OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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Via Electronic Mail
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RE: OMA Request for Review – 2011 PAC 15795

Dear Mr. Bohlen and Mr. Cox:

The Public Access Counselor has received a Request for Review submitted by Mr. Richard Cox pursuant to section 3.5(a) of the Open Meetings Act (OMA) (5 ILCS 120/3.5(a) (West 2010)), and the responsive correspondence submitted to this office by the Kankakee City Council (Council).

BACKGROUND

Mr. Cox's July 26, 2011, Request for Review asserts that during the Council's June 20, 2011, meeting, the Council voted to amend the agenda to include an additional item, and then took action on that additional agenda item at the same meeting.[1] Specifically, an alderman voted to add to the unfinished business section of the agenda a second reading of an application by a citizen for a conditional use permit to operate a crematorium on a particular parcel of city property. This application, referred to as the Jensen Special Use permit, had passed on first reading but was defeated at the June 20, 2011, meeting.

[1]Letter from Richard Cox to Office of the Public Access Counselor (July 26, 2011).

This office initiated further review on August 8, 2011.[2] In a letter addressed to Mr. Christopher Bohlen, Corporation Counsel for the City of Kankakee, this office requested a written explanation with respect to the allegations raised in the Request for Review. In a response dated August 16, 2011, Mr. Bohlen points out, on behalf of the Council, that section 2.02(a) of OMA (5 ILCS 120/2.02(a) (West 2010)) provides that "[t]he requirement of a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda."[3] On September 23, 2011, after an informal inquiry from this office requesting that the Council clarify its August 16, 2011, letter, the Council sent an email and explained:

> As you can see the issue of the Jenson Special Use permit was considered on May 16, 2011 and was tabled at that time. It was on the Agenda under communications for the 5/16 meeting. The issue was on the agenda for 6/6/11 under unfinished business. It was taken from the table and voted upon and passed for first reading as reflected in the minutes of that regular meeting. The agenda for the regular 6/20/11 meeting is also enclosed. *The issue was not on the agenda. The agenda was amended during the meeting, as the minutes reflect and the second reading was voted upon and defeated.*[4] (Emphasis added.)

In addition to the response, the Council furnished us with copies of agendas from the May 16, 2011, June 6, 2011, and June 20, 2011, meetings, and the written minutes from those meetings. This office forwarded a copy of the Council's August 16, 2011, and September 23, 2011, responses to Mr. Cox on September 27, 2011.[5] Mr. Cox did not reply to either of the Council's responses.

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[2]Letter from Matthew C. Rogina, Assistant Attorney General, Office of the Attorney General, to Mr. Christopher Bohlen, Corporation Counsel, City of Kankakee (August 8, 2011).

[3]Letter from Mr. Christopher Bohlen, Corporation Counsel, City of Kankakee, to Matthew C. Rogina, Assistant Attorney General, Office of the Attorney General (August 16, 2011).

[4]Email from Mr. Christopher Bohlen, Corporation Counsel, City of Kankakee, to Matthew C. Rogina, Assistant Attorney General, Office of the Attorney General (September 23, 2011).

[5]Letter from Matthew C. Rogina, Assistant Attorney General, Office of the Attorney General to Mr. Richard Cox (September 27, 2011).

DETERMINATION

The only issue for the Public Access Counselor's review is whether the Council's actions in amending the agenda to include the motion for the Jenson Special Use Permit and then voting to deny the motion at the same meeting violated OMA. The June 20, 2011, meeting minutes furnished to us by the Council reflect the following exchange:

> ALDERMAN HUNTER: I have another comment, ah, ah, Mayor Epstein. I would ask the Council's indulgence to amend the agenda to incorporate the matter that was passed on the First Reading at the last meeting regarding the conditional use permit regarding the crematorium. That particular matter would be incorporated under roman numeral ten under Unfinished Business.
>
> ALDERMAN JONES: Second it.
>
> MAYOR EPSTEIN: Motion by Alderman Hunter, seconded by Alderman Jones to amend the agenda to include the second reading on the crematorium issue.[6]

Later in the meeting, the Council addressed the crematorium issue on Second Reading and took a vote:

> MAYOR EPSTEIN: Motion carries. Moving into Unfinished Business, we have an added agenda item. We have the Second Reading of the issue better known as the crematorium. Do I have a motion to place this.....
>
> ALDERMAN HUNTER: Am I missing something here?
>
> MAYOR EPSTEIN: No. We're on Unfinished Business.
>
> ALDERMAN HUNTER: Okay.
>
> MAYOR EPSTEIN: Do I have a motion to place this item on its Second Reading?

