



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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July 25, 2007

Mr. Phillip J. Eckert
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Dear Mr. Eckert:

Attorney General J.B. Van Hollen has asked me to respond to your June 28, 2007, letter enclosing a verified complaint from Ms. Ann Meyer ("Meyer") and supporting documentation. The complaint alleges that the Village of Newburg ("Village") violated the open meetings law by failing to correct the meeting notice posted on its website to reflect the addition of an agenda item for an upcoming meeting.

Ms. Meyer alleges that the Village first posted notice of its April 12, 2007, meeting sometime prior to April 12, 2007. Additional information you provided me at my request supports the inference that the Village posted paper copies of the meeting notice on the outdoor bulletin board at the Village hall, in the interior lobby of the State Bank of Newburg, and inside the Tri-Par gasoline filling station, and additionally posted a textually identical electronic copy of the meeting notice on the Village's website, <http://www.village.newburg.wi.us>.

Ms. Meyer further alleges that sometime prior to the April 12, 2007, meeting, the Village added the following subject to its meeting agenda: "Consideration and action to amend 18.04(6) of the Village's Subdivision and Platting Code to require 35 acre Minimum parcels in the Village's Extraterritorial Plat Jurisdiction."

Ms. Meyer alleges that the Village posted paper copies of a revised meeting notice that contained the additional agenda item at the Village hall bulletin board, the bank lobby, and the Tri-par station at least 24 hours in advance of the April 12 meeting. Most importantly, Ms. Meyer alleges that at no time prior to the April 12 meeting did the Village change the text of the meeting notice posted on its website to reflect the additional agenda item that had been added to the paper copies of the meeting notice.

Mr. Phillip J. Eckert
July 25, 2007
Page 2

The analysis and conclusions contained in this response are based solely on the information you and Ms. Meyer have provided. I have not conducted any investigation to determine the factual accuracy of that information. Based solely on the information I have considered and in the absence of any contravening information, it is my opinion that a court could conclude that the Village violated the open meetings law by failing to reasonably apprise the public of one of the likely subjects of the April 12 meeting, as required by Wis. Stat. § 19.84(2). If an enforcement action were commenced, the parties would have an opportunity to develop a more complete factual record related to the issue Ms. Meyer raises. A more complete factual record may or may not support the opinion expressed in this letter.

Wisconsin Stat. § 19.84 provides, in relevant part:

(1) Public notice of all meetings of a governmental body shall be given in the following manner:

(a) As required by any other statutes; and

(b) By communication from the chief presiding officer of a governmental body or such person's designee to the public, to those news media who have filed a written request for such notice, and to the official newspaper designated under ss. 985.04, 985.05 and 985.06 or, if none exists, to a news medium likely to give notice in the area.

(2) Every public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof. The public notice of a meeting of a governmental body may provide for a period of public comment, during which the body may receive information from members of the public.

The nature of the "communication" that a presiding officer is required to give to the public under Wis. Stat. § 19.84(1)(b) is not defined in the statutes. However, in a 1977 opinion written shortly after the adoption of the current open meetings law, the Attorney General advised as follows, 66 Op. Att'y Gen. 93, 95 (1977) (emphasis in original):

Posting is not required by subsecs. (1) (a) or (1) (b) of sec. 19.84, Stats. Posting may be a means of informing the public of regular or special meetings or as a supplement to the publication of a class 1 notice for a city school district regular monthly meeting. See sec. 120.48, Stats. The front door of the school, if reasonably accessible to the public, would constitute a proper place for posting of

Mr. Phillip J. Eckert
July 25, 2007
Page 3

notices. The statutes do not specify a number of places where posting must occur. Since neither sec. 19.84(1) nor sec. 120.48, Stats., *require* publication of a notice in a newspaper, the provisions of sec. 985.02(2), Stats., which require, when posting is elected in place of publication, posting in “at least 3 public places likely to give notice to persons affected” are not applicable. However, three public places would be a prudent number to utilize. Where posting is to be relied upon, the number of places used might well vary depending on the size of the district, the number and location of schools and the place or places the board customarily holds its meetings.

Within broad limits, the statute gives every governmental body discretion to determine how the public will be notified of that body’s meetings. Wisconsin Stat. § 19.84, as interpreted by the 1977 Attorney General opinion, requires every governmental body to act reasonably in notifying the public about the business it is likely to take up at its meetings. That reasonableness standard applies to both the substantive meeting information communicated and the manner in which the body communicates it. As the supreme court recently determined in *State ex rel. Buswell v. Tomah Area School District*, 2007 WI 71, ¶ 22, ___ Wis. 2d ___, 732 N.W.2d 804, the legal sufficiency of any particular meeting notice “will depend upon what is reasonable under the circumstances.”

Applying the reasonableness standard to the limited factual record available to me, the question is whether the public was reasonably apprised that the Village Board would consider an amendment to Village’s Subdivision and Platting Code when the publicly posted paper version of the agenda identified that subject matter and the electronically communicated version of the agenda made no mention of it. On the basis of the limited facts available to me and in the absence of any contravening information, there appears to be a factual basis for arguing to a court that the Village’s contradictory communications about whether the Village’s Subdivision and Platting Code was going to be a subject of the April 12 meeting amounted to a failure to reasonably apprise the public that the Village would consider and ultimately adopt an amendment to that Code, in violation of the requirements of Wis. Stat. § 19.84(2).

The cover letter that accompanies Ms. Meyer’s verified complaint asks the Attorney General to “take action to enforce Wisconsin’s Open Meetings laws, and seek a declaration that Village of Newburg Ordinance 05-2007 is void.” The Department of Justice declines to do so, for three principal reasons. First, the issue raised by Ms. Meyer is of predominantly local, rather than statewide, concern. Enforcement actions raising such claims are more appropriately handled by a local district attorney, rather than by the Attorney General’s Office. Second, it does not appear that Ms. Meyer filed her complaint relating to the discrepancy between the paper and electronic meeting notices with the district attorney, asking him to specifically consider the violations she alleges. You should be aware that the decision to commence an enforcement action, and the decision to seek a forfeiture penalty or another sort of remedy against conduct

Mr. Phillip J. Eckert
July 25, 2007
Page 4

believed to be an open meetings violation are ones entrusted to the broad discretion of the prosecutor. *State v. Karpinski*, 92 Wis. 2d 599, 607, 285 N.W.2d 729 (1979). Third, I am aware that open meetings litigation is currently pending on the validity of the Village's ordinance, and that the relator in that case is asking the court to declare the ordinance void. *State ex rel. Deerprint Enterprises, LLC v. Village of Newburg*, Washington County Circuit Court, Case No. 07-CV-396, alleges in an amended complaint that the amended meeting notices posted inside the bank and the gas station were defective because both of those private businesses were closed for substantial periods of time before the April 12 meeting. The amended complaint asks the court to void the Village ordinance. Under Wisconsin's liberal civil practice rules regarding the joinder of parties and claims, intervention, and the amendment of pleadings, it may be possible for Deerprint Enterprises and/or Ms. Meyer to allege the facts and assert the legal theory Ms. Meyer asks the Attorney General to assert on her behalf.

Thank you for your interest in assuring full compliance with the open meetings law. Please notify me if the district attorney commences an enforcement action based on the legal theory asserted in Ms. Meyer's complaint, or if that theory becomes a subject of the litigation currently pending in the *Deerprint Enterprises* matter.

Sincerely,



Bruce A. Olsen
Assistant Attorney General

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