



STATE OF INDIANA

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February 6, 2012

Mr. Eric D. Kurtz
16 Indiana Camp Trail
Ogden Dunes, Indiana 46368-1002

Re: Formal Complaint 12-FC-24; Alleged Violation of the Open Door Law by the Ogden Dunes Town Council

Dear Mr. Kurtz:

This advisory opinion is in response to your formal complaint alleging the Ogden Dunes Town Council ("Council") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* Charles F.G. Parkinson, Attorney, responded on behalf of the Council. His response is enclosed for your reference. I have granted your request priority status pursuant to 62 Ind. Admin. Code 1-1-3(1).

BACKGROUND

In your formal complaint you allege that the Council met on Monday, January 23, 2012 at 12:00 p.m. for a "special" meeting to transact public business. All five (5) members of the Council were in attendance, along with the Clerk-Treasurer. The meeting was convened at the Ogden Dunes Town Hall, 115 Hillcrest Road, Ogden Dunes, Indiana.

You allege that the Council violated the ODL by failing to provide timely notice of the meeting. Public notice for the meeting was posted at the meeting place sometime after 5:00 p.m. on Friday, January 20, 2012. Media notification was given to the *Northwest Indiana Times* and the *Chesterton Tribune* via e-mail at 7:46 a.m. on Saturday, January 21, 2012. No media notification was provided to the *Post-Tribune*, who had previously requesting meeting notification. You believe that the Council knowingly committed the violation, having complete disregard for the ODL, with the intent to prevent members of the public from observing the meeting. You note that only seven (7) members of the public attended the hearing, whereas generally meetings of the Council have thirty (30) members of the public in attendance. You believe any attempt by the Council to argue that the meeting was an "emergency" is disingenuous.

In response to your formal complaint, Mr. Parkinson advised that the meeting held by the Council on January 23, 2012 was called in compliance with the requirements

of the ODL in light of pending litigation. In 2011, the Council concluded that there was an overpopulation of deer necessitating action, which included making application for a Special Purpose Deer Control Permit ("Permit") to conduct a deer cull. On September 30, 2011, the Indiana Department of Natural Resources ("DNR") issued the Permit with an effective date of November 1, 2011. On October 19, 2011, a group of residents filed a Petition for Review and Stay with the Indiana Natural Resources Commission ("INRC"), the agency which conducts reviews of DNR-issued permits. The hearing was originally set for December 29, 2011, but was continued until January 24, 2012.

On January 1, 2012, four newly elected Council members and a new Clerk-Treasurer were sworn into office. The first meeting of the Council held after the swearing in occurred on January 17, 2012, which was the first possible date, given the new Council members' schedules. During the meeting, the Council discussed the Permit and voted to voluntarily suspend the exercise of its rights under the Permit until January 25, 2012, so that the hearing with the INRC could proceed as scheduled. The Council thereafter scheduled an executive session for the purpose of discussing the litigation for January 20, 2012 at 5:00 p.m. At the conclusion of the executive session on January 20, 2012, the Council scheduled a meeting for Monday, January 23, 2012 at 12:00 p.m. to discuss the option of completely suspending the Town's rights under the Permit prior to the January 24, 2012 hearing.

The Council met on January 23, 2012. Notice of the meeting was provided substantially as you have alleged. However, of the three news media outlets which traditionally request notice of the Town's meetings, only the *Northwest Indiana Times* officially requested media notification from the Town prior to January 1, 2012. As to your allegation that the Council violated the ODL by failing to post an agenda, the ODL or the Ogden Dunes Town Code does not mandate the use of an agenda. No agenda was utilized by the Council at the January 23, 2012 meeting.

As to your allegation that the emergency basis of the meeting was not posted in the notice or qualified at the meeting, the Council noted that you received the answer to your inquiry regarding the emergency status at the January 23, 2012 meeting, which you attended. Nothing in the ODL requires an "emergency" reference, either in the notice or during the meeting itself. The ODL only requires that the substance of the meeting deal with situations which exempt such meetings from the usual notice requirements.

