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May 14, 2010

Debra Hass
PO Box 113
Ithaca, NE 68033

Re: *File No. 10-M-106; Ithaca Village Board; Debra Hass*

Dear Ms. Hass:

This letter is in response to your correspondence received by us on January 26, 2010 and the supplemental information provided on March 24, 2010, March 26, 2010, and April 6, 2010, in which you requested that this office investigate alleged violations by the Village of Ithaca Board ("Board") and/or the Ithaca Planning Commission ("Planning Commission") of the Nebraska Open Meetings Act, Neb. Rev. Stat. §§ 84-1407 through 84-1414 (Reissue 2008, Supp. 2009). In accordance with our normal procedures, we requested a response from the Board and Planning Commission after we received your complaint and supplemental materials, and we subsequently received responses from the Village Attorney on April 26, 2010 and May 6, 2010. We have now had an opportunity to review your allegations and the Village's response in detail, and our conclusions are set out below.

FACTS

Our understanding of the facts in this case is based upon your correspondence, its voluminous supporting documentation, and the responses from the Board and Planning Commission. We have identified nearly two dozen Open Meetings Act allegations in your correspondence. However, because of the large number of complaints, and the one year statute of limitations for civil proceedings against a public body in the Open Meetings Act, we will limit our detailed analysis herein to only those allegations which occurred in the year preceding your letter, or to those which we believe reveal a violation of the Open Meetings Act. See, Neb. Rev. Stat. § 84-1414 (2008). We have, however, reviewed each one of your complaints and have made a determination as to each one.

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In general, your Open Meetings Act complaints relate to the agendas and minutes of meetings, and "secret meetings" of the Board.

In addition to your Open Meetings Act allegations, you also allege the Board violated various other state, federal, and local laws, and generally allege "corruption." However, as explained in our February 2, 2010 letter to you, this office does not have general supervisory authority over governmental subdivisions in Nebraska. We do not have the authority to investigate matters related to "corruption," FEMA, zoning, building permits and regulations, payment of employees, mail tampering, changes to comprehensive plans or zoning maps, trespassing, bidding, or any of the other non-Open Meeting Act complaints listed in your letter. We also have no authority over the enforcement of local ordinances, election matters relating to local boards, and whether Ithaca should have a separate "Board of Adjustment." Thus, we can take no action on your complaints related to these items and they will not be discussed further herein.

ANALYSIS

AGENDA

Neb. Rev. Stat. § 84-1411 (2009) provides the agenda requirements for purposes for the Open Meetings Act.

> (1) Each public body shall give reasonable advance publicized notice of the time and place of each meeting by a method designated by each public body and recorded in its minutes. Such notice shall be transmitted to all members of the public body and to the public. Such notice shall contain an agenda of subjects known at the time of the publicized notice or a statement that the agenda, which shall be kept continually current, shall be readily available for public inspection at the principal office of the public body during normal business hours. Agenda items shall be sufficiently descriptive to give the public reasonable notice of the matters to be considered at the meeting. Except for items of an emergency nature, the agenda shall not be altered later than (a) twenty-four hours before the scheduled commencement of the meeting or (b) forty-eight hours before the scheduled commencement of a meeting of a city council or village board scheduled outside the corporate limits of the municipality. The public body shall have the right to modify the agenda to include items of an emergency nature only at such public meeting.

Neb. Rev. Stat. § 84-1411.

"Sufficiently Descriptive"

You have complained that the Board meeting agendas for the July 2009 and August 2009 meetings list an item, "nonconforming lots/nonconforming uses," that is not sufficiently descriptive under the Open Meetings Act.

We agree that the July 2009 and August 2009 agenda item, "nonconforming lots/nonconforming uses," is not sufficiently descriptive under the Open Meetings Act. We would recommend the Board include those properties which it will discuss as "nonconforming" in the agenda. This will ensure sufficient notice to all in the community as to which properties will be discussed. However, the Board took no vote on the issue in its July 2009 meeting, and voted to send the issue to the Planning Commission for determination at the August 2009 meeting. We will not take any action against the Board for this lack of sufficiently descriptive agenda items, as we understand the Board believed that agenda item to be sufficiently descriptive, was acting in good faith, and took no action against the property owners at either of these meetings.

