



Advisory Opinion 16-005

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2015). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

James Peters requested an advisory opinion regarding Westfield Township Board of Supervisors' (Board) conduct under Minnesota Statutes, Chapter 13D, the Minnesota Open Meeting Law (OML). Jack Perry, attorney for the Board, submitted comments.

Mr. Peters provided a summary of the facts as follows. The Board posted notice of a special town meeting of the Township electors (resident voters) for March 31, 2015. The notice stated the time and place of the meeting, and the following purpose: "[t]o discuss with electors only, the question of whether the town board, consisting of 3 supervisors, shall, at some time, adopt land use and zoning regulations in the township of Westfield."

Mr. Peters asked the Commissioner to address three issues. First, he objected to actions the Board took at the March 31 meeting, namely, hiring an attorney and adopting an interim ordinance regarding zoning. He also stated that prior to the meeting at issue, he had made a written request that his law firm be notified of all special Board meetings, but the Board did not notify his firm of the March 31 special meeting.

(Mr. Peters also raised issues about the operation of statutes governing town meetings, which the Township also discussed in its response. Pursuant to Minnesota Statutes, section 13.072, subdivision 1(b), the Commissioner is addressing only matters governed by the OML in this opinion.)

Second, Mr. Peters asserted that the Board held serial meetings sometime in late 2014. He wrote that at its regular October 2014 meeting, the Board agreed to have a public hearing and special meeting on December 1, 2014, for the purpose of taking public input regarding Township planning and zoning. Subsequently, it cancelled that meeting.

Mr. Peters' third issue is his belief that two Board Supervisors violated the OML by attending a Dodge County Planning Commission meeting, held on December 11, 2014, "for the purpose of taking in information on matters of significance to the Township without giving notice of the special town board meeting."

Issues:

Based on the opinion request, the Commissioner agreed to address the following issues:

1. Did the Westfield Township Board of Supervisors comply with Minnesota Statutes, section 13D.04, regarding a March 31, 2015, meeting?
2. Did the Supervisors comply with Minnesota Statutes, Chapter 13D, if they met outside a noticed meeting and agreed not to implement any planning or zoning ordinance?
3. Did Supervisors comply with Minnesota Statutes, Chapter 13D, when two members (a quorum) attended a county planning commission meeting and heard and discussed matters also before the Board?

Discussion:

Issue 1. Did the Westfield Township Board of Supervisors comply with Minnesota Statutes, section 13D.04, regarding a March 31, 2015, meeting?

Pursuant to Minnesota Statutes, Chapter 13D, public bodies may hold three types of meetings: regular, special, and emergency. For regular meetings, Minnesota Statutes, section 13D.04, subdivision 1, requires a public body to keep a schedule on file at its primary offices. No additional notice is required. A meeting that differs in date, time or location from a regular meeting is a special meeting. Pursuant to subdivision 2, a public body must post written notice of a special meeting on its principal bulletin board or regular meeting room door at least three days before the meeting and it must include the date, time, place, and purpose for the meeting on the notice. (Emergency meetings are not at issue here.)

The parties agree that the March 31, 2015, meeting was a special meeting.

As noted above, the stated purpose for the meeting was, “[t]o discuss with electors only, the question of whether the town board, consisting of 3 supervisors, shall, at some time, adopt land use and zoning regulations in the township of Westfield.”

According to Mr. Peters, the Board violated the OML at the March 2015 meeting because it took actions not listed in the statement of the purpose of the meeting, i.e., hiring an attorney and adopting an interim ordinance. He stated that “the three Board members immediately opened the special town board meeting, hired an attorney and adopted an interim ordinance all without notice, without holding a public hearing, and without taking public input.”

In response, the Township wrote:

Clearly encompassed by and as a means to facilitate the “discuss[ion]” called for in the Petition and the Notice, the Board began the March 31, 2015 special town meeting by unanimously (1) hiring legal counsel and (2) adopting an interim ordinance temporarily prohibiting any new land uses or land use and zoning regulations in the Township (Interim Ordinance). The express purpose of the Interim Ordinance was to allow the

Board “to study and review the implications of and costs associated with” the adoption of a land use and zoning ordinance.

Despite attaching the public notice of the March 31, 2015 special town meeting to his letter, Peters inexplicably complains that the March 31, 2015 special town meeting was conducted without giving public notice.

To the extent Peters’ complaint is that the Board and its Supervisors hired an attorney and adopted an interim ordinance at this meeting, Minn. Stat. § 366.01, subd. 7 expressly authorizes the Board to employ an attorney for town business, and Minnesota law expressly authorizes the adoption of an Interim Ordinance without advance notice.....

