

February 7, 2007

Warren Auxier
P.O. Box 215
Hanover, IN 47243

*Re: Formal Complaint 07-FC-4; Alleged Violation of the Open Door Law by the
Madison Common Council and Mayor*

Dear Mr. Auxier:

This is in response to your formal complaint alleging that the City of Madison Common Council ("Council") and Mayor (collectively, "City") violated the Open Door Law during its meetings held on Sunday, December 31, 2006.

BACKGROUND

You allege that the Council and Mayor violated the Open Door Law because the Council failed to post timely notice of its December 31, 2006 public meeting and executive session. There was no justification for calling an emergency meeting, you allege. In addition, you allege that the notice for the executive session did not meet the requirements of the Open Door Law in that it did not specify the purpose for the executive session. Finally, the Council could not hold an executive session for the purpose for which an executive session may be held.

According to your complaint, the Mayor called a special public meeting and executive session, posting notice on Friday, December 29, 2006 for the Sunday, December 31 meetings. The notice that you provided stated that the open meeting was at 3:00 p.m. at City Hall. The special executive session was set for 2:30 p.m. at City Hall, "to discuss potential contract."

You state that a member of the Common Council told you that the Mayor used the executive session to explain why the City needed to purchase the property instead of the City of Madison Redevelopment Commission, and there was not any discussion necessary for competitive or bargaining reasons. You enclosed a copy of a purchase agreement dated October 27, 2006, showing "Madison Redevelopment Com." as the buyer. It appeared to have been

executed by the parties, but no date appears with the seller's signature. The purchase agreement bears a date of January 1, 2007 as the closing date.

The City's attorney Mr. Robert Barlow II prepared the City's response to your complaint. You have received this response. Mr. Barlow denies that the Council or Mayor violated the Open Door Law. The executive session was necessary and provided for by Indiana Code 5-14-1.5-6.1(b)(2)(D), which permits an executive session for the purchase of real property up to the time the contract to purchase the property is executed by the parties. The Madison Redevelopment Commission had previously entered into a purchase agreement but later learned that it could not complete the purchase because the property was not within the City limits. Rather than lose the benefit of the bargain, the Council was to purchase the real estate. Because no contract was executed between the buyer, the City, and the Seller, the Council could hold an executive session to discuss the purchase. In this case, the contract between the City and the seller was going to be the warranty deed conveying the property once the Council approved the purchase at an open meeting. During the open meeting that followed, the Council approved the purchase and the closing followed.

The strategy discussion involved the dilemma facing the City given the short notice it had of the fact that the seller was not willing to extend the closing date. It had previously been intimated that the closing date would be extended while the City was in the process of annexing the property. The seller had already filed a petition for voluntary annexation and the first reading of an annexation ordinance had previously occurred at a prior regular council meeting.

Conceding that the notice was posted on December 29 and that Saturday and Sunday could ordinarily not be counted toward the 48 hour notice time, the City argues there was an emergency for the meeting. The media was provided the notice in accordance with the emergency provisions. The emergency meeting was necessitated by the City's learning on December 29 that the seller of the real property would not be willing to extend the scheduled closing date of January 1, 2007. The meeting was going to be necessary to preserve the benefit of the bargain with respect to the purchase of an important piece of industrial development property and so that the City did not forgo a \$5,000 earnest money deposit. The City feels that it met both the letter and the spirit of the Open Door Law as the meeting dealt with an emergency involving threatened injury to property if it had to forgo the property sale and the deposit.

In rebuttal, you have asserted that informed persons have told you that the Mayor assured the seller that the Redevelopment Commission had assigned the purchase agreement to the City, and that this occurred prior to the executive session. In speaking with Mr. Barlow, Mr. Barlow denies that any such assignment occurred.

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. 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). 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. Ind. Code 5-14-1.5-5(a). Public notice shall be given by the governing body of a public agency by posting a copy of the notice at the principal office of the public agency holding the meeting or, if no such office exists, at the building where the meeting is to be held. In addition, the governing body shall deliver notice to all news media which deliver by January 1 an annual written request for such notices for the next succeeding calendar year to the governing body of the public agency. IC 5-14-1.5-5(b).

If a meeting is called to deal with an emergency involving actual or threatened injury to person or property, or actual or threatened disruption of the governmental activity under the jurisdiction of the public agency by any event, then the time requirements of notice under section 5 shall not apply, but news media which have requested notice of meetings must be given the same notice as is given to members of the governing body, and the public must be notified by posting a copy of the notice according to section 5. IC 5-14-1.5-5(d).