You have also alleged that the August 19, 2008 meeting Agenda item "International Building Code" and the agenda items for the November 24, 2009, December 22, 2009, and January 26, 2010 Board meetings "Building ordinances/building inspector" were insufficient for the Board to discuss implementing the 2009 International Building Codes as an update to Village code. We do not agree. These agenda items are sufficiently descriptive under Neb. Rev. Stat. § 84-1411.

Items discussed but not on agenda

You have also complained that the Board voted on an issue in November 2009 that was not found on its agenda. You state you were told that the Board believes that it can vote on "old business," without that old business being on the agenda. If this is the understanding of the Board, this is generally incorrect. The November 2009 Board minutes reflect that the Board took a vote on the hiring of the village clerk, however, this item was not on the agenda for this meeting. The vote, therefore, was a violation of the Open Meetings Act, unless the vote was of an emergency nature, which the Board has not indicated was the case.

The purpose of the agenda requirement is to give some notice of the matters to be considered at the meeting so that persons who are interested will know which matters are under consideration. *State ex rel. Newman v. Columbus Township Board*, 15 Neb. App. 656, 735 N.W.2d 399 (2007); *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281 (1979). If the Board votes on an item not found on its agenda, it is not complying with the very basic tenant of the Open Meetings Act – that the public is

informed as to what the public body plans to discuss and/or vote on during its public meetings.

However, the Board took up the same issue at its meeting in December 2009 when it moved and voted a second time on the hiring of the Village Clerk. Thus, the Board has cured its violation of the Open Meetings Act in a proper public meeting, and this situation does not warrant a lawsuit by this office to void the vote of November 2009. *Pokorny v. City of Schuyler*, 202 Neb. 334, 275 N.W.2d 281.

You have also alleged that the Board discussed and/or voted upon items in its July 21, 2009 meeting that did not appear on the agenda, in violation of the Open Meetings Act. The minutes of this meeting list various items to be discussed, one of which is "Nuisance Letters Hearings." The minutes from the meeting state that a "Motion to discuss the Cafe property . . concerning nuisance" was made and voted upon. "Nuisance Letters Hearings" may be more vague than this office would prefer, as we believe the properties to be discussed as nuisances should be listed in the agenda. However, if the owner of the Cafe property received a letter notifying him or her that a hearing would be held by the Board concerning that property, then the owner had sufficient notice of the hearing. You have not alleged you are the owner of that property and did not have sufficient notice. Thus, we can find no violation of the Open Meetings Act for this allegation.

Agenda "posting" and alteration

While your next allegations relate to 2008 meetings, and are more than one year old, they are allegations our office sees frequently regarding public bodies, so we have decided to address these issues. You allege that the agendas for both the April 22, 2008 meeting and the July 2008 meeting were not "posted" 24 hours before the meeting, and that the April 2008 agenda was altered less than 24 hours before the meeting. The Open Meetings Act does not require "posting" 24 hours before the meeting, only that there is "reasonable advance publicized notice" of the meeting. In addition, the Board has responded that both the April 2008 and July 2008 agendas were, indeed, "posted" more than 24 hours before the meeting. Furthermore, while the agenda cannot be altered less than 24 hours before the meeting, unless the item is of an emergency nature, the agendas from April 2008 you have provided state they were last altered more than 24 hours before the meeting. Without further documentary proof, we cannot assume any more than what the agenda states on its face. In addition, the Board states that the April 2008 agenda was posted, in its final form, more than 24 hours before the meeting. The Board denies any alteration was made to the agenda within 24 hours of the April 2008 meeting. Therefore, we found no Open Meeting Act violations relating to this complaint.

MINUTES

The Open Meetings Act provides:

(1) Each public body shall keep minutes of all meetings showing the time, place, members present and absent, and the substance of all matters discussed.

(2) Any action taken on any question or motion duly moved and seconded shall be by roll call vote of the public body in open session, and the record shall state how each member voted or if the member was absent or not voting. The requirements of a roll call or viva voce vote shall be satisfied by a municipality, a county, a learning community, a joint entity created pursuant to the Interlocal Cooperation Act, a joint public agency created pursuant to the Joint Public Agency Act, or an agency formed under the Municipal Cooperative Financing Act which utilizes an electronic voting device which allows the yeas and nays of each member of such city council, village board, county board, or governing body to be readily seen by the public.