Seven members of the public appeared at the January 23, 2012 meeting, which was open to the public. At the meeting, the Council discussed the hearing scheduled for the following day and voted to suspend the Town's rights under the Permit through February 15, 2012, which amounted to the remained of the Permit's duration. Prior to the meeting, Mr. Parkinson telephoned all counsel involved in the hearing to discuss what impact possible action by the Council would have on the hearing. Thereafter, Eric Wyndham, attorney for the DNR, issued all parties and the Administrative Law Judge an e-mail, where Mr. Wyndham noted the parties' request for a continuance "because of the Town's likely decision to voluntary suspension of its rights under the Permit." Only the Administrative Law Judge had the authority to continue the hearing. As indicated in ALJ

Lucas's e-mail from January 23, 2012 at 11:20 a.m., there was no continuance granted *prior* to the Council's emergency meeting. Only after he was apprised of the Council's action did ALJ Lucas formally continue the hearing. Although you argued that the Council could have taken the same action at a legally noticed meeting with no prejudice to the parties involved, there was no continuance granted before the Council gave notice of its emergency meeting. Without action taken by the Council at the January 23, 2012 meeting, the hearing may have taken place in contravention of the Council's desired shift in policy and creating a disruption in the governmental activity, that being the deer cull.

In prior opinions issued by the Public Access Counselor dealing with I.C. § 5-14-1.5-5(d), the Counselor provided that declaration of an emergency by the Roseland Town Council to take official action with respect to the filing of a request for an injunction was determined to potentially violate the ODL, unless the Town could show that the lawsuit was unforeseen and the meeting was necessary to deal with an emergency that threatened disruption of a governmental activity. *See Opinion of the Public Access Counselor 07-FC-127*. The facts in the preceding opinion provide that the Town Council had at least five days notice that the injunction suit was going to be filed prior to calling an emergency meeting. By contrast, the action taken by the Council here, to suspend the Town's rights under the Permit and avoid further litigation, could not have been anticipated prior to the Council's executive session on Friday, January 20, 2012, with insufficient time to provide notice of a public meeting with at least 48 hours' notice.

By meeting in emergency session on the day prior to the hearing and voting to change the Council's policy, the Council mooted the issues and eliminated the necessity of a hearing. The Council thereby avoided the disruption of its collective decision not to continue with the deer cull and the litigation, which presumably was the result of discussions during the executive session. Arguably the same result could have been achieved by requesting a continuance of the hearing, but due to the timing of the first meeting of the newly elected Council, the emergency meeting provided the most openness for the Council to make a change in their policy respecting a pending legal proceeding. As the town's attorney, Mr. Parkinson could have unilaterally requested a continuance based upon his understanding of the consensus of the Council. However, this would have created a situation where the public would have undoubtedly questioned the openness of the action that the lawyer took on behalf of a Council that had not yet deliberated or voted in public on the issue.

In addition, the Council's action also avoided the inconveniencing of the numerous witnesses, attorneys, and the Administrative Law Judge who were scheduled to appear and testify at the hearing. The Council action at the January 23, 2012 hearing avoided this threatened disruption, as well as the expense of the litigation.

ANALYSIS

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people

may be fully informed. *See* I.C. § 5-14-1.5-1. Accordingly, except as provided in section 6.1 of the ODL, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. *See* I.C. § 5-14-1.5-3(a).

Public notice of the date, time, and place of any meeting, executive session, or any rescheduled or reconvened meeting of a public agency shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) prior to meeting. *See* I.C. § 5-14-1.5-5(a). In addition to providing notice to any news media who by January 1 of the year have requested notice, the agency must post notice at the principal office of the agency or, if there is no office, at the building where the meeting will be held. *See* I.C. § 5-14-1.5-5(b). Notice has not been given in accordance with Section 5 of the ODL if a governing body of a public agency convenes a meeting at a time so unreasonably departing from the time stated in its public notice that the public is misled or substantially deprived of the opportunity to attend, observe, and record the meeting. *See* I.C. § 5-14-1.5-5(h).

