

December 14, 2001

Mr. David D. Mikesell
110 West Park Street
Westfield, IN 46074

Re: *Advisory Opinion 01-FC-75*;
Alleged Violation of the Open Door Law by the Westfield Town Council.

Dear Mr. Mikesell:

This is in response to your formal complaint, which was received on November 20, 2001. You have alleged that a majority of the Westfield Town Council, ("Town Council,") violated the Indiana Open Door Law, ("ODL,") Indiana Code chapter 5-14-1.5. Specifically, you claim that a majority of the Town Council members met in a conference room in the Town Hall on October 23, 2001 without providing notice. Town Attorney Brian Zaiger responded in writing to your complaint and a copy of his response and the attached affidavits from the three (3) Town Council members in question are enclosed for your reference.

For the reasons set forth below, it is my opinion that there does not appear to have been a violation of the ODL. It is clear that two (2) members of the Town Council took official action on public business during that gathering, however, there is insufficient evidence that a third member participated in such official action. Without a majority's participation in that official action, the requirements of the ODL would not have been triggered.

BACKGROUND

According to your complaint, on October 23, 2001, you were notified that three (3) of the five (5) members of the Town Council had a private meeting in the conference room at the Town Hall at approximately 4:30 p.m. You are also a member of the Town Council but were not present. You claim that at least four (4) Town employees witnessed the three (3) Town Council members going into the private meeting, that no one knew the reason for the meeting and no notice was provided as required under the ODL. You then filed a formal complaint with this Office based on what you call a "gross violation of the ODL."

In response to your complaint, Mr. Zaiger provided affidavits from each of the three (3) Town Council members concerning the events of October 23, 2001. All three of the members, Mr. Russell Lamb, Mr. Mike McDonald and Mr. Mic Mead stated that they went to the Town Hall that day in response to a request by the Clerk-Treasurer's Office to sign an ordinance¹ that had been adopted at a

meeting of the Town Council. Each of the three stated that while they were present, no meeting was held and no business was discussed other than the execution of the duly adopted ordinance.

Because the affidavits provided did not provide much detail on the actual events of October 23, 2001, I contacted each of the three (3) members who were present that day at the Town Hall to elicit more information. Mr. Mead stated that before he signed the ordinance, he contacted Town Attorney Zaiger by telephone to ask if the language used was the same as that agreed upon during the public meeting at which the ordinance was passed. Mr. Mead stated that the three (3) members were there but if any discussion took place it was only with respect to putting their signatures on the ordinance.

Mr. McDonald confirmed that they did indeed make a phone call to Attorney Zaiger that afternoon but that it was only to verify that the correct version of the ordinance was being signed. He stated that they merely wanted to ensure the language of the ordinance was accurate but no other action or business took place during that time. He also stated that Mr. Lamb came in during the telephone call but had left his truck running outside so he was not there long.

In my conversation with Mr. Lamb, he stated that he did appear at the Town Hall at approximately 4:30 pm on October 23rd, but that he had left the truck running with an employee waiting for him as he intended to go in, sign the ordinance and leave. He was directed to the conference room where he found Mr. Mead and Mr. McDonald having a telephone conversation via speaker phone with Attorney Zaiger. He greeted those present as well as Mr. Zaiger and was told that the other two members were attempting to clarify the language of the ordinance. Mr. Lamb told the other two members that he would just sign the ordinance and then he left. His perspective was that if the other two were not comfortable in signing the ordinance, the fact that he had signed would not prevent the Town Council from taking action later on the matter.² Mr. Lamb stated that he was not in the conference room long and that he had no part in any discussions with the Town Attorney about the language of the written ordinance.

ANALYSIS

The intent and purpose of the 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 Town Council is a governing body of a public agency subject to the ODL. Ind. Code § 5-14-1.5-2(b)(2).

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." Ind. Code §5-14-1.5-2(c). Meetings of a governing body must be held openly, with the exception of executive sessions, including affording the public the right to attend, observe and record these meetings. Ind. Code §5-14-1.5-3(a). Further, if the ODL applies to a meeting, the Town Council must have posted notice in accordance with Indiana Code section 5-14-1.5-5.