(3) The vote to elect leadership within a public body may be taken by secret ballot, but the total number of votes for each candidate shall be recorded in the minutes.

(4) The minutes of all meetings and evidence and documentation received or disclosed in open session shall be public records and open to public inspection during normal business hours.

(5) Minutes shall be written and available for inspection within ten working days or prior to the next convened meeting, whichever occurs earlier, except that cities of the second class and villages may have an additional ten working days if the employee responsible for writing the minutes is absent due to a serious illness or emergency.

Neb. Rev. Stat. § 84-1413 (2009).

Items discussed but not in minutes

You have made more than one allegation regarding items being discussed by the Board, but not appearing in the minutes for that meeting.

You allege that the minutes from the July 21, 2009 Board meeting do not reflect the discussion or vote as to "nonconforming lots/nonconforming uses." We did not find any discussion or vote in the minutes relating to this topic. However, we did find the

vote about which you appear to be concerned, "Hass properties . . delay the hearing next meeting." This discussion appeared to take place during the "Nuisance Letters Hearings," which *is* listed as an agenda item. We do not find a violation of the Open Meetings Act relating to this complaint. However, we do question why the Board has several items listed under "New Business," including the "nonconforming" item, but has no mention of any of these three items in its minutes. If these items were discussed during the July 21, 2009 meeting, they should appear in the minutes. Neb. Rev. Stat. § 84-1413 (1)(the minutes should show "the substance of all matters discussed").

We have the same concern regarding the June 23, 2009 meeting, where several items appear on the agenda, but not in the minutes. If the Board is only including items which are voted upon in its minutes and omitting items simply discussed, it is violating the Open Meetings Act. However, they have denied that this has occurred. We are not entirely convinced, but without more, cannot state that a violation of the Open Meetings Act occurred. None of the recordings of meetings provided to us were from either of these dates. We will provide a copy of this letter to the Board, and remind them that the Open Meetings Act requires the minutes to include all items discussed in the meeting to appear in the minutes, not only those items on which it votes.

You have also alleged that in July 2009, the Planning Commission held a discussion regarding "nonconforming" properties which was omitted from the minutes. However, the agenda for this meeting lists no such item, and the Planning Commission has denied that any such conversation took place before, during, or after the July 2009 Planning Commission meeting. Thus, we can find no violation of the Open Meetings Act relating to this allegation.

Alteration of minutes

You have complained that the Board and/or the Planning Commission are violating the Open Meetings Act by altering minutes after meetings. You point to the July 14, 2009 Planning Commission minutes as an example. The record of a 30 x 30 garage being approved for a building permit was changed to a 36 x 36 garage. The Board has responded by explaining that the 30 x 30 description was a typographical error, and the application for the building permit listed the garage size as 36 x 36. Nothing in the Open Meetings Act prevents a public body from correcting typographical errors in its minutes. We do not have any evidence that this was anything other than a typographical error, and do not find a violation of the Open Meetings Act for this allegation.

Missing minutes

You contend that the minutes of the February, 2008 meeting were "missing" from the Board's records. The Board has admitted that its record keeping has been less than ideal over the years, but that no records are intentionally unavailable. There is no Open Meetings Act requirement that minutes of Board meetings be kept for any certain length of time. You do not allege that the minutes were not available at the Village office within the statutory time frame of ten working days or prior to the next meeting; only that you were unable to get copies nearly two years later. Thus, we can find no violation of the Open Meetings Act relating to this allegation.

MEETING BY TELECONFERENCE

You complain that the December 11, 2008 Planning Commission meeting was held with one member of the Planning Commission present by telephone. We have reviewed the minutes from this meeting and agree that the Open Meetings Act was violated on this date.

