

September 13, 2004

Mr. Samuel McCombs
Ms. Elizabeth McCombs
201 East Rendle Street
South Bend, IN 46637

*Re: Consolidated Formal Complaints 04-FC-138; 04-FC-139; Alleged Violation of
the Open Door Law by the Roseland Town Council*

Dear Mr. and Ms. McCombs:

This is in response to your formal complaint alleging that the Roseland Town Council (“Council”) violated the Open Door Law (“ODL”) by denying you access to a meeting. For the reasons stated below, I find that the Roseland Town Council violated the Open Door Law when a majority of the Town Council visited the site of property that was for sale. Ms. McCombs raises an issue regarding whether the marriage of two of the three Council members, David Snyder and Dorothy Paul, presents a conflict of interest.

BACKGROUND

You filed your complaints on August 12, 2004, after you discovered that on July 31, 2004 the Council and Clerk Treasurer of Roseland had viewed real property located at the northeast corner of Dixie Way North and Pendle Street to consider purchasing the building for a new police department. No notice of this gathering occurred. After receiving your complaints, I forwarded a copy to Clerk-Treasurer Cheryl Gridley. In response to the complaint, attorney Glenn L. Duncan, legal counsel for the Council filed a written response, which I enclose for your reference. In his response, Mr. Duncan does not dispute that the gathering occurred, or the purpose for the gathering. Mr. Duncan stated that several provisions of law allowed the gathering to occur without notice to the public. First, he claims that the gathering was nothing more than an “on-site inspection.” Second, he contends that the Council could meet without formal notice because they were carrying out town administrative functions, which would include evaluating the adequacy of town facilities or town services. Finally, Mr. Duncan states that the Council could have met to discuss the sale or lease of the facility under one of the instances in which a governing body may meet in executive session, although Mr. Duncan concedes that no notice of an executive session was posted. He explains that the Council had not determined it needed to replace the existing facility and did not want to send false hope to current owner that the Council was seriously considering the property.

With respect to Ms. McComb's contention that the marriage of two of the three Council members presented a conflict of interest, Mr. Duncan believes that this is not a public access issue for this Office to determine.

ANALYSIS

The Open Door Law requires that 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. The Council is a governing body of a public agency and is therefore subject to the Open Door Law.

A "meeting" is defined as "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). The definition of meeting excludes "any on-site inspection of any project or program." IC 5-14-1.5-2(c)(2). If the gathering of the Council did not constitute a "meeting", then the Council would not be required under the Open Door Law to provide notice or an opportunity for the public to attend. Conversely, if the gathering constitutes a meeting, the Council would have been required to post timely notice and allowed the public to attend.

Although members of the public generally must be given notice of meetings, the requirements of notice do not apply when the legislative body of a town meets:

"[S]olely to receive information or recommendations in order to carry out administrative functions, to carry out administrative functions, or confer with staff members on matters relating to the internal management of the unit. 'Administrative functions' do not include the awarding of contracts, the entering into contracts, or any other action creating an obligation or otherwise binding a county or town." [IC 5-14-1.5-5(f)].

Meetings subject to this exception are open to the public, but notice is not required.

The Council's response, although stating that the gathering was to carry out the administrative function of evaluating the adequacy of town facilities, does not state that the gathering was open to the public to observe and record the proceedings. Also, it does not cite to any authority that considering the sale or lease of property is an administrative function. Certainly considering or evaluating the sale or lease of real property is not a mere administrative function of a town, since the legislature has considered discussions strategizing on such matters a proper reason for an executive session, for which a governing body must provide notice. See IC 5-14-1.5-6.1(b)(2)(D). I conclude that the Council has not sustained its burden of showing that notice was not required under the "administrative function" exception to notice, and in addition, the Council does not assert that members of the public were free to attend this Saturday gathering.

Similarly, I conclude that the gathering did not constitute an "on-site inspection of a project or program." No Indiana court has construed "on-site inspection of a project or program" within the context of the Open Door Law. In *Office of the Public Access Counselor 98-5*, this Office found the plain meaning of "on-site inspection" as "an examination or review concerning

a place or the setting of an event.” In that decision, the commissioner’s gathering with the hospital board to discuss problems with the ambulance service did not fall within the ordinary meaning of an on-site inspection.

Applying a narrow construction to this exception to the definition of a “meeting,” I find that the gathering to view property that was for sale for consideration as the site of a new police station does not fall within the meaning of “on-site inspection.” Although the Council has stated through counsel that it did not discuss the sale or condition of the property with the current owner, I find that even a mere inspection of the property does not meet the definition because the sale property is not a “program” or “project.” The property may be in connection with a planned purchase or replacement of a police station, but the property itself is not a program or project. Again, I look to the plain meaning of project: “a proposal of something to be done; a plan; scheme;” and of program: “a plan or procedure for dealing with some matter.” *Webster’s New Collegiate Dictionary, 2nd Edition*. Hence, my determination that viewing property for sale is not an on-site inspection does not rely on whether the Council received information about the property from the current owner, although I note that if the Council did receive information about the property, that fact would also disqualify the event as an on-site inspection.

Finally, the Council’s assertion that the meeting could have been considered a proper instance for an executive session does not aid it, since an executive session must be timely noticed to the public, and no such notice was provided.

Because the gathering of a majority of the Council at the Saturday viewing of the sale property does not constitute an “on-site inspection” and because the Council has not sustained its burden to show that the gathering was for an administrative function, I find that the Council violated the Open Door Law by failing to post a notice of the meeting at least 48 hours prior to the meeting for purposes of allowing the public to observe the gathering.

I specifically decline to opine regarding the marriage of two of the Council members and its effect on the governance of the Council, since this lies outside the purview of this office which is to render advice regarding the public access laws.

CONCLUSION

For the foregoing reasons, I find that the Roseland Town Council violated the Open Door Law when it failed to post notice of its July 31, 2004 gathering.

Sincerely,

Karen Davis
Public Access Counselor

cc: Glenn L. Duncan