December 8, 2006

Sent Via Facsimile

Michael A. Marturello
The *Herald-Republican*
P.O. Box 180
Angola, IN 46703

Re: Formal Complaint 06-FC-195; Alleged Violation of the Open Door Law by the Orland Town Council and the Steuben Lakes Regional Waste District

Dear Mr. Marturello:

This is in response to your formal complaint alleging that the Orland Town Council ("Council") and the Steuben Lakes Regional Waste District ("District") violated the Open Door Law by holding an executive session for an improper purpose. I find that the Council and District could hold a joint executive session for strategy discussions for initiation of litigation, but not for pending litigation. The District could not have met for the purpose of discussing litigation threatened specifically in writing.

BACKGROUND

You filed two complaints on behalf of the *Herald-Republican* challenging the October 11, 2006 joint executive session of the Council and the District. The purpose of the executive sessions was identical for both bodies: for discussion of strategy with respect to the initiation of litigation or litigation that is either pending or has been threatened specifically in writing. There is no issue concerning adequacy of notice of the executive session, only whether the stated purpose met the requirements of the Open Door Law.

When questioned about the joint executive session, Orland Clerk-Treasurer Rhonda Engle and Superintendent of the District Tim Frederick told you that the litigation involved a federal court case, Jones & Henry, Engineers, Ltd. v. Town of Orland, a matter filed in U.S. District Court, Northern District of Indiana. In 1997, the parties Town of Orland and Jones &

Henry, Engineers, Ltd. entered into a Consent Judgment and Order of Dismissal [hereinafter, "Consent Judgment"]. You claim that because the case was settled in August 1997, and because the District was never a party to the suit, neither governing body could have met on October 11, 2006 for purposes of strategy discussions concerning that litigation. No other litigation was pending concerning Jones & Henry, Engineers, Ltd., so the October 11, 2006 executive session was held in violation of the Open Door Law.

I sent a copy of your complaint to the Council and District. I have enclosed copies of the responses for your reference. The Council advanced a three-prong argument that the October 11 meeting was proper for discussion of strategy with respect to 1) initiation of litigation; 2) pending litigation; and 3) litigation specifically threatened in writing.

In 2004, the Town petitioned the District to be included within the territory of the District pursuant to Indiana Code 13-26-8-1. As a consequence of this initiative, in order to secure financing and bonding for the waste water system, a question concerning the Consent Judgment was raised. According to the terms of the Consent Judgment, the judgment, in the amount of $356,460 together with interest at the contract rate of 8%, constituted a special obligation of the Town of Orland, with the Town consenting to a judgment lien. The judgment lien could be satisfied from no source other than from funds generated by construction of facilities or improvements providing sewer or water service. Specifically, the Consent Judgment states: "Orland consents to a judgment lien to be asserted and filed against the revenues from projects undertaken by the Town, its Sewer and/or Water Utility of the Town of Orland, or their successors or assigns with respect to expenditure of funds or financing directed to improvements…" in the Town's physical facilities for sewer and water services.

The Council asserts that because of the potential for the judgment creditors to assert that the District has liability for the judgment as a "successor or assigns" of the Town, the Town met to discuss strategy with respect to initiating a declaratory judgment action with the District. A declaratory judgment action would be litigation; hence, the executive session called for purposes of discussing this strategy was consistent with the Open Door Law, according to the Council.

For the "pending litigation" purpose, the Council argues the litigation was still pending in spite of the settlement in 1997, because the judgment is not fully satisfied. The Council cited caselaw in support of this theory. As well, the Council asserts that the executive session was proper as strategy discussion concerning litigation specifically threatened in writing, pointing to a September 2006 letter authored by Patrick Hess, counsel to Jones & Henry, Engineers, Ltd. and excerpted in the Council's complaint response. Included is a statement that "over the course of the next eleven months, Jones & Henry will be taking affirmative action to reaffirm its judgment against the Town for the total amount due and owing on the judgment." Upon subsequent discussion with Mr. Hess, the Council learned that this meant that the judgment plaintiffs intended to renew the nearly 10-year old judgment.

Finally, the Council asserts that it was proper to meet on October 11 with the District, since the Open Door Law permits a governing body to admit those persons necessary to carry out its purpose.

The complaint response of the District takes the same approach as the Council's with respect to the "initiation of litigation" purpose; the District would join the Council in filing a declaratory judgment action to prevent attachment of the District's rates to secure satisfaction of the Consent Judgment. The District also believes it could meet for purposes of pending litigation and threatened litigation, given that the District and Town are "inexorably linked" in the matter by virtue of the District's seeking to pursue the waste water project and become a potential "assign" under the Consent Judgment. The District has been aware for some time of the Hess letter and Jones & Henry's intention to pursue the District in the event the Orland project came to fruition. The District concluded that the initiation of a declaratory judgment action would include strategy discussions dealing in general with the Jones & Henry litigation; it would be impossible to separate discussion of the declaratory judgment action without also discussing the underlying pending litigation that led to the Consent Judgment that now directly affects the District.

