

February 20, 2006

*Sent Via Facsimile*

Steven R. Lloyd  
21244 Anthony Road  
Noblesville, IN 46062

*Re: Formal Complaint 06-FC-17; Alleged Violation of the Open Door Law by the  
Town of Westfield*

Dear Mr. Lloyd:

This is in response to your formal complaint alleging that the Town of Westfield (“Town”) violated the Open Door Law by holding a secret meeting.

#### BACKGROUND

You filed your formal complaint on February 1, 2006. You alleged that “representatives of the Town met with a developer prior to a public hearing on April 26, 2004.” You allege that you learned about this meeting the week of January 23, 2006 or thereabouts. You stated that following this closed meeting, the developer withdrew its petition for a Kroger grocery at 161<sup>st</sup> and Springmill Road. You state that this closed session should have been a public meeting.

I sent a copy of your complaint to the Town. Town Attorney Brian Zaiger responded by letter, a copy of which is attached for your reference. He states unequivocally that no secret meeting was held; the Town posts regular notices and agendas, and no meeting was held without the requisite notice. Further, Attorney Zaiger responded to your allegation that a decision had been made outside the public in settlement of the matter with Flynn & Zinkan Company. There was no settlement decided by the Council, states Attorney Zaiger. The matter was tried to a court, and a decision rendered that was adverse to the Town. The Town did meet in a properly noticed executive session to discuss whether to appeal. The Council did not decide to act to further the litigation. This failure to act allowed the case to be decided as the court outlined. As Mr. Zaiger was not given authority to file an appeal, the loose matters were left to be dealt with

by Mr. Zaiger and the Town staff. An agreement was entered into that terminated the need for further hearings on possible damages by the court.

## ANALYSIS

I write to discuss one preliminary matter. Under the complaint procedure for the Office of the Public Access Counselor, a complaint must be filed within 30 days of the denial, or after the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. IC 5-14-5-7(a). You alleged in your complaint that a meeting of the Town was held without notice around April 2004, and that you first learned of the action that you allege was taken in a secret meeting during the last week of January, 2006. Because you alleged that you filed your complaint within 30 days of receiving notice in fact that a meeting was held by a public agency, and you allege the meeting was conducted secretly or without notice, your complaint is timely.

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. The Open Door Law applies to meetings of governing bodies, which are two or more individuals who are, or who are part of, a public agency that is a board, commission, authority, council, committee, body, or other entity which takes official action on public business. IC 5-14-1.5-2(b). In addition, a governing body is any committee directly appointed by the governing body or its presiding officer to which authority to take official action upon public business has been delegated. IC 5-14-1.5-2(b). Meetings of staff members of a public agency are not subject to the Open Door Law if the staff members are not part of a governing body.

Under IC 5-14-1.5-6.1(b)(2)(B), a governing body may meet in executive session to discuss strategy with respect to litigation that is either pending or has been threatened specifically in writing. An executive session is a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose. IC 5-14-1.5-2(f). A final action must be taken at a meeting open to the public. IC 5-14-1.5-6.1(d). "Final action" means a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. IC 5-14-1.5-2(g).

The Town avers that it did not hold any meeting for which notice was not provided. It also stated that a proper executive session was held by the Town Council regarding whether to appeal the adverse decision of the trial court regarding the Flynn & Zinkan Company matter.

I agree that the Town Council could meet in executive session to discuss strategy with respect to the pending litigation in the Flynn & Zinkan matter. However, a final action must be taken in a public meeting. Attorney Zaiger appears to deny that a final action was taken, but does so by stating that the Council did not decide to act to further the litigation. Making a determination to not continue with litigation is still official action, even though the decision is in the negative, i.e., to not continue on a course of action. If the Town Council met in executive

session and a motion or proposal to not pursue an appeal was carried during the executive session, this action would have been final action, and would have been in violation of the Open Door Law.

### CONCLUSION

For the foregoing reasons, I find that if the Town Council of Westfield met in an executive session and took final action to not appeal a judgment, the Town Council violated the Open Door Law.

Sincerely,

Karen Davis  
Public Access Counselor

cc: Brian J. Zaiger