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May 4, 2005

Mr. Chuck Boyle, Jr.
736 Main Street
Marinette, WI 54143

Dear Mr. Boyle:

I am writing in response to your January 24, 2005, inquiry about the legal sufficiency of a series of three public notices for a public hearing on a tax incremental financing ("TIF") project in the city of Marinette, Wisconsin. You have submitted copies of the three notices and have pointed out several possible flaws in them.

According to your letter, the first two notices were published on January 3 and 10, 2005, in the Marinette Eagle Herald, the city's designated official newspaper. Each of those notices was titled: "Notice of Public Hearing on Creating Tax Incremental District and Proposed Project Plan Tax Incremental District No. 7." The third notice, according to your letter, was posted on the bulletin board at Marinette City Hall, but was not published in the newspaper. That notice was titled: "Notice of Plan Commission Public Hearing on Proposed Creation, Boundaries and Project Plan for Tax Incremental District #7." It is not clear on what date the third notice was posted. For purposes of this discussion, I will assume that it was posted at least 24 hours before the hearing in question. According to all three notices, that hearing was scheduled for January 18, 2005, and I assume that it took place as scheduled.

The TIF statute gives the Wisconsin Department of Revenue ("DOR") primary responsibility for enforcing the special notice requirements of that statute and, in particular, prohibits DOR from certifying the tax incremental base of a proposed TIF district unless that agency determines that the municipality has complied, among other things, with the procedural and notice requirements of section 66.1105(4)(a) of the Wisconsin Statutes. *See* sec. 66.1105(5)(d), Wis. Stats. Because the Legislature has specifically delegated that enforcement responsibility to DOR, please direct your inquiry to them at:

Department of Revenue
2135 Rimrock Road
Madison, WI 53702

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In spite of the above limitation, however, this office can address your questions with regard to any possible violations of the specific notice requirements of the open meetings law.

The first possible flaw you point to in the notices is that there are some inconsistencies between the time and place information in the first notice and that in the second and third notices.

With regard to time, the first notice indicated that the hearing would take place at 3:00 p.m., whereas the other two notices gave 3:30 p.m. as the starting time. I assume that the hearing actually began at 3:30 p.m., as specified in the later notices.

In my opinion, a court would probably conclude that the above time discrepancy did not violate the open meetings law. Under section 19.84(2) and (3), public notice of every meeting of a governmental body must be given at least 24 hours before the commencement of the meeting and must set forth the time, date, place and subject matter of the meeting. Here, the January 10, 2005, notice, was published more than 24 hours before the January 18, 2005, hearing and set forth the correct starting time. The third notice likewise provided the correct starting time and I assume that it was posted on the city hall bulletin board at least 24 hours before the hearing. Therefore, even if some members of the public could have been misinformed about the starting time by the first notice, these later notices corrected the error in advance of the 24-hour deadline. In addition, any person who might have been misinformed by the time on the first notice would not have been deprived of the opportunity to attend the hearing, but would simply have arrived a few minutes early.

With regard to location, you point out that the first notice indicated only that the hearing would take place at the Marinette City Hall, while the two later notices additionally gave the street address of the city hall and identified the specific room in which the hearing was to be held.

In my opinion, a court would probably conclude that this discrepancy also does not violate the open meetings law. Under section 19.84(2), public notice of a meeting of a governmental body must set forth the place of the meeting "in such form as is reasonably likely to apprise members of the public and the news media thereof." While it may be preferable for a meeting notice to include the street address and exact room number for the meeting, a court would probably conclude that the first notice, in identifying by name a unique and publicly known building like a city hall, reasonably informed the public of the location of the hearing. In addition, even if the location description in the first notice was inadequate, the second and third notices corrected the error in advance of the 24-hour deadline.

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Your letter also asks whether the above discrepancies between the first two notices violate the requirement in section 66.1105(4)(a) and (e) that notice of public hearings under the TIF law conform to the class 2 notice requirements of chapter 985 of the Wisconsin Statutes—*i.e.*, two insertions of a legal notice in the official city newspaper, once each week for consecutive weeks, with the last one published at least one week before the event in question. *See* secs. 985.01(1m) and 985.07(2), Wis. Stats. You suggest that the two notices published in the Marinette Eagle Herald on January 3 and 10, 2005, did not constitute two insertions of a legal notice because they were not identical, but rather contained the time and place discrepancies described above. Unfortunately, this office cannot advise you on that question because, as already noted, compliance with the special notice requirements of the TIF law is a matter over which DOR has primary enforcement responsibility.