ANALYSIS

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. The purposes of the Open Door Law are remedial, and its provisions are to be liberally construed with the view of carrying out its policy. IC 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(a). "Executive session" means 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).

Executive sessions may be held only in the following instances:

…

(2) For discussion of strategy with respect to any of the following:

…

(B) Initiation of litigation or litigation that is either pending or has been threatened specifically in writing.

…

However, all such strategy discussions must be necessary for competitive or bargaining reasons and may not include competitive or bargaining adversaries. IC 5-14-1.5-6.1(b)(2).

Initiation of Litigation

The Council and District argue that the October 11, 2006 executive session was held for purposes of discussion of strategy with respect to the initiation of litigation. This would be a proper purpose for holding an executive session for either governing body if the discussion fit the exemption. The "initiation of litigation" discussion involved the District and Council joining as plaintiffs in a declaratory judgment action against Jones & Henry, Engineers, Ltd. I agree that the filing of a declaratory judgment action is initiation of litigation. A declaratory judgment action is a remedy sought from a court of competent jurisdiction. IC 34-14-1-1; Ind. Trial Rule 57. However, I disagree that the District and Council could hold a joint executive session

because one body was permitted to admit necessary persons, as set out in the definition of "executive session." The definition of "executive session" permits necessary persons to attend even though the governing body may exclude the public. This provision does not provide independent authority for a governing body to attend another governing body's executive session. It is only where both bodies in their own right meet the executive session exemption that a joint executive session may be held.

The strategy discussions pursuant to IC 5-14-1.5-6.1(b) may not include competitive or bargaining adversaries. Based on the submission of the Council and District, it appears that the strategy discussion concerning joining in a declaratory judgment action against Jones & Henry preclude a finding that the discussions involved competitive or bargaining adversaries. Hence, the Council and District could meet for purposes of discussion of strategy with respect to the initiation of litigation. Concurrent with the discussion regarding initiating a declaratory judgment action, the parties no doubt discussed the 1997 litigation generally; I concur with the District that the declaratory judgment strategy discussions could not occur in a vacuum. This discussion seems consistent with the holding in *Baker v. Town of Middlebury*, *753 N.E.2d 67 (Ind. Ct. App. 2001), transfer denied.*

Pending Litigation

The Council and District argue that the Jones & Henry litigation was pending litigation for which strategy discussions could occur in an executive session. The Council has offered caselaw that, in contexts not related to the Open Door Law, hold that an action is "pending" until the judgment is fully satisfied. I omit citation and in-depth discussion of these cases, but would observe that the context of the cases did not permit easy analogy to the exemption for "pending litigation" strategy discussions. The policy of openness would demand that "pending litigation" be given a narrow construction. The litigation is not "pending" in the sense contemplated by the Open Door Law, in my opinion, because final judgment was rendered and the case was dismissed. Although the judgment was not yet satisfied, it is my opinion that the litigation was no longer pending when the October 11 executive session occurred. Accordingly, neither the Council nor the District could have met for pending litigation.

Litigation Threatened Specifically in Writing

The Council and the District are on different footing with respect to the discussion of litigation threatened specifically in writing. The Council provided an excerpt of a September 2006 letter from Patrick Hess, counsel for Jones & Henry, to the attorney for the Council; I do not have the benefit of a copy of the letter. From the parts of the letter provided by the Council, it appears that Jones & Henry intended to renew its judgment by filing an action in court. Such an action would have involved litigation against the Town of Orland, the judgment debtor. This was written, threatened litigation, allowing the Council to engage in strategy discussions concerning this litigation in an executive session. The District argues that the Town and District are inexorably linked by virtue of the Orland Project, so the threat of litigation applied to the District as well as the Council. It is my opinion that the threat of litigation was absent insofar as the District's participation in the executive session was concerned. The letter's subject was renewal of the judgment; there was no reference to the planned waste water project. As I stated

earlier, each governing body must come within the stated exemption in its own right. Because I have said that the District could meet for purposes of initiation of litigation, it was not a violation of the Open Door Law for the District to have met in executive session on October 11, even though it may have believed it could do so because of a specific written threat of litigation.

CONCLUSION

For the foregoing reasons, I find that the Orland Town Council and the Steuben Lakes Regional Waste District could hold a joint executive session for strategy discussions for initiation of litigation, but not for pending litigation. In addition, the Steuben Lakes Regional Waste District could not have met for the purpose of discussing litigation threatened specifically in writing.

Sincerely,

Karen Davis
Public Access Counselor

cc: Brett Carlile
Kevin Bruns