

September 7, 2000

Mr. Thomas T. Dye
609 North 13th
Vincennes, Indiana 47591

Re: *Advisory Opinion 00-FC-23 Alleged Violations of the Indiana Open Door Law by the City of Vincennes with the respect to the Purchase of Real Property.*

Dear Mr. Dye:

This is in response to your formal complaint, which was received on August 9, 2000. You have alleged that THE City of Vincennes, through either their Redevelopment Commission or the Board of Public Works, has violated the Indiana Open Door Law, Indiana Code chapter 5-14-1.5 ("ODL.") Specifically, you claim that action was taken without proper notice to the public and outside of a public meeting to acquire real property known as "Parcel 17." Mr. Rabb Emison, City Attorney, responded to your complaint in a letter dated August 14, 2000. A copy of his response is enclosed for your reference.

The Redevelopment Commission is the responsible governing body in the purchase of Parcel 17. It is my opinion that the Redevelopment Commission has not been posting public notices of its meetings in accordance with Indiana Code section 5-14-1.5-5. While it appears that the Redevelopment Commission took action in their public meeting of April 18, 2000 to approve the claim and purchase of Parcel 17, the public was not notified in accordance with the Open Door Law. It is also my opinion that the Redevelopment Commission is required to prepare memoranda for their meetings, and that the minutes prepared for the April 18th meeting, and for the other meetings of the Commission, are not sufficient to satisfy the memoranda requirements under Indiana Code section 5-14-1.5-4.

BACKGROUND

According to your complaint, you believe that the Open Door Law was violated with respect to the purchase of Parcel 17, property formerly owned by R. David Van Eaton and for which the City paid \$84,950.00 earlier this year. You have provided copies of the agendas and meeting minutes of the Redevelopment Commission and the Board of Public Works as evidence that these bodies did not notify the public or take action to purchase Parcel 17 in a public meeting. Accordingly, you have asked for a determination of which of these two governing bodies for the City had authority to purchase Parcel 17 and if the responsible governing body violated the Open Door Law with respect to that purchase.¹

In his response to your complaint, Mr. Emison responded that the Redevelopment Commission is

the responsible governing body in the purchase of Parcel 17.² This purchase was part of the Hart Street Improvement Plan authorized by the adoption of a TIF (tax increment financing) program in the City. The Redevelopment Commission operates this program in compliance with federal guidelines. Independent consultants who planned the street improvement requested that the City purchase Mr. Van Eaton's property, Parcel 17, and the offer to buy was made by an independent buyer employed by that consultant. The first exhibit attached to Mr. Emison's response indicates that the transaction was begun in 1999. After taking office in January 2000, Mayor Mooney was asked to sign the certificate of review, a copy of which is attached. Thereafter, the Redevelopment Commission at some time authorized the payment of the appraised amount, \$84,950.00 to Mr. Van Eaton, as is evidenced by the third exhibit attached to Mr. Emison's response.

It was necessary to seek out information beyond that provided in Mr. Emison's response in order to fully address your complaint. When I inquired about meeting notices, Ms. Dawn Krzynowek, who prepares notices and prepares the minutes for the Redevelopment Commission, stated that the members schedule their meetings one at a time. While a notice is immediately sent to the local media, no public notice is not posted in the building at least forty-eight (48) hours in advance of that meeting.

A review of the minutes of the Redevelopment Commission's meetings for the last several months or more do not provide any specific evidence that the purchase was approved at a public meeting. According to the facts provided by Mr. Mark Kimmel, financial consultant to the Commission, at some point in the last year, public meetings were held to discuss four (4) alternatives for the intersection in question. After deciding that one particular plan would be implemented, the Commission directed that an appraisal be performed and offers to be made, including to the owners of Parcel 17. Once the offer was accepted, a claim was prepared for consideration by the Commission. The only actions of the Commission with respect to the purchase of Parcel 17, therefore, would have been the approval of the claim since independent contractors were handling the other activities related to the purchase of land for this intersection project.

Mr. Kimmel also reported to me over the telephone that he did present the issue of the claim for the purchase of Parcel 17 to the Commission in their April 18, 2000 public meeting. The agenda and minutes of the April meeting do reflect the presentation of the financial report by Mr. Kimmel and the approval of claims, but there is no specific reference to the parcels approved for purchase at that meeting. Enclosed you will find a copy of Mr. Kimmel's financial report, which includes references to the VanEaton property (Parcel 17) that he submitted to the Commission for consideration at their April, 2000 meeting.

ANALYSIS

The intent and purpose of the Indiana 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 Redevelopment Commission is a public agency and a governing body for the purposes of the Law. Ind. Code §§ 5-14-1.5-2(a) and 2(b).

Indiana Code section 5-14-1.5-3(a) provides, in pertinent part, that: 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.

A meeting is defined as "a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business." Ind. Code §5-14-1.5-2(c). The questions presented by your complaint are whether the Redevelopment Commission properly notified the public of its purchase of Parcel 17 and whether the action to purchase took place outside of a public meeting in violation of the Open Door Law.

Meeting Notices

Indiana Code section 5-14-1.5-5(a) provides that:

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 (48) hours (excluding Saturdays, Sundays, and legal holidays) before the meeting.

The governing body is required to:

- (1) (post) 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; and
- (2) (deposit) in the United States mail with postage prepaid or by delivering 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.

Indiana Code §5-14-1.5-5(b).

According to the information provided by Ms. Krzynowek, once the Commission sets its next meeting date, the media is notified. No public notice is posted in the building until the day of the meeting, short of the forty-eight (48) hour notice requirement under the Open Door Law.

