

September 1, 2006

Susan D. Sommers
2774 W. St. Rd. 67
Portland, IN 47371

*Re: Formal Complaint 06-FC-133; Alleged Violation of the Open Door Law by the
Portland Area Plan Commission*

Dear Ms. Sommers:

This is in response to your formal complaint alleging that Portland Area Plan Commission (“Commission”) violated the Open Door Law by meeting outside of a public meeting.

BACKGROUND

You filed your complaint with the Office of the Public Access Counselor against the “Portland City-County Zoning Board.” I take your complaint to be against the Portland Area Plan Commission, and I refer to zoning board as the “Commission” throughout this opinion. Your allegations concern the aftermath of a public meeting held by the Commission on July 6, 2006. You allege that the Commission met on July 6 for the purpose of considering a final detailed plan for Premier Ethanol to construct an ethanol plant in Portland. The Chairman of the Commission Vicki Tague adjourned the meeting after tabling the matter concerning approval of plans for Premier Ethanol.

You state that after the public had left the meeting room, you observed the Commission, representatives of Premier Ethanol, Mayor Hosier, and Mr. Shockley, attorney for the City of Portland, staying in the meeting room. You were outside the building for at least 15 to 20 minutes and none of those persons left in that time. Premier Ethanol refiled its zoning request the following day. At the next public meeting of the Commission on July 27, you asked Ms. Tague if a meeting had taken place after the public had left and she stated that Premier Ethanol was probably deciding what to do next and had talked with Bill Milligan of the zoning permit

department for Portland and Jay County. You believe the other people were also involved with Premier Ethanol's decision to refile the next day.

I sent a copy of your complaint to the Commission. I received a detailed response from attorney Scott Shockley, who represents the Portland Area Plan Commission. He enclosed his own affidavit as well as that of Vicki Tague. Ms. Tague averred that prior to the meeting on July 6, certain individuals (including yourself) had filed a lawsuit challenging official decisions made by the City and Commission concerning Premier Ethanol. Mr. Shockley was retained to represent the defendants in the lawsuit. Earlier in the day, Ms. Tague met with the Mayor, City Attorney, and two members of Mr. Shockley's firm to discuss the lawsuit. No other members of the Commission were present at this meeting. Acting on advice of counsel, Ms. Tague convened the meeting on July 6 to advise the Commission and those members of the public present that the application of Premier Ethanol was being tabled and the Commission would take no action on the final development plan.

Both before and after the meeting, Ms. Tague spoke with representatives of the engineering firm connected with Premier Ethanol. Ms. Tague does not recall that any other Commission members were present during these discussions. At no time after the meeting was adjourned did any group of Commission members meet, formally or informally, to discuss the Premier Ethanol application, nor was any substantive decision made with regard to it other than during the public meeting.

Mr. Shockley averred that he had no contact with any Commission members besides Ms. Tague either before or after the meeting on July 6. After the meeting, he did not have contact with anyone in the meeting room other than a reporter from the local newspaper. He also did not see any group of Commission members congregated after the meeting adjourned. In his responsive letter, Mr. Shockley explained that Premier Ethanol's representatives were discussing what to do regarding the pending litigation and the zoning matter with Bill Milligan, who is Portland's Zoning Coordinator. Mr. Milligan is not a member of the Commission. No violation of the Open Door Law occurred because the Commission did not gather to take official action on public business outside of the confines of the public meeting on July 6.

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). A "meeting" is 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). "Official action" means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. IC 5-14-1.5-2(d). "Public business" means any function upon which the public agency is empowered or authorized to take official action. IC 5-14-1.5-2(e).

Clearly, if the Commission held a meeting outside of the public, the Commission violated the Open Door Law. However, I do not find that the Commission violated the Open Door Law on the facts before me. While I do not doubt the veracity or sincerity of your statement, it does not lead one to conclude that a majority of members of the Commission must have gathered to discuss the Premier Ethanol matter following the meeting. The representatives of Premier Ethanol could have spoken with Mr. Milligan, who is not a member of the Commission, and with Ms. Tague, who was only one member of the Commission, regarding its decision to refile the application the following day. Such discussion or activity would not have been a violation of the Open Door Law, because it did not involve a gathering of a majority of the Commission. Only if official action occurred during a gathering of a majority of the members of the Commission would a violation of the Open Door Law have occurred.

CONCLUSION

For the foregoing reasons, I find that the Portland Area Plan Commission did not violate the Open Door Law.

Sincerely,

Karen Davis
Public Access Counselor

cc: Scott E. Shockley