



STATE OF INDIANA

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April 13, 2009

Tom DeArk
PO Box 2062
Clarksville, Indiana 47131

*Re: Informal inquiry 09-INF-10 regarding the Town of Clarksville
Redevelopment Commission*

Dear Mr. DeArk:

This is in response to your informal inquiry dated February 16, 2009. Pursuant to Ind. Code § 5-14-4-10(5), I issue the following opinion in response to your inquiry.

You write regarding the Town of Clarksville Redevelopment Commission ("Commission"). You pose four questions, essentially inquiring whether the Commission violated the Open Door Law ("ODL") (Ind. Code 5-14-1.5) and, if so, what can be done to enjoin the Commission from committing future violations.

BACKGROUND

You indicate that the Commission held a public meeting on January 8, 2009, at which the Commission approved a contract with an outside contractor. You further indicate that in a letter dated January 22, the Commission terminated the contract. At a February 5 meeting, the Commission voted to affirm the action taken in the letter. During the February 5 meeting, the Commission indicated that prior to the January 22 letter a consensus had been reached regarding terminating the contract.

You submit the following questions:

1. Does the decision to cancel the contract, the decision to send the letter, and/or the act of sending the letter constitute "official action" by the Redevelopment Commission?
2. If either decision or action does in fact constitute "official action," has the Redevelopment Commission violated the ODL by taking such "official action" outside a public meeting?
3. Does the ex post facto vote at the February 5 meeting to "affirm" the decision and action pertaining to the contract cure any violation of the ODL that might have occurred?

4. If violation(s) have occurred, what can be done to enjoin the Commission from committing future violations?

My office provided the Commission the opportunity to respond to the allegations. The Commission responded to the inquiry by undated letter received on March 9 from Clarksville Town Attorney Christopher Sturgeon. The Commission contends there was no violation of the ODL because no meeting occurred outside of or between the January 8 and February 5 meetings. The Commission contends that consensus was reached among the members of the Commission but was done so without a gathering of a majority of the members. The Commission cites *City of Gary v. McCrady*, 851 N.E.2d 359 (Ind. Ct. App. 2006) as support for the Commission's actions. Finally, the Commission contends the letter was not "official action."

ANALYSIS

The ODL requires that a meeting of a governing body of a public agency must be open so members of the public may observe and record. Ind. Code § 5-14-1.5-3(a). A "meeting" is a "gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. I.C. § 5-14-1.5-2(c). "Official action" is receiving information, deliberating, making recommendations, establishing policy, making decisions, or taking final action (i.e. voting). I.C. § 5-14-1.5-2(d).

You inquire whether the Commission took "official action" by reaching a consensus and sending the January 22 letter. It is important to understand that nothing in the ODL requires a governing body to meet in order to take "official action." Instead, the ODL requires that when a majority of the members of a governing body do gather for the purpose of taking official action on public business, that gathering is a meeting and must be open so the public may observe and record, unless another provision allows the meeting to be closed to the public. I.C. § 5-14-1.5-3. So your inquiry as to whether the Commission took official action is moot. Even if the Commission did take official action by sending the January 22 letter, nothing in the ODL would require that action to have been taken at a meeting.

The question, then, is whether the Commission violated the ODL by conducting a meeting without notice to the public and without the opportunity for the public to observe and record. In my opinion, it did not. You base your allegation on the January 22 letter and the indication that the Commission reached a consensus before sending the January 22 letter. The Commission agrees that the members did reach a consensus. But the Commission contends there was not a gathering of a majority of the members. Instead, the members were polled concerning their views about continuing the contract. As the Commission indicates, *City of Gary v. McCrady*, 851 N.E.2d 359 (Ind. Ct. App. 2006) is directly on point. There, a member of the Common Council polled other members outside of a meeting to learn their views on an issue. The court said, "in order to have a meeting under the Open Door Law, a majority of the governing body must be present." *Id.* at 367.

Here, there was no gathering of a majority of the governing body. As such, there was no meeting. And if there was no meeting, the ODL was not implicated by the Commission's actions. The ODL does not provide guidelines for taking actions when there is no meeting.

Your final two questions are contingent upon the finding of an ODL violation. In my opinion the Commission has not violated the ODL. As such, I do not address whether the violation was cured. You inquire about enjoining the Commission from committing future violations. This office does not have the power to enjoin the Commission from taking any action. For an injunction, you would need to go to any court of competent jurisdiction. *See* I.C. § 5-14-1.5-7. Here, though, it is my opinion there has been no violation.

CONCLUSION

For the foregoing reasons, it is my opinion the Commission has not violated the ODL.

Best regards,



Heather Willis Neal
Public Access Counselor

Cc: Christopher Sturgeon, Clarksville Town Attorney