The Indiana General Assembly and the Indiana Court of Appeals have recognized that a notice that does not meet all of the technical requirements may still be valid under a substantial compliance approach. In *Town of Merrillville v. Blanco*, 687 N.E.2d 191 (1997), the Indiana Court of Appeals reviewed an issue concerning that Town's police commission. In that case, the Court determined that the Town clearly violated the technical requirements of the ODL by failing to post notice of a hearing at least forty-eight (48) hours in advance. *Id.* at 196. The Court analyzed this technical violation in light the decision in , 489 N.E.2d 616 (Ind. App., 1986) and subsequent changes to the Open Door Law by the Indiana General Assembly. Under the ODL, a court will review a governing body's notice under standards identified at Indiana Code section 5-14-1.5-7(d), including the extent to which the violation "denied or impaired access to any meetings that the public has a right to observe and record." Ind. Code §5-14-1.5-7(d)(1).

The question, therefore, is whether the Commission's practices concerning public notice substantially comply with the notice requirements of the Open Door Law. Unlike other situations that have been presented to this Office³, the failure to post in compliance with Indiana Code section 5-14-1.5-5 is not a one-time matter, it is the practice of the Commission. While the media is notified well in advance of the forty-eight (48) hours, there is no requirement that the media print or report the meeting date, time and location for the public. The only public notice required is consistently being done in a manner that does not ensure the public an adequate opportunity to learn that a meeting will be held. For these reasons, it is my opinion that the current practice with respect to the public notices of the Commission does not substantially comply with the Open Door Law and the failure to post public notice of meetings at least forty-eight (48) hours in advance violates the Open Door Law.

Public Meetings and Meeting Memoranda

Under the Open Door Law, public agencies that conduct meetings are required to keep memoranda.

As the meeting progresses, the following memoranda shall be kept:

- (1) The date, time, and place of the meeting.
- (2) The members of the governing body recorded as either present or absent.
- (3) The general substance of all matters proposed, discussed, or decided.
- (4) A record of all votes taken, by individual members if there is a roll call.

Indiana Code section 5-14-1.5-4(b). These memoranda are to be available within a "reasonable period of time after the meeting for the purpose of informing the public of the governing body's proceedings." Ind. Code §5-14-1.5-4(c). Meeting minutes are not required under the Open Door Law, but if created, must be available for public inspection and copying. Ind. Code §5-14-1.5-4(b).

You provided copies of several of the Redevelopment Commission's meeting minutes with your complaint. There were no separate memoranda provided to you or in response to my request to the City for information on the Commission's meetings, so I have reviewed these minutes to determine whether they conform to the minimal requirements set for meeting memoranda under the Open Door Law.

In my review of these minutes, the place of the Commission's meetings is not stated, but they do include the dates and the times. A record of members present and absent and of votes taken is included. As far as the general substance of matters, proposed, discussed or decided, the minutes do reflect some of the actions of the Commission, but often there is no detail at all or even "inaudible" statements that note that the transcriber could not determine what was considered. What is more troubling is that the Commission's meeting minutes I have reviewed indicate that minutes of prior meetings that have these inaudible portions were still approved with no attempts to reconstruct or address these inaudible portions of the meeting tapes.

With respect to your complaint, it was not evident to me after reviewing the April 18, 2000 minutes that the Commission even acted upon Parcel 17 at their public meeting, as there was only a general reference to the approval of claims. Only after contacting various people and obtaining the

financial report that was presented to the Commission at their April meeting was I able to confirm that the claim for Parcel 17 was among those items under consideration at that meeting.

It is my opinion that the Redevelopment Commission must keep memoranda of their meetings that conforms to the very minimal requirements of Indiana Code section 5-14-1.5-4 and that the current minutes being prepared after each meeting do not sufficiently meet these requirements. While the minutes that were provided to me meet some of these requirements, it is entirely too difficult to determine what happens at the Commission's meetings by reviewing their minutes alone. The purpose of the Open Door Law is to ensure that the public is fully informed. My advice to the Commission, therefore, is to provide a more adequate description of matters discussed, decided or proposed in the text of its memoranda or attach to their memoranda copies of any reports received at their meetings to better accomplish this purpose.

CONCLUSION

It is my opinion that the Vincennes Redevelopment Commission did act in a public meeting on the approval of the claim and purchase of Parcel 17. The Commission, however, does not properly post public notices of its meetings, including the meeting held on April 18, 2000, and this failure to post at least forty-eight (48) hours in advance of the meeting violated Indiana Code section 5-14-1.5-5. It is also my opinion that the Redevelopment Commission is required to prepare memoranda for their meetings, and that the minutes prepared for the April 18th meeting, and for the other meetings of the Commission, are not sufficient to satisfy the memoranda requirements under Indiana Code section 5-14-1.5-4.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. Rabb Emison, City Attorney

Mr. Mark Kimmel

Ms. Dawn Krzynowek

¹ You had also asked for a determination as to whether it is too late to ask a court to void the decision under Indiana Code section 5-14-1.5-7 if the responsible governing body had violated the Open Door Law. It is clear in Indiana Code section 5-14-1.5-7 that you must file such an action within 30 days after the alleged violation occurred or the date that you had knowledge of the alleged violation. Your

complaint indicates that you knew of the alleged violation in mid-July, therefore, you would have been required to file your action to void the action of the governing body by mid-August of this year. The filing of a formal complaint does not toll the statute of limitations. See, Ind. Code §5-14-5-12.

² The remainder of the Opinion will therefore, focus on the alleged violations of the ODL.

³ See, for example, Opinion 00-FC-6.
