



STATE OF INDIANA

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August 22, 2013

Mr. Peter G. DePrez
24 E. Polk Street
Shelbyville, Indiana 46176

Re: Formal Complaint 13-FC-239; Alleged Violation of the Open Door Law by the Henry County Planning Commission

Dear Mr. DePrez:

This advisory opinion is in response to your formal complaint alleging the Henry County Planning Commission ("Commission") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* James E. Millikan, Attorney, responded in writing to your formal complaint. His response is enclosed for your reference. I have granted your formal complaint priority status pursuant to 62 Indiana Administrative Code 1-1-3(1)

BACKGROUND

In your formal complaint you provide that on July 25, 2013, the Commission held a public meeting at which time it considered an application of Milestone Contractors, LP ("Milestone") that, as filed, called for a rezoning of a specific parcel of land along with a request for an approval of a Commission Approved Use for the parcel. You and the adjoining landowner were remonstrators before the Commission. The Commission consists of nine members, eight of which were present for the meeting.

During the meeting, Milestone's request for rezoning and approval of a Commission Approved Use were bifurcated. The notice provided for the meeting did not indicate that the issues would be treated separately, or that the Commission Approved Use would be dealt with at a different time. The bifurcation of the issue limited the ability of the public and any remonstrator to provide evidence as to the intended use of the parcel, if re-zoned. Further, you allege that the bifurcation had the purpose and effect of improperly separating the question of zoning from the issue of what was the intended use of the affected property. You maintain that Milestone restricted its evidence to take advantage of the bifurcation and reduced the impact of its plan to use the parcel for an asphalt plant.

In addition, you provide that during the relevant portions of the meeting, members of the Commission either moved away from or covered the microphone to discuss

matters amongst themselves, in such a way that deprived the public of hearing what was being discussed. In at least one instance, a member stood from their chair and walked to each of the other seven members that were present, whispering something to each member in a way that prevented the public from observing. Further, on several occasions, groups of 2-3 members of the Commission stood from their seats and met in small gatherings away from the microphones, again so the public would be prevented from hearing what was being said. The alleged actions of the Commission occurred despite the adamant objections of the public that were present. You provide that the number of different individuals conferring in small, private gatherings totaled a quorum of the Commission. At no point did the members of the Commission state on the record what the substance of their private discussions was. You further note that notice of an executive session was not provided by the Commission. Despite the objections noted by the public, the Commission thereafter conducted a vote where it approved the recommending rezoning.

In response to your formal complaint, Mr. Millikan advised that the notice that was provided for the Commission's July 25, 2013 public meeting complied with the requirements of Indiana law. The meeting was attended by a large number of remonstrators. Milestone's application to the Commission was in two parts. The initial request was in regards to Milestone's application to rezone certain real estate from Agriculture 1 to Heavy Industry. Under Indiana law, and in accordance with the Henry County Development Code, a notice of hearing on that issued was published and mailed to interested parties and a hearing was conducted on July 25, 2013. At the conclusion of the hearing, a roll call vote was conducted and the application was recommended for approval to the Henry County Commissioners ("Commissioners"). A rezoning application is a request to change a local ordinance; the Commission conducts a hearing on the issue and taken action on the application in an advisory capacity only. The Commissioners, being the county's legislative body, is the only entity that can amend or change a county ordinance. That matter came before the Commissioners on August 14, 2014, whereupon Milestone's request was denied.

The second part of the application was for a Commission Approved Use. Prior to the hearing, you suggested in writing to the County's Interim Zoning Administrator that the use being requested by Milestone was not listed in the county's development code as one that qualified as a Commission Approved Use in property that was zoned "Heavy Industry." As a result, you concluded that the Commission Approved Use could not be acted upon by the Commission. You also raised this issue prior to the meeting on July 25, 2013. Mr. Millikan advised that unlike an application for rezoning, an application for a Commission Approved Use is a matter considered only by the Commission. At the hearing, Milestone withdrew its request on the Commission Approved Use and the hearing proceeded forward on Milestone's request for rezoning. The evidence and standards for a rezoning in a Commission Approved Use are independent and each must be considered on its own merit. The fact that Milestone withdrew its application for a Commission Approved Use had no effect and did not prejudice you or any other remonstrator with regards to the issue of rezoning.

As to the alleged serial gatherings, Mr. Millikan acknowledged that actions of certain members of the Commission acted as described in your complaint. However, Mr. Millikan denies that such allegations constitute an “executive session” or that the substance of what was communicated between the members amounted to anything other than tabling further action on the application for rezoning. The Commission did not conduct an executive session on July 25, 2013; as such no notice was posted for an executive session.

