

March 16, 2000

Mr. Alvin Cheeks
832 Merrill Street
Hammond, Indiana 46320

Re: Advisory Opinion 00-FC-6 *Notice of Executive Session of Hammond Redevelopment Commission.*

Dear Mr. Cheeks:

This is in response to your formal complaint, which was received on February 23, 2000. You have alleged that the Hammond Redevelopment Commission ("Commission") has violated the Indiana Open Door Law, ("ODL"), Indiana Code chapter 5-14-1.5. Specifically, you allege that the notice provided for an executive session to be held by the Commission on February 14, 2000 was inadequate under Indiana Code section 5-14-1.5-5. In addition to the allegations raised in your complaint, I noted that the stated purpose of the executive session does not appear to fall within one of the executive session exceptions under the ODL. Mr. James Davis, President of the Commission, responded to your complaint in letters dated February 28 and 29, 2000 with respect to the notices in general. A copy of Mr. Davis' written responses and the attachments are enclosed for your reference. I also spoke by telephone with Commission Attorney Carol Green and her associate, Dan Goeman, about the stated purpose of the executive session.

For the reasons stated below, it is my opinion that the Commission substantially complied with the notice requirements of the ODL, but it is my advice that the Commission conform to the technical requirements of Indiana Code section 5-14-1.5-5 in the future. Less than a majority of the members of the Commission actually attended the posted February 14, 2000 executive session, and as such, it was not a "meeting" as defined under the ODL. The Commission, however, did post notice and intend to hold an executive session for a purpose that did not conform to Indiana Code section 5-14-1.5-6.1 and again, the Commission is advised to conform to the requirements of the ODL with respect to all meetings in the future.

BACKGROUND

According to your complaint, the Commission failed to give proper notice of an executive session to be conducted on February 14, 2000 when it did not post the notice at least forty-eight (48) hours in advance of that meeting. Also, you indicated that the notice was defective in that it did not have the name of the Commission on it, depriving you of your right to know who would be meeting.

In his response to your complaint, Mr. Davis provided copies of the notices provided to the Commission members and the local media. Those notices did show that the notice was being provided to the news media and the Commission members, but did not include the time of the executive session. The notice that was posted outside of the principal office of the Commission was on Hammond Department of Planning and Development stationery and included the date, location and purpose of the executive session, but did not state the name of the governing body that would be meeting. No time was provided in the posted notice, but according to the Commission staff, the posted notice was revised to reflect that the executive session would begin at 10:00 am and end at 12 Noon. In sum, the Commission believes that it provided proper notification of the February 14, 2000 executive session.

With respect to the stated purpose of the executive session, the reason listed was "for any legal questions regarding the proposed contract for the Downtown Developers." According to Commission Attorneys Green and Goeman, the Commission had intended to hold the executive session under Indiana Code section 5-14-1.5-6.1(b)(3) for interviews with industrial or commercial prospects. However, according to Ms. Green, less than a majority of the Commission, only two of the five members, actually attended the meeting so, in her opinion, no actual violation of the Open Door Law occurred.

ANALYSIS

The intent and purpose of the Indiana Open Door Law ("ODL") is 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. The provisions of the ODL are to be "liberally construed with the view of carrying out its policy." Ind. Code § 5-14-1.5-1. The Commission is clearly both a public agency and a governing body subject to the requirements of the ODL. Ind. Code §5-14-1.5-2.

Notices of Executive Session

Indiana Code section 5-14-1.5-5(a) provides that:

Public notice of the date, , and place of any meetings, *executive sessions*, or of any rescheduled or reconvened meeting, shall be given at least forty-eight (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting.

(Emphasis added). A notice of an executive session must also state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under Indiana Code section 5-14-1.5-6.1(d). The public agency is required to:

- (1) (post) a copy of the notice at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held; and
- (2) (deposit) in the United States mail with postage prepaid or by delivering notice to all news media which deliver by January 1 an annual written request for such notices for the next succeeding calendar year to the governing body of the public agency.

Indiana Code §5-14-1.5-5(b).

Clearly, the notice posted by the Commission did not include all of the information required under Indiana Code section 5-14-1.5-5. The date and location were provided, but the time of the executive session was not. It is fair to state that it is contemplated under the ODL that the public will also be informed which governing body will be conducting the executive session.

The Indiana General Assembly and the Indiana Court of Appeals have recognized that a notice that does not meet all of the technical requirements may still be valid under a substantial compliance approach. In *Town of Merrillville v. Blanco*, 687 N.E.2d 191 (1997), the Indiana Court of Appeals reviewed an issue concerning that Town's police commission. In that case, the Court determined that the Town clearly violated the technical requirements of the ODL by failing to post notice of a hearing at least forty-eight (48) hours in advance. *Id.* at 196. The Court analyzed this technical violation in light the decision in *Riggin v. Board of Trustees of Ball State University*, 489 N.E.2d 616 (Ind. App., 1986) and subsequent changes to the Open Door Law by the Indiana General Assembly. Under the ODL, a court will review a governing body's notice under standards identified at Indiana Code section 5-14-1.5-7(d), including the extent to which the violation "denied or impaired access to any meetings that the public has a right to observe and record." Ind. Code §5-14-1.5-7(d)(1).

