

March 29, 2007

Shannon Rawley Watkins  
7033 S. Ramsey Creek Road W  
Lexington, IN 47138

*Re: Formal Complaint 07-FC-54; Alleged Violation of the Open Door Law by the  
Jefferson County Commissioners*

Dear Mr. Watkins:

This is in response to your formal complaint alleging that the Jefferson County Commissioners (“County Commissioners”) violated the Open Door Law. I find that the County Commissioners did not violate the Open Door Law.

#### BACKGROUND

You named the County Commissioners in your complaint, but you allege that the Jefferson County Plan Commission considered a new ordinance at its January 23, 2007 meeting. This ordinance was in addition to a different version of an ordinance that had been considered at the January 18 meeting of the Plan Commission. Your complaint is that the Open Door Law was violated when the second ordinance was considered without the public’s viewing it until it was passed by the County Commissioners. You also complaint that the County Commissioners put undue pressure on the Plan Commission to pass an ordinance that the Plan Commission did not want, and the County Commissioners sought legal advice from their attorneys in private about matters that were not related to litigation. The language of the second ordinance was prepared by one or more attorneys retained by the Commissioners outside of any public meeting. The new ordinance was written entirely outside of the public eye.

I sent a copy of your complaint to the County Commissioners. County attorney Wilmer E. Goering submitted a response, a copy of which is enclosed for your reference. Mr. Goering said that he had a difficult time determining your specific allegation concerning the Open Door Law. Mr. Goering submitted a timeline of events leading to the adoption of the ordinance, which concerned regulation of confined animal feeding operations (CAFOs).

In pertinent part, the County explained that the Plan Commission held a public hearing on January 18 on CAFOs. After public comment, the CAFO Advisory Committee submitted a proposed ordinance. Julie Berry submitted a proposed ordinance as did one of the members of the CAFO Advisory Committee. The Plan Commission discussed the terms of a proposed ordinance and asked Mr. Goering to draft a proposed ordinance based on the discussions that had occurred. This ordinance was to be considered by the Plan Commission at their next meeting on January 23, 2007.

At the Plan Commission meeting on January 23, the members again discussed an ordinance drafted based on the discussion of January 18. In addition, Mr. Pietrykowski, a County Commissioner and a Plan Commission member also introduced a proposed ordinance. The ordinance introduced by Mr. Pietrykowski had greater setback requirements than the one discussed by the Plan Commission on January 18. When asked, Mr. Pietrykowski stated that while he could speak only for himself, he believed the County Commissioners would not approve an ordinance with just minimal setbacks.

The ordinance approved by the Plan Commission was drafted at the January 23 public meeting, and was read three times prior to approval. The Plan Commission voted to send the ordinance to the County Commissioners without a recommendation. This ordinance was available for public inspection several hours before the County Commissioners' meeting of January 24, which had been noticed 48 hours in advance of the meeting.

Although not required to do so, the County Commissioners took public comments prior to adopting the ordinance formally certified by the Plan Commission. The ordinance was read in its entirety prior to the vote. The County Commissioners did not violate the Open Door Law in any respect.

## ANALYSIS

It is the intent of the Open Door Law that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. Ind. Code 5-14-1.5-1. Except as provided in section 6.1 of the Open Door Law, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. IC 5-14-1.5-3(a). "Meeting" means a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. IC 5-14-1.5-2(c).

Public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. Ind. Code 5-14-1.5-5(a). A secret ballot vote may not be taken at a meeting. IC 5-14-1.5-3(b). A rule, regulation, ordinance, or other final action adopted by reference to agenda number or item alone is void. IC 5-14-1.5-4(a). A governing body utilizing an agenda shall post a copy of the agenda at the entrance to the location of the meeting prior to the meeting. IC 5-14-1.5-4(a).

You do not specify the provisions of the Open Door Law that you believe the County Commissioners violated, and indeed, it is difficult to discern your complaint other than your belief that the process by which the CAFO ordinance was adopted by the County Commissioners was not transparent. You believe that the public was not allowed to see the ordinance until it was passed by the County Commissioners. However, there is nothing in the Open Door Law that requires the governing body to post the ordinance or publish it prior to its meeting. Only an agenda, if one is utilized, must be posted prior to the meeting.

The public agency must disclose the draft ordinance if a person requests it, under the Access to Public Records Act. IC 5-14-3-3(a). You do not allege that you asked to see the ordinance or was denied the right to inspect the ordinance. The County Attorney stated that the ordinance was available to the public prior to the meeting. The Open Door Law prohibits a governing body from adopting an ordinance by reference to agenda number or item alone, but you do not allege that this occurred. The county attorney stated that the ordinance was read in its entirety at the January 24 meeting of the County Commissioners. There is no basis to claim a violation of the Open Door Law in this respect.

Your second claim is that the County Commissioners put undue influence on the Plan Commission to pass an ordinance that the Plan Commission did not want. Perhaps you infer this from the fact that the Plan Commission voted to send the ordinance to the County Commissioners without any recommendation. There is also evidence that one County Commissioner stated that he did not believe that the County Commissioners would pass an ordinance with only minimal setbacks. There is nothing in the Open Door Law that addresses your concern about pressure on the Plan Commission to pass a CAFO ordinance that would likely pass muster with the County Commissioners, the body ultimately responsible to the public for adopting a CAFO ordinance. I decline to find any violation of the Open Door Law concerning undue influence.

Finally, you state that the County Commissioners sought legal advice outside of the public about matters which were not related to litigation. If the County Commissioners had gathered as a majority to confer with counsel on the CAFO ordinance, this would have been a meeting that should have been open to the public. However, you do not specifically allege that the County Commissioners met to consult with counsel, only that the ordinance language was prepared by one or more attorneys retained by the Commissioners. From the complaint response of the County Commissioners, it is clear that the attorney was not consulted during a gathering of a majority of the County Commissioners outside of a duly noticed public meeting. Rather, the attorney was asked by the Plan Commission during its January 18 meeting to draft one proposed ordinance. From the information before me, I decline to find any violation of the Open Door Law with respect to consultation or utilization of counsel.

CONCLUSION

For the foregoing reasons, I find no violation of the Open Door Law by the Jefferson County Commissioners.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Wilmer E. Goering