March 26, 2007

Kevin Russell
6123 Golden Eagle Drive
Zionsville, IN 46077

Re: Formal Complaint 07-FC-49; Alleged Violation of the Open Door Law by the Whitestown Redevelopment Commission

Dear Mr. Russell:

This is in response to your formal complaint alleging that the Whitestown Redevelopment Commission ("Redevelopment Commission") violated the Open Door Law by holding its February 1 meeting in a building that is not accessible to individuals with a disability. I find that the Open Door Law's prohibition on public agencies does not by its terms apply to the Whitestown Redevelopment Commission. I also find that holding a meeting in a building that is not accessible to individuals with a disability violates the spirit of the Open Door Law.

BACKGROUND

You filed a formal complaint alleging that the February 1 meeting of the Redevelopment Commission violated the Open Door Law because it was held in Town Hall, which you contend is not accessible to individuals with a disability under the standards enunciated in the Americans With Disabilities Act ("ADA"). You alleged a similar violation with respect to the Whitestown Town Council in Complaint #07-FC-15. I issued an opinion in that matter on February 20, 2007.

I sent a copy of your complaint to the Redevelopment Commission. I received the enclosed response from Stephen C. Unger. Mr. Unger mounts a two-prong defense. First, Mr. Unger states that by its terms the Open Door Law does not prohibit the Redevelopment Commission from holding its meetings in a location that is not accessible to individuals with a disability, because Indiana Code 5-14-3-8(a) limits the scope of the provision. IC 5-14-3-8 does not apply to the Redevelopment Commission because the Redevelopment Commission is not the type of public agency covered by IC 5-14-3-8. Mr. Unger cites several cases to support his contention that the Court of Appeals' opinion in *Town of Merrillville v. Blanco* is not precedent

for the proposition that section 8 applies to local units of government such as the Redevelopment Commission, because that issue was not before the Court of Appeals in that case.

His second contention is that even if section 8 governed the Redevelopment Commission, the ADA's accessibility guidelines apply only to the design or construction of buildings that existed prior to the January 26, 1992 effective date of Title 2, or subsequent alterations to the buildings.

Mr. Unger specifically requested an opinion setting forth whether section 8 of the Open Door Law applies to the Redevelopment Commission and other local public agencies.

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. The purposes of this chapter are remedial, and its provisions are to be liberally construed with the view of carrying out its policy. Ind. Code 5-14-1.5-1.

Except as provided in section 6.1 of this chapter, 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).

The Open Door Law generally provides that "public agency" means the following:

(1) Any board, commission, department, agency, authority, or other entity, by whatever name designated, exercising a portion of the executive, administrative, or legislative power of the state.

(2) Any county, township, school corporation, city, town, political subdivision, or other entity, by whatever name designated, exercising in a limited geographical area the executive, administrative, or legislative power of the state or a delegated local governmental power.

(3) Any entity which is subject to either:

(A) budget review by either the department of local government finance or the governing body of a county, city, town, township, or school corporation; or

(B) audit by the state board of accounts.

(4) Any building corporation of a political subdivision of the state of Indiana that issues bonds for the purpose of constructing public facilities.

(5) Any advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency, except medical staffs or the committees of any such staff.

(6) The Indiana gaming commission established by IC 4-33, including any department, division, or office of the commission.

(7) The Indiana horse racing commission established by IC 4-31, including any department, division, or office of the commission.

IC 5-14-1.5-2(a).

The provision at issue in your complaint is the following:

(a) **This section applies only to the following public agencies**:

(1) A public agency described in section 2(a)(1) of this chapter.

(2) A public agency:

(A) described in section 2(a)(5) of this chapter; and

(B) created to advise the governing body of a public agency described in section 2(a)(1) of this chapter.

(b) As used in this section, "accessible" means the design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (41 C.F.R. 101-19.6, App. A (1991)) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (56 Fed. Reg. 35605 (1991)).

(c) As used in this section, "individual with a disability" means an individual who has a temporary or permanent physical disability.

(d) A public agency may not hold a meeting at a location that is not accessible to an individual with a disability.

IC 5-14-1.5-8 (Emphasis supplied).