ANALYSIS

It is the intent of the ODL 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. *See* I.C. § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, 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. *See* I.C. § 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 on public business. *See* I.C. § 5-14-1.5-2(c). “Official action” means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* I.C. § 5-14-1.5-2(d). “Public business” means any function upon which the public agency is empowered or authorized to take official action. *See* I.C. § 5-14-1.5-2(e). “Final action” means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See* I.C. § 5-14-1.5-2(g). Final action must be taken at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c).

The ODL requires that 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. *See* I.C. § 5-14-1.5-5(a). The notice must be posted at the principal office of the agency, or if not such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notice, generally nothing requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2).

As applicable here, you allege that the Commission violated the ODL by failing to provide in its notice that the issue of rezoning and approval of the Commission Approved Use were be treated separately or that the Commission Approved Use would be dealt with at a separate time. The ODL only requires that public notice provide the date, time, and place of the meeting to be held by the governing body. There are times when the Indiana Code specifically requires that a governing body provide in its notice the topics to be discussed at the meeting (e.g. I.C. 36-2-2-8; I.C. § 5-14-1.5-6.1(d)); however you have failed to cite to any applicable state or federal statute that would have required the Commission to provide such information here. Further, the requirements of section 5 of the ODL do not apply when notice by publication is required by statute, ordinance, rule

or regulation. *See* I.C. § 5-14-1.5-5(e). The Commission maintains that notice of the hearing on Milestone’s application was “published and mailed to interested parties and a hearing was conducted” which was done in accordance with the Indiana Code and Henry County Development Code. However, the Commission fails to cite to the specific Indiana Code nor provide a copy of the relevant Henry County Development Code. It is my opinion that the Commission properly complied with the notice requirements of section 5 of the ODL for its meeting that was held on July 25, 2013.¹ If the Commission was required to provide notice by publication pursuant to the Indiana Code or the Henry County Development Code, pursuant to I.C. § 5-14-1.5-5(h), it is my opinion the Commission would not have been required to comply with the requirements of sections 5 of the ODL.

As noted *supra*, 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. *See* I.C. § 5-14-1.5-3(a). You allege that the Commission violated this section of the ODL when individual members of the Commission carried on private discussions during the July 25, 2013 public meeting, which included meeting in small groups or by covering their microphones so that the Commission member’s statements could not be heard. Mr. Millikan provided that your description of the Commission member’s conduct during the meeting was accurate. It is my opinion that the Commission member’s conduct of meeting in small groups during the public meeting, where such discussions were not audible to those in attendance, and by repeatedly covering their microphones during relevant points of discussion, again so that their comments could not be heard by the public, was a clear and intentional violation of section 3(a) of the ODL.

The ODL prohibits governing bodies from conducting serial meetings. *See* I.C. § 5-14-1.5-3.1. By definition, the serial meeting law can only be violated by governing bodies of six or more individuals. The serial meeting prohibition provides:

Sec. 3.1. (a) Except as provided in subsection (b), the governing body of a public agency violates this chapter if members of the governing body participate in a series of at least two (2) gatherings of members of the governing body and the series of gatherings meets all of the following criteria:

- (1) One (1) of the gatherings is attended by at least three (3) members but less than a quorum of the members of the governing body and the other gatherings include at least two (2) members of the governing body.
- (2) The sum of the number of different members of the governing

¹ Separate from providing notice, a governing body that utilizes an agenda must post a copy of the agenda at the entrance of the location of the meeting prior to the meeting. *See* I.C. § 5-14-1.5-4(a). A governing body is not required to use an agenda. If a public agency utilizes an agenda, the ODL does not prohibit it from changing or adding to the agenda during the meeting, unless the meeting is reconvened pursuant to section 5(a). *See Opinion of the Public Access Counselor 04-FC-166; 09-FC-40; and 12-FC-43.*

body attending any of the gatherings at least equals a quorum of the governing body.

(3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days.

(4) The gatherings are held to take official action on public business. For purposes of this subsection, a member of a governing body attends a gathering if the member is present at the gathering in person or if the member participates in the gathering by telephone or other electronic means, excluding electronic mail.

(b) This subsection applies only to the city-county council of a consolidated city or county having a consolidated city. The city-county council violates this chapter if its members participate in a series of at least two (2) gatherings of members of the city-county council and the series of gatherings meets all of the following criteria:

(1) One (1) of the gatherings is attended by at least five (5) members of the city-county council and the other gatherings include at least three (3) members of the city-county council.

(2) The sum of the number of different members of the city-county council attending any of the gatherings at least equals a quorum of the city-county council.

(3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days.

(4) The gatherings are held to take official action on public business. For purposes of this subsection, a member of the city-county council attends a gathering if the member is present at the gathering in person or if the member participates in the gathering by telephone or other electronic means, excluding electronic mail.