Executive sessions are meetings that are not open to the public. IC 5-14-1.5-2(f). An executive session may be held only in certain prescribed instances. One purpose is for “discussion of strategy with respect to...the purchase or lease of real property by the governing body up to the time of a contract or option to purchase or lease is executed by the parties.” IC 5-14-1.5-6.1(b)(2)(D). 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). Public notice of executive sessions must state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b). IC 5-14-1.5-6.1(d).

Specificity of Executive Session Notice

You allege that the notice for the December 31 executive session was not specific as to the purpose, as required in IC 5-14-1.5-6.1(d). The City offers no rebuttal to this allegation, and indeed, it has been restated by this Office many times that a general description such as “to discuss potential contract” is insufficient under the Open Door Law. In its complaint response, the City puts forth the purpose to be for strategy discussion for purchase of real estate, IC 5-14-1.5-6.1(b)(2), but offers no reason why the notice did not state this. It is my opinion that the notice of executive session for the December 31 meeting did not meet the requirements of the Open Door Law.

Emergency Meetings

As set forth previously, an emergency meeting may be held when necessary to deal with an emergency involving actual or threatened injury to person or property, or actual or threatened disruption of the governmental activity under the jurisdiction of the public agency by any event. The City cites the loss of the earnest money deposit and the benefit of the bargain as a result of the failure to convene a quick meeting to approve the purchase of the property by January 1, but this preservation of the benefit of the bargain does not, in my opinion, meet the “actual or threatened injury to property” contemplated in the Open Door Law. The potential injury appears

to be in the loss of the bargain, not to property itself. In addition, by the plain language of the statute, emergency meetings must proceed only as a result of actual or threatened injury to property occasioned “by any event.” Similar reasons for holding an emergency meeting, the loss of funding due to a school corporation’s failure to take action on a matter, were proposed to be an emergency and rejected by the public access counselor. *See Opinion of the Public Access Counselor, Informal Inquiry Response 03-FC-32.* It is my opinion that the City could not hold an emergency meeting for the reason offered by the City in its complaint response, because there was no actual or threatened injury to property of the City.

Executive Session

Your final assertion is that the Council could not meet in executive session even for strategy discussion concerning the purchase of the real estate. This is because a purchase agreement had already been executed, and because you have been told that the discussion was not necessary for bargaining reasons. If it is true that the City, prior to the executive session, had already been substituted for the Redevelopment Commission as the buyer in the executed purchase agreement, then the Council’s meeting in executive session to discuss the need to approve the purchase and close no later than January 1 would not appear to meet the executive session instance, since such strategy discussions must occur before the parties have executed an option to purchase or purchase contract. Whether the City had executed a purchase agreement when the Council convened the executive session is a matter of dispute between you and the City. The City states “it was only upon learning that the seller would not extend the time for the Redevelopment Commission to purchase the property that steps were taken to have the Common Council purchase the real estate on behalf of the City of Madison generally *rather than the Redevelopment Commission.*” The City denies that it was a party to the purchase agreement, either when it was originally executed by the Redevelopment Commission in October or by assignment as you allege.

Generally, the public access counselor is not in a position to resolve factual disputes. It is difficult to ignore the impression that the City is taking inconsistent positions: the emergency meeting was necessary so that the City could meet the terms of an agreement to close the sale by January 1, or else lose the benefit of the sale price or even the opportunity to purchase the parcel at all. How could the City lose the “benefit of its bargain” if no bargain had been struck at the time that the City convened the executive session? If the strategy discussions were to consider accepting the seller’s offer to sell the property to the City on the same terms as the seller had agreed to sell to the Redevelopment Commission, then the executive session would fit. Yet, the City has made no such assertion. In any case, exceptions to open meetings are narrowly construed so as to effectuate the policy of openness that is the purpose of the Open Door Law. IC 5-14-1.5-1.

CONCLUSION

For the foregoing reasons, I find that the notice of executive session did not specify the purpose for the executive session as required by the Open Door Law. In addition, I find that the notice of the executive session and public meeting were not posted at least 48 hours in advance, and the meetings did not meet the “emergency meeting” criteria. In addition, the City of Madison Common Council could not hold an executive session for strategy discussions with respect to the purchase of real property if the City of Madison Common Council had executed an agreement to purchase the property prior to the executive session.

Sincerely,

Karen Davis
Public Access Counselor

cc: Robert L. Barlow II