the Commissioner, Mr. Von Korff wrote:

A Watershed District is governed by Managers, who have legislative and adjudicative powers under Chapter 103D. The Managers meet and make decisions in the same way that City Councils, County Commissioners, or school boards meet and make decisions. The meetings of managers are subject to the open meeting law, to the same extent as school boards or City Councils, of course.

....

.... The primary function of viewers or appraisers is to visit and view the farms and other lands of potentially impacted landowners and to make a recommendation to the managers on the extent of benefits to each parcel of land. For this reason, they are granted the right of entry on potentially impacted lands. The majority of their work thus occurs at farm locations, where they inspect (view) the farm or other property, make notes of soil conditions, inquire of the landowner and discuss particular land conditions at each location. They also visit county and other land records to obtain land valuation information. The suggestion that viewers [sic] activities are public meetings would cripple and destroy the statutory purpose. The result would be that the viewers could not visit sites together, and that if any two of the viewers exercised their right of inspection together, it would constitute a public meeting, located on the property of a private citizen.

....

.... Often viewers wait until significant rain events or flooding conditions in order to collect data regarding direction and velocity of surface drainage. That means that in many circumstances, it is essential that viewers must be able to visit landowner locations at times that they cannot set in advance.

.... The viewers don't even have to agree or adopt the same conclusions. If individual viewers come to different conclusions, each one can file his own report.

Mr. Von Korff further wrote:

Mr. Swanson suggests that [Advisory Opinion 08-007] should drive the outcome of his request. We completely disagree. As pointed out above, [08-007] deals with a statutorily created entity, an advisory board specifically created as an entity by the legislature. There is no identified viewing entity that has legal existence. The IPAD opinion specifically states that the reason that the open meeting law applied to [an advisory panel of the Saint Paul Port Authority] was that the [panel] had standalone legal authority to “issue recommendations on these study topics that are separate from those presented by [the Authority.] That is not the case here. Viewers have no independent function apart from the managers. Their recommendations must implement manager policy, and if the managers find that the viewers have failed to implement that policy, they can, and often do, instruct them to go back and do their job over again, implementing manager decided policy.

....

Mr. Swanson is suggesting, evidently, that in order to conduct their viewing process, the viewers would need to contact each landowner and arrange for a public meeting date for the viewers to visit the property, and then the viewers would have to publicly announce the time and place of that “meeting,” and further advise the landowner to prepare for the possibility that the property will be inspected by a group of citizens who will follow along with the viewers. If the landowner were to cancel the viewing, for some reason, then the viewers would have to notify the public that the “meeting” is cancelled, and failing that, members of the public would arrive at the private property for the expected meeting.

On the District's current Brandt/Angus project, for example, there are now 116 different 40 acre tracts or sub-parcels, with 38 different ownership entities (individual owner, joint owners, tenants in common, life tenants/remaindermen, trustee(s), or corporations). Consequently, for many of these parcels, meeting with the “owner” means meeting with more than just one person on each piece of land. It would be preposterous and unworkable if for every individual viewer recommendation there have to be 3 days posted notice each time two viewers want to meet with an owner.

Minnesota Statutes, Chapter 103E, sets forth how a drainage authority, like the Board, must conduct drainage proceedings. The Board appoints the viewers, whose duties and responsibilities are described in statute, but it has the final authority to make determinations regarding any drainage project.

Mr. Swanson argued that the ditch viewers are like the Port Authority’s advisory panel, because “the duties and responsibilities of viewers are clearly defined in Minnesota Statutes, Chapter 103E, as well as their statutory authority” and are therefore subject to the OML.

However, according to the Port Authority’s advisory panel’s enabling legislation, it was required to meet regularly *as a group*, and was able to include its separate recommendations as part of the Port Authority recommendations. (See 2007 Session Laws, Chapter 57, Article 2, Section 3.) The advisory panel is subject to the OML because it is a committee of the Port Authority; it is not a separate public body.

The ditch viewers are not a separate public body subject to the OML. Given the nature of the viewers’ duties, as set forth in Chapter 103E, and per Mr. Von Korff’s description of the way they perform those duties, they are also not a committee, subcommittee, board, department or commission of the Board. They gather largely on an *ad hoc* basis on private property, they are permitted to act individually, and the Board may accept, amend or reject the viewers’ report(s), all of which distinguishes them from the Port Authority’s advisory panel. Furthermore, the viewers perform duties more like employees or contractors, not a sub-body, under the control of the Board. Accordingly, gatherings of the ditch viewers are not subject to the Open Meeting Law.

Issue 2. *Did the MSTRWD Board comply with Minnesota Statutes, section 13D.04, regarding notice of a meeting of the appointed ditch viewers held on February 28, 2012, and subsequent meetings of the viewers?*

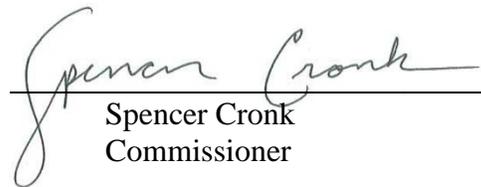
See Issue 1.

Opinion:

Based on the facts and information provided, the Commissioner’s opinion on the issues Mr. Swanson raised is as follows:

1. Meetings of the ditch “viewers,” appointed by the Middle Snake Tamarac Rivers Watershed District (MSTRWD) Board of Managers pursuant to statutory authority, are not subject to Minnesota Statutes, Chapter 13D, the Minnesota Open Meeting Law.
2. See Issue 1. Thus, the MSTRWD Board did not have to comply with the notice requirements set forth in Minnesota Statutes, section 13D.04, regarding a February 28, 2012, gathering of the ditch viewers.

Signed:



Spencer Cronk
Commissioner

Dated:

May 29, 2012