Furthermore, according to the Township, in June of 2015, Mr. Peters asked the Dodge County Attorney to file a criminal complaint against the Board, alleging in part that the Board violated the OML. The Olmsted County Attorney investigated (due to a conflict of interest on the part of Dodge County), and “determined that the Board had at all times acted lawfully and properly. No criminal charges were filed.” One of the issues the Olmsted County Attorney investigated was, “Whether Westfield Township supervisors violated the Minnesota Open Meeting Law ...by failing to conduct a town meeting as required by statute, [and] failing to give adequate notice of a special board meeting on March 31, 2015?”

The Olmsted County Attorney’s report said, in part:

The meeting notice was “to discuss with electors only, the question of whether the town board ... shall, at some time, adopt land use and zoning regulations and restrictions in the township of Westfield.” To the extent there is alleged a violation of §365.56, Subd. 2, the minutes of the meeting reflect some preliminary “business” was conducted before the discussion of adopting land use and zoning regulations. That preliminary business was the board hiring an attorney to advise the board on the issue to be discussed. The board also adopted a temporary ordinance to prohibit any new land uses or land use and zoning regulations, effectively freezing the situation in Westfield Township for a year to sort out the question.

While this preliminary business may have strayed a little from the specific meeting notice, the conduct of those discussions and decisions could certainly be considered germane to the business noticed. In fact, a judge or fact finder could certainly determine that the preliminary discussion was within the umbrella of the notice provided.

As “purpose of the meeting” is not defined in section 13D.04, subd. 2(a), and has yet to be interpreted by the appellate courts, the Commissioner agrees that the actions taken at the March 31, 2015, are germane to the special meeting notice. Mr. Peters also complained that the Township did not provide his law firm with notice of the meeting. However, pursuant to Minnesota Statutes, section 13D.04, subdivision 2 (b) and (c), the Board was obliged to mail or otherwise deliver notice of the special meeting to Mr. Peters, or:

... as an alternative to mailing or otherwise delivering notice to persons who have filed a written request for notice of special meetings, the public body may publish the notice once, at least three days before the meeting, in the official newspaper of the public body or, if there is none, in a qualified newspaper of general circulation within the area of the public body’s authority.

Mr. Peters provided the Commissioner a copy of the notice the Board published on March 17, 2015, in the *Byron Review* newspaper, thereby satisfying its obligation to provide him notice of the special meeting.

Issue 2. *Did the Supervisors comply with Minnesota Statutes, Chapter 13D, if they met outside a noticed meeting and agreed not to implement any planning or zoning ordinance?*

The Minnesota Supreme Court has held that a gathering of a quorum or more of the members of a public body like the Board is a “meeting” for purposes of Chapter 13D and the requirements of that chapter must be met. *Moberg v. Independent School District No. 281*, 336 N.W.2d 510 (Minn. 1983). As part of its discussion in *Moberg*, the Supreme Court cautioned members of a public body that: “... serial meetings in groups of less than a quorum for the purpose of avoiding public hearings or fashioning agreement on an issue may also be found to be a violation of [Chapter 13D] depending upon the facts of the individual case.” *Moberg* at 518.

According to Mr. Peters, the Board held serial meetings, in person and otherwise:

... to reach an agreement on deciding to not to [sic] implement any planning and zoning and to cancel the public hearing scheduled for December 1, 2014. The Supervisors communicated positions and strategies, engaged in serial communications and gatherings, with the specific intent to avoid public discussion altogether and to forge majority without any public hearing and special meeting.

The serial meeting or meetings for cancellation of the December 1, 2014, ... special meeting is documented in the public hearing testimony of [a] Supervisor given on December 11, 2014, before the Dodge County Planning Commission. [He] testified as follows with regard to the private meetings of the Supervisors held to cancel the December 1, 2014 public hearing and special meeting: “we figured that was good enough so we cancelled he [sic] meeting and we have -- as of now we have no intentions of -- having another one unless things change.”

According to the Township, the only basis for Mr. Peters’ allegations is the Supervisor’s statements at the Dodge County Planning Commission meeting that, “we had a meeting in between, which I was looking for so we could check into this a little bit. We talked to various people in the community of Westfield and they did not think it was necessary to have our own zoning.” Also, according to the Township, the meeting the Supervisor mentioned “was the Board’s regular public meeting on November 10, 2014. And there is simply nothing improper about each of the Supervisors’ individual discussions with members of the public, and their reporting of those discussions during regular Board meetings.”

At that regular meeting, the Board, “after a long discussion” voted to rescind its October motion, thus cancelling the December 1, 2014, special meeting. The Board also voted not to proceed with Township planning and zoning.

