



STATE OF INDIANA

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December 17, 2009

Mr. C.J. Hoyt
WFIE Channel 14
1115 Mt. Auburn Rd.
Evansville, IN 47720

*Re: Informal Inquiry 09-FC-271; Alleged Violation of the Open Door Law by
the Board of Commissioners of Vanderburgh County*

Dear Mr. Hoyt:

This advisory opinion is in response to your formal complaint alleging the Board of Commissioners of Vanderburgh County ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.*

BACKGROUND

A. Your Complaint

In your complaint, you allege the following to support your claim that the Board violated the ODL by prohibiting public access to certain committee meetings: On October 13, 2009, the Board considered a rezoning ordinance for a development known as Majestic Place. Rather than vote on the ordinance, the Board elected to establish a study committee (the "Committee"). The Committee's first meeting was scheduled at the Board meeting consistent with the schedules of the commissioners. Members of the Committee were selected by the Board's president, Tony Tornatta. The Committee was created with Board approval.

President Tornatta charged the Committee with gathering information from community members when he stated: "[The Board should] try this study committee and see if we can find some solid information." President Tornatta hoped the Committee could provide information regarding the effect of the rezoning. President Tornatta also expressed the desire that the Committee would "come to some consensus . . . and try and find where our good points are, find out where we are deficient in some areas, and then, obviously, traffic issues and what not [that] we need to address."

The Committee's first meeting was held on October 17, 2009, at the University of Southern Indiana. You attempted to attend the meeting but were denied entrance by President Tornatta.

On October 19, 2009, Vanderburgh County Attorney David Miller sent President Tornatta a letter in which he opined that the Committee meetings "are not required to be open to the public." On October 26, 2009, your attorney sent a letter to Mr. Miller in which your attorney disagreed with Mr. Miller's conclusion. On October 29, 2009, Mr. Miller informed your attorney that his opinion was unchanged. When you attempted to attend the Committee's November 7, 2009, meeting, President Tornatta again denied you access.

B. The Board's Response

Mr. Miller's response on behalf of the Board is enclosed for your review. Mr. Miller asserts the following: The Board maintains its position that it did not violate the ODL. The rezoning petition that came before the Board on October 13, 2009, concerned a proposed development that drew substantial public attention and controversy. The October 13th Board meeting was heavily attended with multiple parties prepared to speak for and against the petition. During the meeting, President Tornatta recommended that the owners, developer, and adjacent property owners form a committee (i.e., the Committee) to discuss their concerns and attempt to reach a resolution or compromise. President Tornatta "indicated his willingness to personally facilitate the discussions."

Mr. Miller also maintains that the three Board's three commissioners are not members of the Committee, citing to signed affidavits to that effect from each member. President Tornatta is the only commissioner who has attended the Committee meetings. Further, the only action taken by the commissioners during the October 13th meeting regarding Majestic Place was the motion by Commissioner Winnecke, who stated, "Mr. President, at this time I would move that we vote to delay the final reading on VC-10-2008, Majestic Place until the December 8th meeting."

Mr. Miller argues that the Committee is not a "governing body" within the meaning of the ODL because neither President Tornatta nor the Board appointed the Committee. Rather, during the October 13th meeting, President Tornatta "merely noted the names of individuals who had previously indicated that they would like to take part in meetings seeking to resolve issues between the developers and the remonstrators." The Board did not take any official action to create a committee and did not appoint any individuals or vote to affirm anyone's membership on the committee. Moreover, Mr. Miller asserts that the Committee "has no power or authority to take any official action on behalf of the Commissioners." However, Mr. Miller notes that "those who participate in the[Committee's] discussions will have the right, if they choose to exercise it, to advise the Commissioners in an open meeting of the Commissioners if they have resolved their various concerns regarding the pending rezoning petition. But that is all [the members of the Committee] can do."

ANALYSIS

The General Assembly enacted the ODL with the intent that official action of public agencies be taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. I.C. § 5-14-1.5-1. Thus, the ODL requires that all meetings of the governing bodies of public agencies be open at all times for the purpose of permitting members of the public to observe and record them. I.C. § 5-14-1.5-3(a). The plaintiff in a lawsuit under the ODL has the burden of proving that the defendant entity is a “public agency” within the meaning of the statute and, thus, subject to the ODL. *Perry County Dev. Corp. v. Kempf*, 712 N.E.2d 1020 (Ind. Ct. App. 1999).

The issue here is whether or not the Committee constitutes a “governing body” of a public agency. If it is, it would be subject to the ODL. A governing body is, among other things, two or more individuals who are “any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated.” I.C. § 5-14-1.5-2(b)(3). “‘Official action’ means to: (1) receive information; (2) deliberate; (3) make recommendations; (4) establish policy; (5) make decisions; or (6) take final action.” I.C. § 5-14-1.5-2(d). Thus, if the committee was appointed directly by the commissioners (presumably by a vote or other directive) or directly by the presiding officer (i.e., President Tornatta) *and* was delegated the authority to take official action on public business, the committee would be a governing body under I.C. §5-14-1.5-2(b)(3).