The question, therefore, is whether the Commission substantially complied with the notice requirements of the ODL. With respect to executive sessions, the public is not invited to observe and record those gatherings of a governing body. The fact that the time of the Commission's February 14th executive session was not posted was certainly not appropriate, but according to Commission staff was corrected as soon as it was detected as missing from the notice. While the posting may have occurred less than forty-eight (48) hours before the scheduled executive session, the public was not denied access to a meeting at which they would have been entitled to observe and record. The public was merely deprived of information concerning the time on a particular date that the Commission would be meeting in executive session.

With respect to the name of the governing body being absent from the posted notice, your complaint notes that the notice to the public of this executive session was printed on the stationery of the Department of Planning and Development. The Commission members and the media were specifically made aware that the executive session was to be held by the Commission, only the notice posted for the public did not include a specific reference to the Commission.

The Indiana Supreme Court has reviewed a similar matter concerning a public meeting in *Pepinsky v. Monroe County Council*, 461 N.E.2d 128 (1984). The Supreme Court determined in *Pepinsky* that the failure to state the name of the governing body did not violate the ODL because the public had been alerted to the time of the meeting and that the local media had received the information and publicized the meeting. However, the Supreme Court did note that while the notice in question "might not be a model for further application, it did provide the type of information necessary to insure that the Monroe County Council would not be operating behind closed doors without public input or supervision." *Pepinsky*, at 136.

Again, while the notice in question is not an ideal example under the ODL, there would have been enough information provided to alert the public that one of the governing bodies served by the Department of Planning and Development would be meeting in executive session. The staff of the Department quickly resolved the failure to state the time of the executive session when alerted about it and it is likely that this would have been the case if they had been made aware of your uncertainty about the particular governing body that would be meeting in executive session.

Conduct of Executive Sessions

One further question arises from the Commission's meeting notice that was not raised in your complaint. It is important, however, that the purpose of the executive session conducted on February 14, 2000 be analyzed for compliance with the ODL. As stated above, the ODL requires governing bodies to post notice of an executive session and state the enumerated instance under Indiana Code section 5-14-1.5-6.1(b) that authorizes the executive session. According to the notices provided by the Commission, the purpose of the February 14th executive session was meeting in executive session "for any legal questions regarding the proposed contract for the Downtown Developers."

The purposes for which executive sessions may be held are limited to the eleven situations listed at Indiana Code section 5-14-1.5-6.1(b), but the notice of the February 14th executive session does not appear to conform to any of the listed statutory exceptions. Upon inquiry, the Commission's Attorney informed me that the exception that was intended to be used for this executive session is the one that provides that a governing body may hold an executive session for

Interviews with industrial or commercial prospects or agents of industrial or commercial prospects by the department of commerce, the Indiana development finance authority, the film commission, the Indiana business modernization and technology corporation, or economic development commissions.

Indiana Code §5-14-1.5-6.1(b)(3). The Commission's Attorney explained that the executive session was intended for the purpose of meeting with representatives of Downtown Developers to discuss the details of a proposed contract.

Executive session exceptions are to be construed narrowly in light of the public policy of the ODL that the workings of government should be conducted openly except where specifically authorized by statute. *Common Council of the City of Peru v. Peru Daily Tribune, Inc.*, 440 N.E.2d 726, 729 (Ind. App. 1982). Upon review of Indiana Code section 5-14-1.5-6.1(b)(3), it appears that the exception cited by the Commission to support the February 14th executive session is intended to permit interviews with industrial or commercial prospects, not to discuss the terms of a draft or proposed contract. Also, redevelopment commissions are not the same as economic development commissions as each of these entities is created under different statutes¹. See, Ind. Code §36-7-12-5 (economic development) and Ind. Code §36-7-14-3 (redevelopment). For these reasons, it is my opinion that the Commission could not take advantage of this executive session exception under the facts presented.

It has, however, been noted that a majority of the Commission did not actually meet in executive session on February 14th. A meeting of a governing body is defined as a "gathering of a majority of the members of the governing body for the purpose of taking official action upon public business." Ind. Code §5-14-1.5-2(c). Executive sessions, while not open for the public to attend, observe and record them are "meetings" under the ODL. Ind. Code §5-14-1.5-2(f). The fact that less than a majority of the Commission was present means that there was no actual violation of the ODL that occurred; however, the Commission certainly did intend to conduct an executive session for a purpose that was not authorized by the ODL. The Commission is encouraged to examine the ODL and re-evaluate both the notice provisions and the executive session provisions to ensure that the problems identified in your complaint and this opinion do not occur in the future.

CONCLUSION

It is my opinion that the Hammond Redevelopment Commission substantially complied with the notice requirements of the Open Door Law at Indiana Code section 5-14-1.5-5 with respect to the notice of an executive session to be held on February 14, 2000. The Commission intended to meet in executive session for a purpose that was not authorized under Indiana Code section 5-14-1.5-6.1(b) and only avoided a violation by virtue of the fact that less than a majority of the members of the governing body were in attendance.

Sincerely,

Anne Mullin O'Connor

Enclosures

cc: : Mr. James Davis, President
Hammond Redevelopment Commission

1 While there are references to "economic development" in the redevelopment commission statute, there is nothing that implies that such entities are one in the same.