By its terms, section 8(d), prohibiting a "public agency" from holding a meeting at a location that is not accessible to an individual with a disability, applies to the entities described in section 8(a)(1) and (2), which are:

(1) Any board, commission, department, agency, authority, or other entity, by whatever name designated, exercising a portion of the executive, administrative, or legislative power **of the state**; or

(2) Any advisory commission, committee, or body created by statute, ordinance, or executive order to advise the governing body of a public agency described in section 2(a)(1) of the Open Door Law (an entity described in (1) above).

Section 8, added in 1992, applies to only the above two entities. However, in *Town of Merrillville v. Blanco, 687 N.E.2d 191(Ind. Ct. App. 1997)*, the Indiana Court of Appeals held that IC 5-14-1.5-8 makes clear that meetings are to be held in facilities that permit barrier-free physical access to the physically handicapped. *Id.* at 198. The plaintiff in that case had challenged his dismissal after a meeting of the Merrillville Board of Metropolitan Police Commissioners.

The plaintiff had argued that the Town of Merrillville had held meetings in locations that were not accessible to individuals with a disability. The Town of Merrillville argued that its failure to hold the meeting in an accessible location was a harmless variation from the strict requirements of the Open Door Law, and it substantially complied because the Town had a policy to accommodate any disabled individual who sought to attend a commission meeting, and there was no evidence that anyone was denied access because of a disability. The Court held that the statute does not make allowances for agencies with plans to accommodate disabled individuals when those individuals express an interest in attending the hearing. Rather, the statute prohibits a meeting from being held in an inaccessible location, without regard to the willingness to accommodate an individual with a disability.

Mr. Unger argues that because the *Town of Merrillville* case did not confront or decide any issue with respect to the application of section 8 to the town of Merrillville, the case is not precedent for the proposition that towns or other local units outside the ambit of section 8(a) must hold meetings in a location that is accessible.[1] I agree with the Redevelopment Commission that *Town of Merrillville* did not decide the issue of the scope of section 8, and therefore is not relied upon as precedent. *See Hahn v. Moore*, *134 N.E.2d 705, 706 (Ind. Ct. App. 1956)*("To determine whether a case is a precedent for a stated proposition and therefore to be adhered to under the rule of *stare decisis*, it is proper to ascertain the exact point or points before the court for adjudication."); and *Rouse v. Paidrick, 49 N.E.2d 528, 531 (Ind. 1943)*("An opinion which does not mention the principle for which the case is supposed to be authority carries little weight.")

Therefore, it is my opinion that the Redevelopment Commission does not come within the ambit of section 8(a). I also find that the case of *Town of Merrillville v. Blanco* does not hold that a town or other local public agency is required to follow section 8.

I expressly do not make any finding with respect to whether federal law directly mandates that persons with a disability must be accommodated at meetings of local governing bodies. Hence, Mr. Unger's argument that the Whitestown Town Hall has been "grandfathered" because it was constructed prior to 1992 is relevant with respect to whether or to what degree the Town Hall must be altered to meet accessibility standards, but this issue lies beyond the scope of the Office of the Public Access Counselor.

However, I do not agree with the Redevelopment Commission that the age of the building would be a consideration *if* section 8 applies to the Redevelopment Commission. In my opinion, section 8 prohibits public meetings in locations that do not conform to certain standards set forth in the ADA. Whether the ADA would mandate alterations to buildings or not, the legislature has determined that public meetings should be held in only those locations that meet the ADA standards. Hence, this opinion should not be read to endorse the Redevelopment Commission's view that entities subject to section 8 may hold meetings in inaccessible locations where the ADA would not mandate alterations.

Finally, I wish to state that holding a meeting in a location that is not accessible to individuals who are physically disabled may prevent individuals with a disability from attending a meeting. Inclusiveness is consistent with the policy of the Open Door Law. At a minimum, persons who wish to attend a meeting should be accommodated upon request, and notice should be published prior to every meeting explaining how such accommodation can be requested. A better policy that accommodates individuals who regularly attend meetings is to hold the meetings in a location that is accessible to individuals with a disability.

[1] The Board of Metropolitan Police Commissioners is not an entity that exercises any power of the state and does not advise a governing body exercising a power of the state.

CONCLUSION

For the foregoing reasons, I find that the Redevelopment Commission did not violate section 8 of the Open Door Law.

Sincerely,

Karen Davis
Public Access Counselor

cc: Stephen C. Unger