

January 14, 2004

Mr. Michael L. Muenich  
3235 45<sup>th</sup> Street  
Highland, Indiana 46322

*Re: Formal Complaint 03-FC-140: Alleged Violation of the Open Door Law  
by the Town of St. John Plan Commission*

Dear Mr. Muenich:

This is in response to your formal complaint, received on December 16, 2003, wherein you allege that the Town of St. John Plan Commission (Plan Commission) violated the Indiana Open Door Law (Open Door Law) by holding an executive session on November 19, 2003, by taking "official action" in that executive session, and by holding additional closed meetings on that same date. The Plan Commission has submitted a response to your complaint, and that response is enclosed for your reference. For the reasons set forth below, it is my opinion that the Plan Commission did not violate the Open Door Law.

#### BACKGROUND

On November 19, 2003, the Plan Commission held an executive session. The Plan Commission provided notice of the executive session setting forth the date, time and location of the meeting, and further setting forth that the meeting was being held pursuant to Indiana Code 5-14-1.5-6.1(b)(2)(B) for discussion of strategy with respect to the initiation of litigation or litigation that is either pending or has been threatened specifically in writing. The minutes of the meeting set forth the date, time and location of the meeting, identify the people that were present (including the attorney for the Plan Commission) and not present, identify the general substance of the matters discussed, note that no votes were taken, and certifies that the minutes accurately reflect the action that occurred in that meeting.

In addition to the executive session referenced above, the materials you provide indicate that two other meetings were held on November 19, 2003. The first was a regular meeting of the Plan Commission. The minutes indicate that this meeting was convened after the conclusion of the executive session referenced above. Those minutes further indicate that the public, including you, were invited and in attendance, and that public comment was had on matters discussed at that meeting. That meeting adjourned approximately 30 minutes after it was called to order, and the Plan Commission thereafter conducted a meeting of its study committee. Again, the minutes

reflect your attendance along with the attendance of other members of the public, and comment and presentation by the public on matters discussed at that meeting.

On November 21, 2003, you received a letter from David Wickland, counsel for the Plan Commission. Mr. Wickland wrote to you in your capacity as counsel for Tram Development Group, Inc., and on behalf of the Plan Commission made various demands on your client. Specifically, counsel requested that your client make immediate repairs to curbs in the Maginot Meadows Unit 1 subdivision development, and set forth conditions of compliance and a deadline for those repairs to be accomplished. Counsel further demanded that your client post a letter of credit equal to fifteen (15%) percent of the total cost of the improvements to insure maintenance of the repairs/project for a two-year period.

On December 13, 2003, you prepared and signed a formal complaint subsequently filed with this office alleging that the meetings of November 19, 2003, were held in violation of the Open Door Law. Specifically, you assert that the executive session was illegal because it cited to the litigation strategy provision of Indiana Code 5-14-1.5-6.1(b)(2)(B) as a pretext in that no litigation was then pending or had been threatened in writing.<sup>1</sup> You further allege that the Plan Commission took “final action” in the meeting in violation of the Open Door Law, asserting that it voted to adopt a policy as evidenced by counsel’s letter of November 21, 2003. Your complaint also challenges the legality of the other two meetings held on November 19, 2003. With regard to those meetings, you assert that the public was excluded from the meetings where official action was taken by the Plan Commission.<sup>2</sup> The Plan Commission responds that the executive session was proper because it discussed the “initiation of litigation” by the Plan Commission, and the strategy regarding the subject of that meeting as evidenced by the Plan Commission’s subsequent demands on your client. The Plan Commission denies that it took “final action” on any matter in that meeting, and further argues that the law permits it to take other forms of “official action” such as deliberating and making decisions about litigation strategy without running afoul of the Open Door Law. The Plan Commission further denies that the public was excluded from any part of the additional meetings held on November 19, 2003, or that any private or other discussion was had on issues related to the curbs or curb repairs in the Maginot Meadows Unit 1 subdivision development.

## ANALYSIS

The intent and purpose of the Open Door Law 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 exception to the general rule that a meeting of the governing body must be open to the public is an executive session. IC 5-14-1.5-6.1. “Executive session” is defined as a meeting “from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose.” IC 5-

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<sup>1</sup> You do not make any assertion otherwise challenging the timing or substance of the notice.