[6] Kankakee City Council, Meeting, June 20, 2011, Minutes 3.

ALDERMAN HUNTER: Motion to defeat this matter.

ALDERMAN BROWN: I'll second that.

MAYOR EPSTEIN: Motion..... Would you clarify that for me, Alderman.

ALDERMAN HUNTER: Yeah, in other words we're voting no on the Second Reading. Move that we deny this matter on the Second Reading.

MAYOR EPSTEIN: Thank you. Motion by Alderman Hunter, seconded by Alderman Carl Brown. Roll call.

CLERK DUMAS:
AYE: Brown; Hunter; Thompson; Tall; Stokes; Cox (7)
NAY: Browne, R; Baron (*This is a....what's the motion*?

MAYOR EPSTEIN: The motion is to deny the issuing of the conditional use permit on the Second Reading.); Faford; Swanson; Osenga; Linneman (6).
ABSTAIN: Davidson (1).

MOTION TO DENY CONDITIONAL USE PERMIT FOR CREMATORIUM

MAYOR EPSTEIN: Motion carries[.][7]

Thus, the June 20, 2011, meeting minutes clearly show that the Council did add the Special Use permit to the agenda, and did vote on the issue at that same meeting.

One of the primary intentions of the legislature under OMA is to favor open action. *See People ex rel Hopf v. Barger*, 30 Ill. App. 3d 525 (2nd Dist. 1975). This intention is reflected in section 1 of OMA, which provides that:

[i]n order that the people shall be informed, the General Assembly finds and declares that it is the intent of this Act to

[7]Kankakee City Council, Meeting, June 20, 2011, Minutes 6.

> ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly.
>
> The General Assembly further declares it to be the public policy of this State that its citizens shall be given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way." 5 ILCS 120/1 (West 2010).

Accordingly, OMA provides that a public body, such as the Council, must post an agenda listing the business matters it proposes to take up at least 48 hours in advance of any meeting. 5 ILCS 120/2.02(a) (West 2010).

By failing to include the Jenson Special Use permit on the agenda 48 hours prior to taking action on the permit, the Council violated sections 1 and 2.02 of OMA. Section 1 is explicit that a public body must give citizens notice of all matters on which the public body intends to act at a meeting. Although OMA provides that "[t]he requirement of a regular meeting agenda shall not preclude the *consideration* of items not specifically set forth in the agenda," the Illinois Appellate Court has determined that this language refers only to *discussion* of matters not included in the agenda, not *action* on those matters. (Emphasis added.) *Rice v. Bd. of Trustees of Adams County*, 326 Ill. App. 3d 1120, 1123 (4th Dist. 2002). In other words, the Council may talk about matters that do not appear on its agenda, but may not take a vote on a matter that was not listed on the properly posted agenda. To conclude otherwise would allow a public body to take action on a matter without providing the required 48 hour notice.

The Council points out that the motion was properly noticed in agendas for the May 16, 2011, and June 6, 2011, meetings. There is no language in the statute, nor has the Council provided any authority, to support the proposition that "notice" of an agenda item can carry over from one meeting to another. To accept the Council's position would mean that any unfinished business of a public body could be brought up at subsequent meetings by amending an agenda on the spot and taking a vote, effectively circumventing OMA's notice requirements.

The undisputed facts in this matter demonstrate that the Council took action on the Jenson Special Use permit without providing the required public notice. Therefore, in order to remedy this violation, the Council is directed to post the motion for the Jenson Special Use permit on its next meeting agenda, to discuss the matter in open session, and to re-vote on the matter.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. If you have any questions, you may contact me at 312-814-5383. This letter shall serve to close this file.

Very truly yours,

Matthew C. Rogina

MATTHEW C. ROGINA
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