It appears as though the Board delegated the authority to act upon public business to the Committee. The minutes of the October 13th Board meeting include the following statement from President Tornatta:

One of the things that we are wanting to look [at] and *examine* with this particular rezoning or lack there of [sic] is *what this corridor means to this area, what it means to development, what it means to University Parkway*. Hopefully, *we will come to some consensus in this committee* and try to find where our good points are, find out where we are deficient in some areas, and then, obviously traffic issues and what not [that] we need to address. All this has been brought out, some more eloquently than others, but we’ve listened to it all and *we want to take action* doing something different that we haven’t done before, and that’s get more than one person at a table and *have some serious talks*.

See Minutes of Vanderburgh County Bd. of Comm’rs., October 13, 2009 at 2 (emphasis added). Based on President Tornatta’s statement, the Committee had the authority to

receive information, deliberate, and make decisions regarding the Majestic Place project.¹ Each of these actions satisfies the “official action” element of the definition of a “governing body” in section 2(b)(3) of the ODL.

The only remaining issue is whether the Committee was “directly appointed by the governing body[‘s] . . . presiding officer,” because such an appointment would trigger the application of section 2(b)(3) and the ODL. Here, the parties disagree about whether or not President Tornatta appointed the Committee. The ODL does not define the word “appointed” as its used within section 2(b)(3). *See generally* I.C. § 5-14-1.5.-2. As a general rule of statutory construction, if a statute is unambiguous (i.e., susceptible to but one meaning), Indiana courts give the statute its clear and plain meaning. *Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 942 (Ind. 2001). Webster's Dictionary defines an “appoint” as “[t]o name or select, as a person for a position, a time for an act or meeting, etc.” Webster's Third New International Dictionary 50 (1992). Again, dialogue from the October 13th meeting itself is instructive in making this determination:

President Tornatta: Okay, I believe, I made a request to the Commissioners, and released that that [sic] we, after talking to the petitioner, the remonstrators, talking to USI, and me as a Commissioner, ***I would like to see this put into a study committee. I have a list of study committees, or people on the study committee.*** If it works with this Commission, the first meeting will be 10/17/09, which is Saturday, at USI in the UC at noon. If Stan, Stan, I know you're here somewhere. If you would please come up. Appreciate the work that Stan Blaszczyk has done to work toward just bringing all groups together.... So, the recommendation I would ask of this Board is to have a series of meetings with a group, and ***the RSVP's I have so far are; Stan, Mark Rozewski from USI, Tammy Nasiatka***, is that --

Stan Blaszczyk: Nasiatka.

President Tornatta: Okay, I apologize.... She is a citizen. ***Kevin Goebel from the Hahn Group.... Gene Hahn, Joe Kieffer, Gene Pfeiffer, all with the Hahn Group Development; David Robinson, citizen; Michael Lockard, citizen, Fred Padget, citizen, and Jim Raben will serve on that committee as well....*** I think a Dr. Colter is also somebody who has requested to be on this board. I have not heard from him. So, Stan, anything?

Stan Blaszczyk: Well, ***I would like to thank you for putting this together.*** You know, I've worked pretty hard to try to go from something that I was concerned about for

¹ The ODL defines “public business” so broadly as to encompass the Majestic Place project; the phrase “means any function upon which the public agency is empowered or authorized to take official action.” I.C. § 5-14-1.5-2(e).

myself, to something that I'm concerned about for this entire community. What you see behind you is really how important this really is. You know, zoning seems like such a mundane topic, and it really is about a man's castle and where he lives. I applaud these people for coming out, because it's really important to them. ***I applaud you for setting this up***, because it really needs to be done. So, thank you.

* * *

President Tornatta: With that being said, what I would like to do is to ask my Commissioners to give me a motion on the recommendation.... So, if there's nothing outside that we need, that you think we need to be brought attention to, then ***we would ask that if the motion goes through that we try this study committee and see if we can find some solid information.***

Minutes of Vanderburgh County Bd. of Comm'rs., October 13, 2009 at 2-3 (emphasis added). The foregoing emphasized statements indicate that President Tornatta "name[d]" the members of the Committee within the plain meaning of the word "appoint." Moreover, the fact that President Tornatta was the individual who excluded you from the Committee's meetings indicates that he has an active - rather than passive - role in determining who is permitted to participate on the Committee. These facts, taken as a whole, indicate that President Tornatta did, in fact, directly appoint the members of the Committee within the meaning of section 2(b)(3) of the ODL. Consequently, it is my opinion that the Committee is a "governing body" under the ODL. To the extent that the Committee held meetings of a majority of its members that were neither properly noticed nor open to the public as required by the ODL, the Committee violated the ODL.

CONCLUSION

For the foregoing reasons, it is my opinion that the Committee is subject to the ODL.

Best regards,



Andrew J. Kossack
Public Access Counselor

cc: David V. Miller