The minutes from this meeting state "Meeting was called to Order by Jeff Buckmaster @ 7:20 pm. Present:, Mary Hanson, ,Dee Steele/via phone conference call, Amy Beaty Absent were Aaron Johnson , and Gus Moreno" (typographical errors in original). It does not appear that Jeff Buckmaster is a member, or at least a voting member, of the Planning Commission. A motion was made, "Motion by Hanson and seconded by Steele /phone to accept the plan Vote : 3- 0 -2." It appears that Hanson, Steele (by phone) and Beaty voted "yes," there were no "no" votes, and Johnson and Moreno were marked "absent."

The minutes of this meeting show that a quorum of the members of the Planning Commission was only had by the appearance of one of the members by phone. That member participated in the discussion and vote of the motion. This is not permitted under the Open Meetings Act. Neb. Rev. Stat. § 84-1411(3) provides very limited circumstances under which a meeting via teleconference is permitted. The meeting of a local planning commission is not one of these circumstances. It would be permissible for Ms. Steele to participate in the meeting via teleconference, but she could not be counted towards the quorum or allowed to vote via phone. The quorum and any votes are only counted as to members of the public body present, in person, at the meeting. Thus, this meeting and vote violated the Open Meetings Act. However, as this meeting was over two years ago, no action can be taken against the Planning Commission for this violation.

"SECRET MEETINGS"

You have made general allegations that the Board has conducted "secret meetings," based upon your belief that decisions are made before the Board convenes, and that changes to the comprehensive plan and zoning maps have been made without public meetings. The Board denies this allegation. We must assume that the Board is acting in good faith and is in compliance with the Open Meetings Act, absent compelling evidence to the contrary. You have provided no details regarding alleged secret meetings, such as dates, those in attendance, and the public business discussed. While you state that it was "evident" that four Board members had met and discussed the issue of "nonconforming property" before the August 2009 Board meeting, we see no evidence from the materials you submitted that any discussions violating the Open Meetings Act occurred. Without detailed information, and with the Board's denial, we cannot find a violation of the Open Meetings Act with respect to this allegation. We will, however, remind the Board that it must ensure that all discussions of public business by a quorum of Board members must be made during a public meeting of the Board. See, Neb. Rev. Stat. § 84-1409(2) (2008).

You have also alleged that in March 2008, a quorum of the Board sent a letter to the members of the community, in violation of the Open Meetings Act. We have reviewed this complaint and the letters to which you refer, and have found nothing to substantiate a violation of the Open Meetings Act. Because this alleged violation is over one year old, we will not analyze this in depth here.

MISCELLANEOUS COMPLAINTS

You assert that the Board placed "Dead End" signs in the Village without voting on the matter. However, the Board has responded that the Dead End signs were already owned by the Village. In addition, they state, and we have verified, that the May 2008 Board minutes reflect a discussion regarding purchasing posts for these signs. Thus, your complaints regarding these signs do not involve any Open Meetings Act violations.

You also complain that the Board members pass "secret notes" between them during meetings, in order to keep their discussions off the record. The Board has denied this allegation. Again, we must assume that the Board is acting in good faith and is in compliance with the Open Meetings Act, absent compelling evidence to the contrary. Other than your general allegation of these secret notes, you have provided no evidence or specifics as to this allegation. Thus, we cannot find a violation of the Open Meetings Act relating to this allegation.

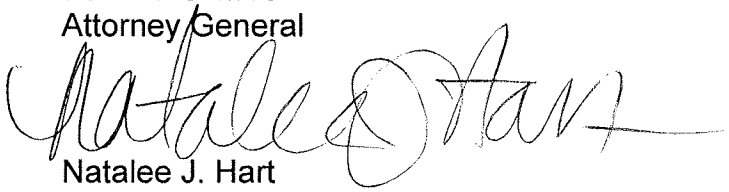
You make allegations of a "good buddy system" in Ithaca. However, none of the examples you cite implicates the Open Meetings Act. This Act does not prevent members of a public body from having access to the same services that any other citizen of a community has, such as building permits.

CONCLUSION

If you disagree with the analysis we have set out above, you may wish to consult your private attorney to determine what additional remedies, if any, are available to you under the Open Meetings Act.

Sincerely,

JON BRUNING
Attorney General



Natalee J. Hart
Assistant Attorney General

cc: Jovan Lausterer, Village Attorney

02-143-20