<sup>2</sup> I have not been provided with copies of the notice of these additional meetings, but no allegation is made that notice was not timely posted or was otherwise inadequate. Rather, your complaint appears to be based on the statements made in the Plan Commission’s November 21, 2003, letter demanding that your client repair curbs in a subdivision development, and the absence of any discussion of those issues in the minutes of the public meetings.

14-1.5-2(f). The Open Door Law sets forth the limited bases pursuant to which a governing body may hold an executive session, and includes where the meeting is for discussion of strategy with respect to the initiation or litigation or litigation that is either pending or that has been threatened in writing. IC 5-14-1.5-6.1(b)(2)(B).

You first assert that the executive session held by the Plan Commission on November 19, 2003, was illegal because the reason cited, to discuss litigation, was a pretext. In support, you note that no litigation was then pending or had been threatened. The plain language of the provision is disjunctive. A governing body may meet in executive session to discuss the “[i]nitiation of litigation *or* litigation that is either pending or has been threatened specifically in writing.” IC 5-14-1.5-6.1(b)(2)(B). There need not be “pending litigation” or litigation that “has been threatened specifically in writing” for a governing body to meet in executive session to discuss strategy with regard to its own “initiation of litigation.” The Plan Commission notes that the subject of the November 19, 2003, executive session was to discuss strategy regarding the governing body’s initiation of litigation against your client, and that assertion is plainly supported by the November 21, 2003, letter and demand the Plan Commission’s attorney sent to you on behalf of the Plan Commission. It is my opinion that the notice and stated basis upon which the Plan Commission met in executive session was proper and did not violate the Open Door Law.

You next assert that the Plan Commission violated the Open Door Law in that it took “final action” in the executive session by adopting a policy as evidenced by counsel’s letter of November 21, 2003. I disagree. Certainly, a governing body may not take final action except at a meeting open to the public. IC 5-14-1.5-6.1(c). “Final action” is specifically defined in the Open Door Law to mean “a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance or order.” IC 5-14-1.5-2(g). The Plan Commission denies that it took any vote at the executive session or that it adopted any policy, and that denial is supported by the minutes of the executive session and the November 21, 2003, letter you cite in support of your argument. The letter does not reference any newly adopted policy or final action of the Plan Commission. The letter instead indicates that the Plan Commission did not take a final action on the initiation of litigation, but rather pursued a strategy that afforded your client an opportunity to take remedial action toward the subject matter of the proposed litigation before making a final decision to initiate litigation. Neither do I think this evidence of other improper “official action” in violation of the Open Door Law. While “[o]fficial action” is defined to include activities short of taking final action, such as receiving information, making recommendations, deliberating, establishing policy, and making decisions, the exceptions permitting executive sessions anticipate and expressly allow various of these activities. *See, e.g.*, IC 5-14-1.5-6.1(b)(2)(B) (for *discussion* of strategy); IC 5-14-1.5-6.1(b)(5) (to *receive information*); IC 5-14-1.5-6.1(b)(6)(B) (to *discuss, before a determination*); *Baker v. Town of Middlebury*, 753 N.E.2d 67, 71 (Ind. Ct. App. 2001), *transfer denied* (2002) (“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.”).

Your additional claims challenge the legality of the two other meetings held by the Plan Commission on November 19, 2003. You assert that in these meetings the Plan Commission

took official action on matters relating to the curbs in the Maginot Meadows Unit 1 subdivision development and in doing so excluded the public. You note in support that the agenda and the minutes are devoid of any reference to this topic being discussed at the meetings. You support your claim that these matters were nonetheless discussed in secret based on the contents of the Plan Commission's November 21, 2003, letter, to you wherein the Plan Commission makes its demand for your client to make repairs to the curbs and post a letter of credit. The Plan Commission agrees that the minutes of the public meetings do not reflect any discussion of the curbs, but counters that this is so because that issue was not discussed in those meetings, but rather was only discussed in the separate executive session. Taken in context, the letter and the minutes of the three meetings amply support that contention. No evidence offered here supports a claim that the Plan Commission had a closed meeting or closed discussion regarding the curbs in the subdivision outside the properly noticed executive session referenced above.

#### CONCLUSION

For the reasons set forth above, I find that the Plan Commission did not violate the Open Door Law.

Sincerely,

Michael A. Hurst  
Public Access Counselor

cc: Mr. David E. Wickland