The determination of whether the Town Council violated the ODL with respect to the actions that

took place on the afternoon of October 23, 2001 is dependent upon three factors. First, a majority of the members must have been present. Secondly, the members must have taken official action and third, that action must have concerned the public business of the Town Council. All three of these factors must have been present in order for the ODL to apply to the gathering on October 23rd.

A majority of the members of the Town Council not only constitutes a quorum of the Town Council, but under the ODL, a majority of the Town Council triggers the requirements for notice and conduct of meetings. See, Ind. Code §36-5-2-9.2. In the case of this five (5) member-Town Council, a majority is three (3) of its members. Under the facts presented, there were three (3) members of the Town Council present, at least for a short time, in the conference room of the Town Hall. The majority requirement for the ODL was met when the three (3) members were gathered in the conference room.

In order for the ODL to have applied to this gathering of a majority of the Town Council, however, the two other factors noted above must also have been met. These three (3) Town Council members must have also been taking official action on public business while present during that October 23rd gathering. "Official action" is defined very broadly to include receiving information, deliberating, making recommendations, establishing policy, making decisions or taking final action. Ind. Code §5-14-1.5-2(d). "Public business" includes "any function upon which the public agency is empowered or authorized to take official action." Ind. Code §5-14-1.5-2(e). If the three (3) Town Council members gathered did take official action on the public business of the Town Council on October 23rd, this would have constituted a violation of the ODL.

The purpose for which each of the three (3) Town Council members was present in the Town Hall on the afternoon of October 23rd was to sign an ordinance that had been previously adopted. The allegation raised in your complaint was that there was a private meeting of these three (3) members on that date and "no one knows" the reason for this meeting. Certainly the action of the Town Council to adopt the ordinance in question was official action under the ODL and there has been no allegation that this was done improperly. Further, it is my position that the simple act of an individual member signing the ordinance after the fact and at the request of the Clerk-Treasurer's Office, would not in and of itself raise an issue under the ODL.

According to the facts presented in your complaint, the affidavits of the Town Council members and my telephone conversations with all three (3) of the members present in the conference room on October 23, 2001, it appears that there was no violation of the ODL. The actions of two (2) of the members, Messrs. Mead and McDonald, to initiate a telephone call to Town Attorney Zaiger and discuss the validity of the ordinance language most likely would constitute official action on public business. This conversation, however, essentially only involved these two (2) members and as such, a majority of the members of the Town Council did not take official action on public business triggering the requirements of the ODL.

Based on the information that has been provided to me, I do not believe that Mr. Lamb participated in this telephone conversation during that gathering despite the fact that he was present for a short time. It was reported by both Mr. McDonald and Mr. Lamb that Mr. Lamb was only in the room for a brief period, exchanged pleasantries, and was told that the other two were attempting to clarify that this

written ordinance was accurate based upon their agreement at a public meeting. Mr. Lamb advised the other two that he needed to leave immediately. He then advised the other two members that he was going to sign the ordinance and if there were any problems with it, the fact that he had signed should not prevent them from remedying it later.

On a final note, I would caution the Town Council to be vigilant about the requirements of the ODL. The responsibility for complying with the requirements of the ODL lies with them. The act of the Clerk-Treasurer calling all board members to stop by the Town Hall to sign off on a duly adopted ordinance presented a situation where a majority of the members happened to be present in the Town Hall at the same time. It is incumbent upon the members of any governing body to ensure that the actions they take conform to the requirements of the ODL when necessary.

CONCLUSION

In conclusion, it is my opinion that there does not appear to have been a violation of the ODL despite the fact that it was clear that two (2) members of the Westfield Town Council took official action on public business during that gathering. There is insufficient evidence, however, that a third member participated in such official action. Without a majority's participation in that official action, the requirements of the ODL were not triggered.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. Brian J. Zaiger, Town Attorney w/o enclosures.

¹ The subject of the ordinance was redistricting of Town Council districts.

² The vote on this particular ordinance was 3 in favor-Messrs. Mead, McDonald and Lamb and 2 opposed.