(c) A gathering under subsection (a) or (b) does not include:

(1) a social or chance gathering not intended by any member of the governing body to avoid the requirements of this chapter;

(2) an onsite inspection of any:

(A) project;

(B) program; or

(C) facilities of applicants for incentives or assistance from the governing body;

(3) traveling to and attending meetings of organizations devoted to the betterment of government;

(4) a caucus;

(5) a gathering to discuss an industrial or a commercial prospect that does not include a conclusion as to recommendations, policy, decisions, or final action on the terms of a request or an offer of public financial resources;

(6) an orientation of members of the governing body on their role and

responsibilities as public officials, but not for any other official action;

(7) a gathering for the sole purpose of administering an oath of office to an individual; or

(8) a gathering between less than a quorum of the members of the governing body intended solely for members to receive information and deliberate on whether a member or members may be inclined to support a member's proposal or a particular piece of legislation and at which no other official action will occur.

(d) A violation described in subsection (a) or (b) is subject to section 7 of this chapter.

The Public Access Counselor is not a finder of fact. You have stated in your formal complaint that you intend to bring suit in the local circuit or superior court to void the Commission's actions pursuant to I.C. § 5-14-1.5-7. A trial court would have the authority to reach factual conclusions regarding the actions of the Commission that occurred on July 25, 2013. In essence, you are alleging that by meeting in small groups during the public meeting, where the discussions could not be heard by the public in attendance, the Commission violated the prohibition against serial meetings. Although I doubt that the General Assembly envisioned this type of scenario (i.e. serial meetings being conducted during an actual public meeting) when the prohibition was passed into law; if the following acts occurred, the Commission violated section 3.1 of the ODL:

- One of the small, private gatherings, alleged to have occurred during the public meeting, consisted of at least three members of the Commission;
- A separate private gathering was conducted by two other members of the Commission²;
- The subject matter discussed in both gatherings concerned the same topic;
- Said gatherings occurred within seven (7) days of each other; and
- The gatherings were held to take official action on public business.

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). The only official action that cannot take place in executive session is a final action, which must take place at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c). "Final action" is defined as a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See* I.C. § 5-14-1.5-2(g).

Notice of an executive session must be given 48 hours in advance of every session and must contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). This requires that the notice recite the language of the statute and the citation to the specific instance; hence, "To discuss a job performance evaluation of an individual employee, pursuant to I.C. § 5-14-

² I am assuming that as the Commission is comprised of nine (9) members, five (5) members would be required to be present for the Commission to have a quorum.

1.5-6.1(b)(9)” would satisfy the requirements of an executive session notice. *See Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39.*

The Commission denies that it held an executive session on July 25, 2013, thus notice was not required to be posted. I interpret your argument to be that if the Commission did not violate the prohibition against serial meetings, then it held an improper executive session by conducting private discussions during the public meeting. Executive sessions are meetings of governing bodies that are closed to the public; however in order for a meeting to occur under the ODL, a majority of the governing body must be present. Five (5) members would equal a majority of the Commission. As applicable here, if one of the private gatherings that is alleged to have occurred during the public meeting was attended by at least five members of the Commission, an executive session would have occurred if the members took official action on public business. From what you have provided in your formal complaint, said small gatherings were only comprised of only 2-3 members. If it could be found that a majority of the members of the Commission did meeting in a private group during the public meeting and took official action on public business, notice of an executive session would have been required to be posted and the Commission would have likely violated section 6.1(e) of the ODL, as a governing body may not conduct an executive session during a meeting, except as otherwise permitted by applicable statute. *See* I.C. § 5-14-1.5-6.1(e). Further, a meeting may not be recessed and reconvened with the intent of circumventing this subsection. *Id.* Again, there are many factual matters applicable here that the trial court would retain the relevant authority to reach a conclusion after reviewing affidavits and receiving testimony.

CONCLUSION

Based on the foregoing, it is my opinion that the Commission properly complied with the notice requirements of section 5 of the ODL for its meeting that was held on July 25, 2013. If the Commission was required to provide notice by publication pursuant to the Indiana Code or the Henry County Development Code, pursuant to I.C. § 5-14-1.5-5(h), it is my opinion the Commission would not have been required to comply with the requirements of sections 5 of the ODL.

It is my opinion that the Commission member’s conduct of meeting in small groups during the public meeting, where such discussions were not audible to those in attendance, and by repeatedly covering their microphones during relevant points of discussion, again so that their comments could not be heard by the public, was a clear and intentional violation of section 3(a) of the ODL.

It is my opinion that if the Commission's actions of conducting small, private gatherings during a public meeting met the requirements of holding serial meetings, a violation of section 3.1 of the ODL occurred.

Finally, if a majority of the members of the Commission met privately during the public meeting and took official action on public business, the Commission conducted an executive session and violated the ODL if it failed to provide proper notice and by conducting an executive session during a public meeting.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor

cc: James E. Millikan