The Commissioner finds the testimony Mr. Peters cited as evidence of serial meetings inconclusive. The minutes of the Board’s November 10, 2014, meeting clearly reflect that the Board took formal action at that public meeting to cancel the December 1, 2014, special meeting and to set aside consideration of planning and zoning at that time. The record does not show that Supervisors met outside a properly-noticed meeting in order to fashion an agreement not to

pursue planning or zoning regulations. It is not a violation of the OML if individual Supervisors speak individually with their constituents and report on those conversations at an open meeting.

Issue 3. Did Supervisors comply with Minnesota Statutes, Chapter 13D, when two members (a quorum) attended a county planning commission meeting and heard and discussed matters also before the Board?

In *Moberg*, the Minnesota Supreme Court wrote:

We therefore hold that “meetings” subject to the requirements of [Chapter 13D] are those gatherings of a quorum or more members of the governing body, or a quorum of a committee, subcommittee, board, department, or commission thereof, at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body. *Moberg* at 518.

Mr. Peters contends that at the Dodge County Planning Commission meeting, the two Supervisors who attended received information on issues that are before the Township. According to the transcript Mr. Peters provided, when one of the two Supervisors in attendance was called by the Commission chair to speak, he identified himself as a Supervisor and stated that people in Westfield “did not think it was necessary to have our own zoning. He further stated, “[o]ur feelings [sic] is, you as a zoning board, you are the ones that have to get your act together and do what you have to to give them the permit.”

The Township commented that the OML “does not prohibit members of a governing body from gathering together for purposes not related to the official business of that body.” It further commented:

As this dispute makes clear, the Board has no authority over matters of zoning and permitting. The December 11, 2014 County Planning Commission meeting involved the taking of public input on a CUP [Conditional Use Permit] application for a swine feedlot The Board had no Authority over the swine CUP. Put simply, Peters’ statement that [the two Supervisors] “conduct[ed] a special town board meeting on December 11, 2014, at which they took public input on issues impacting the Township” is wrong. [They] received at the December 11, 2014 County Planning Commission meeting no information “on issues relating to the official business” of the Board, and their attendance was not in violation of [the OML].

The Commissioner respectfully disagrees. In addition to the Supreme Court’s holding in *Moberg* that gatherings of a public body’s quorum to discuss, decide, or receive information relating to official business are meetings subject to the OML, the Minnesota Attorney General has addressed this issue in several Opinions. In AGO 63a-5 February 5, 1975, the Attorney General opined:

In Op. Atty. Gen. 63a-5, Oct. 28, 1974, we concluded that deliberations by a council on matters within its “official duties or powers” must be open to the public. Examples of matters which were found to be within the council’s official duties or powers were discussions on the appointment of persons to the municipality’s boards and commissions, the priority to be given to the development of park and recreation facilities, the placing of certain items on the agenda of a future council meeting, and the desirability of adopting

various ordinances regarding planning and zoning and the subdividing of land. ID., and Op. Atty. Gen. 471-e, Oct. 28, 1974

In AGO 63a-5, Oct. 28, 1974, the Attorney General wrote, “[a] quorum of a public body may conduct a variety of official business pursuant to statutory or charter authority and, since the [OML] law applies to ‘all meetings’ of the ‘governing body,’ a gathering of a quorum where municipal matters arise can readily be found to be a meeting of the governing body.” (Note 7.)

As the Supreme Court and Attorney General have previously determined, matters within a public body’s official duties or powers are to be interpreted broadly. Here the first two issues in this opinion are, at center, about whether and or when the Board would take up zoning/planning issues. The Supervisor who was called upon to speak at the Dodge County Planning Commission meeting did so as a Township representative. He conveyed the preferences of the community of Westfield Township to the Commission on an issue that the Township Board clearly discussed and considered as official Township business. A quorum of the Board attended and participated in the Planning Commission meeting, relayed Board business, deliberated and received information as a group on issues relating to the official business of the Board. Accordingly, per the OML, the Court’s holding in *Moberg*, and the Attorney General Opinions, it was a special meeting and the Board should have posted written notice of the time, date, place, and purpose (i.e., a quorum of Supervisors will attend the Dodge County Planning Commission meeting on [date] at [time]).

Opinion:

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

1. The Westfield Township Board of Supervisors complied with Minnesota Statutes, section 13D.04, regarding a March 31, 2015, meeting.
2. The Supervisors complied with Minnesota Statutes, Chapter 13D, because the record does not show that they met outside a noticed meeting and agreed not to implement any planning or zoning ordinance.
3. The Supervisors did not comply with Minnesota Statutes, Chapter 13D, when two members (a quorum) attended a county planning commission meeting and heard and discussed matters also before the Board.



Matthew Massman
Commissioner
July 15, 2016