The second possible flaw you point to is that the notices may have failed to comply with the requirements of section 66.1105, in that the title headings of the first two notices did not indicate that the hearing would not only be on the creation of the proposed TIF district and the proposed project plan, but would also be on the district's proposed boundaries.

When a municipality seeks to create a tax incremental district, section 66.1105(4)(a) requires it to hold a public hearing on the creation and proposed boundaries of the district, and section 66.1105(4)(e) requires it to hold a public hearing on the proposed project plan for the district. The latter subsection also provides, however, that the municipality may choose to hold these two hearings together, rather than separately. According to your letter, the January 18, 2005, public hearing in Marinette was a combined hearing of the latter type. You suggest, therefore, that the first two notices failed to comply with the public notice requirements of section 66.1105(4)(a) and (e) because, you maintain, they did not indicate that the hearing would be on the boundaries of the district, as well as on its creation and proposed project plan.

Once again, this is a question of compliance with the special notice requirements of the TIF law which should be directed to DOR, in the first instance, rather than to the Attorney General's Office. I do note, however, that although the title headings of the first two notices did not say that the subject of the hearing would include the boundaries of the proposed TIF district, the second-to-last paragraph of both of those notices did indicate, among other things, that all interested parties would be given an opportunity at the hearing to express their views on "the proposed Boundaries," as well as on "the proposed creation of the District" and "the proposed Project Plan." It is thus possible that DOR could conclude that those notices, when considered in their entirety, adequately informed the public that the January 18, 2005, hearing would be a combined hearing under both subsections (a) and (e) of section 66.1105(4).

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The third possible flaw you point to is that the notices of January 3 and 10, 2005, did not indicate the location of the proposed TIF district. Both of those notices stated that the boundaries of the proposed district “would be within an area detailed below.” According to your letter, however, no such details regarding the boundaries were actually provided below either notice. In contrast, the third notice which was posted at the Marinette City Hall indicated that the proposed district was “encompassing the former Dome properties on West Bay Shore Street, Marinette, Wisconsin.”

In my opinion, a court would probably conclude that the first two notices of January 3 and 10, 2005, were themselves insufficient to satisfy the notice requirements of the open meetings law. Under section 19.84(2), public notice must be reasonably likely to inform members of the public of a meeting’s subject matter. Here, the notices of January 3 and 10, 2005, only said that the January 18, 2005, public hearing would be about a proposed TIF district with the number 7 and omitted the promised details regarding the location of the affected area. I believe that a court could conclude that, absent any information identifying the location of the specific area to be discussed, members of the public and the media could not reasonably determine the subject of the hearing from those notices.

There remains the question of whether the additional location information in the third notice was itself sufficient to independently satisfy the requirements of the open meetings law. The Attorney General’s Office has consistently advised that the public is entitled to the best notice of a meeting’s subject matter that can be given at the time the notice is prepared. Here, it appears that the third notice, although containing more location information than the first two, still did not provide the best notice that could have been given at the time, since the plan commission could have simply provided an exact legal description or map of the area to be discussed at the hearing.

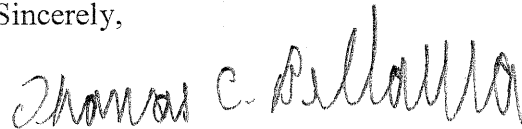
There are, however, few judicial interpretations of the degree of specificity required and, in one case, the Wisconsin Court of Appeals has concluded that an agenda that designated the subject of “licenses” was sufficient to reasonably apprise members of the public that a particular liquor license would be considered for approval at a meeting. *See State ex rel. H.D. Enterprises v. City of Stoughton*, 1999 WL 718506 (No. 98-3112, September 16, 1999). Under that approach, it appears possible that a court could conclude that the location description in the third notice—*i.e.*, “encompassing the former Dome properties on West Bay Shore Street, Marinette, Wisconsin”—was sufficiently detailed to pass the reasonableness test. Because reasonableness is a context-specific determination, however, more facts would be needed to fully assess the adequacy of that description.

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Finally, your letter also suggests that the lack of information about the location of the TIF district in the notices of January 3 and 10, 2005, may have violated the class 2 notice requirements of section 66.1105(4)(a) and (e). This is, again, a question that should be addressed, in the first instance, by DOR, rather than by this office.

I hope this information is useful to you and thank you for your interest in compliance with the open meetings law.

Sincerely,



Thomas C. Bellavia
Assistant Attorney General

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