

September 5, 2001

Mr. Hans Markland
58 W. 1000 N.
Wheatfield, IN 46392

Re: Advisory Opinion 01-FC-45; Alleged Violations of the Indiana Open Door Law by the Jasper County Plan Commission.

Dear Mr. Markland:

This letter is in response to your formal complaint, which was received in this Office on August 17, 2001. You have alleged that the Jasper County Plan Commission ("Commission") violated the Open Door Law ("ODL") Indiana Code section 5-14-1.5. Specifically, you have alleged that the Commission fails to post their agenda outside of their meeting room despite your repeated requests that they do so. In addition, you allege that the meeting room is too small and that meetings are conducted in a manner that discourages citizen input. Mr. James Beaver, the Commission attorney, responded in writing on behalf of the Commission. A copy of his response is enclosed for your reference. For the reasons set forth below, it is my opinion that the Commission substantially complied with the ODL by making copies of their agenda available, but it is also my advice that they post the agendas as has been their practice since the filing of your formal complaint.

BACKGROUND

According to the facts as you have presented them, you filed your complaint after attending a meeting of the Commission held on July 23, 2001. You allege that the Commission violated the ODL by failing to post an agenda outside of the meeting location. You indicate that you raised this issue with Commission staff so that people attending the meeting could understand what would be discussed and how soon a subject matter they may have come to comment upon would be considered. You believe the failure to post an agenda is so citizens will be discouraged from participating. You also allege that the meeting room, which has thirty-eight (38) seats is inadequate to accommodate your growing county. Further, you state that the Commission members do not speak loudly enough for the audience to hear that discussion.

In response to your complaint, Mr. Beaver first states that your complaint was not timely under Indiana Code section 5-14-5-7, which requires a formal complaint to be filed within thirty (30) days after the alleged denial of access. He also clarified in his response that he is not President of the Commission but the Administrative Attorney, who does conduct certain proceedings before the Commission. The Commission members ask questions during these proceedings, deliberate in the open, public meeting and come to a decision. If a matter is continued, Mr. Beaver announces the date and time of the continued meeting. Meetings are recorded by recording equipment and written minutes are prepared and approved at the next public meeting of the Commission. He disputes your allegation that the

Commission has attempted to discourage or prevent citizen participation. Applicants and Respondents are given time to present their views on issues before the Commission and hearings are conducted after the publication of notice in the newspapers, with notice to adjoining landowners. A list of subject matters to be considered at a particular meeting is mailed to news media that have requested such notices as well.

Mr. Beaver had not personally noticed whether the agenda for the meetings had been posted at the meeting site, but the Director of the Commission had begun posting the agenda upon receipt of your formal complaint. The agenda had always been available at the Commission's office and at the hearing location for anyone who asked for it. According to Mr. Beaver, the posting of an agenda would not address your complaint about the amount of time that one must wait before the Commission acts on a particular issue. The Commission does not set specific start times due to fact that the amount of time necessary for each application is unknown prior to the hearing time. As far as the meeting room is concerned, it has always been adequate to hold the persons interested in particular meetings and the reason many people are standing outside is that they have no interest in the Application being heard.

ANALYSIS

The intent and purpose of the ODL 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 provisions of the ODL are to be "liberally construed with the view of carrying out its policy." Ind. Code § 5-14-1.5-1. The Commission is a governing body of a public agency subject to the ODL. Ind. Code § 5-14-1.5-2(b)(2).

As noted above, the general rule is that meetings of public agencies are to be held openly, so that the public may "observe and record them." Ind. Code § 5-14-1.5-3(a). One of the requirements of the ODL is that if an agenda is used, then the governing body "shall post a copy of the agenda at the entrance to the location of the meeting prior to the meeting." Ind. Code § 5-14-1.5-4(a). The failure to post an agenda, therefore, is a violation of the ODL. Until the Commission received your complaint, the agenda had been made available to anyone who asked for a copy and was available to those who attended the meetings, which are commendable. The Commission, however, did not post the agenda and that is required by the ODL.

The failure to post an agenda is a technical violation of the ODL and therefore, it is my position that the Commission was not in technical compliance with the ODL. Under the circumstances, a court would likely look to see if the actions of the Commission were in "substantial compliance" with the Open Door Law. *See, Turner v. Town of Speedway*, 528 N.E. 2d 858 (Ind. App. 1988). "Substantial compliance" includes: (1) the extent to which the violation denied or impaired access to a meeting; and (2) *the extent to which the public knowledge or understanding of the public business conducted was impeded.* (Emphasis added.) *Town of Merrillville v. Blanco*, 687 N.E. 2d 191 (Ind. App. 1998).

Despite the fact that the Commission was not posting the meeting agendas, the agendas were made

available to persons who asked for a copy and in the meeting room. Further, meeting notices are published in newspapers and adjoining landowners are given specific notice under state law. It appears, therefore, that the failure to post an agenda of these hearings, therefore, did not prevent or impair the public's knowledge and understanding of the business to come before the Commission at a particular meeting. For these reasons, it is my opinion that the Commission has substantially complied with the ODL despite their failure to post meeting agendas outside of the meeting location. It is preferable, however, that the Commission also comply with Indiana Code section 5-14-1.5-4(a) and, since the filing of your formal complaint, the agendas are now posted outside of the meeting location. It is my advice that the Commission post the agendas for their meetings in the future.

As to your additional complaints, it does not appear that they constitute violations of the ODL. There are no specific requirements under the ODL for meeting room size or to require that microphones or other amplification methods be used to ensure that all persons can hear the discussion of the governing body. Certainly, if the audience is having trouble hearing the discussion of the Commission, that fact should be brought to the Commission's attention but it is not a violation of the letter of the ODL. Also, there are no requirements under the ODL that require a governing body to set specific times for hearings to take place within a meeting agenda to accommodate those who may want to attend a specific hearing. The fact that a person may have to wait to be heard on a specific application before the Commission is not a violation of the ODL.

CONCLUSION

It is my opinion that, despite the failure to post meeting agendas outside of the meeting location, the Jasper County Plan Commission substantially complied with the ODL. It is my advice that the Commission should continue to post these agendas as has been their practice since the filing of your formal complaint.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Mr. James Beaver, Attorney

Jasper County Plan Commission

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