The General Assembly has provided an exception to the forty-eight hour notice requirement in the event that an emergency meeting is warranted. If a meeting is called to deal with an emergency involving actual or threatened injury to person or property, or actual or threatened disruption of governmental activity under the jurisdiction of the public agency by any event, then the time requirements of notice do not apply. *See* I.C. § 5-14-1.5-5(d). However, news media that have requested notice of meetings must be given the same notice as is given to members of the governing body, and the public must be notified by posting a copy of the notice according to section 5. *Id.* Counselor Davis analyzed the meaning of this provision in a 2006 opinion:

Since there is no case law interpreting Indiana Code 5-14-1.5-5(d), I must rely on the rules of statutory construction to interpret this statute. When construing a statute, the interpreting body attempts to give words their plain and ordinary meaning. *Indiana Wholesale Wine v. State of Indiana, Alcoholic Beverage Commission*, 695 N.E.2d 99, 103 (Ind. 1998). “Emergency” is defined as “an unforeseen combination of circumstances or the resulting state that calls for immediate action.” Merriam-Webster On-Line Dictionary (2007). The term “disruption” is defined as “to throw into disorder” or “to interrupt the normal course or unity of” and “event” means “something that happens.” *Opinion of the Public Access Counselor 06-FC-223*.

The Council does not dispute that public notice for the January 23, 2012 meeting was posted sometime after 5:00 p.m. on Friday, January 20, 2012. For the purposes of this opinion, I will assume that notice was posted at 6:00 p.m. on January 20, 2012. Pursuant to the notice requirements of the ODL, the earliest the Council could have convened would have been Tuesday, January 24, 2012 at 6:00 p.m., unless I.C. § 5-14-1.5-5(d) is applicable. The Council had provided that the January 23, 2012 meeting dealt with a disruption in governmental activity, specifically the deer cull. Accordingly, the

Council maintains it complied with all requirements of the ODL in holding an emergency meeting.

On January 17, 2012, the Council held an open meeting and discussed the Permit. The Council voted to voluntarily suspend the exercise of its rights under the Permit until January 25, 2012 in order to allow the hearing on the Request for Stay to proceed on January 24, 2012 at 9:30 a.m. The Council met on January 23, 2012, citing I.C. § 5-14-1.5-5(d), and extended the suspension of the Permit through February 15, 2012. The alleged disruption in governmental activity, the deer cull, had already been suspended by the Council through January 25, 2012. The Council could have met on January 24, 2012, sometime after 6:00 p.m., performed the same action that it completed on January 23, 2012, without any affect or disruption to the alleged governmental activity. If the Council had held the meeting on January 24, 2012 after 6:00 p.m., this would have required either an unnecessary hearing to be held on January 24, 2012 at a considerable cost and time to all parties involved or would have required the Council to file a request for continuance. Had the Council chosen to file a continuance, an argument could have been made that the Council had already decided to extend the suspension of the rights granted under the Permit prior to voting on the issue at an open public meeting, which would have been in violation of the ODL as well. Clearly, the Town was in an almost untenable position in regards to ODL, regardless of what action it took. However, the requirements of the ODL cannot be ignored. Accordingly, it is my opinion that the Town did not meet its burden to show that an actual or threatened disruption of governmental activity existed that would allow it to avail itself to I.C. § 5-14-1.5-5(d) in regards to the January 23, 2012 meeting.

In regards to media notification, emergency meetings held pursuant to I.C. § 5-14-1.5-5(d) require that news media who have requested notice of meetings must be given the same notice as is given to members of the governing body. You allege that the Council failed to provide notice to the *Post Tribune* for the January 23, 2012 meeting. The Council in response to your allegation provided that only the *Northwest Indiana Times* officially requested media notification from the Council prior to January 1, 2012. As the Council did not receive notification from the *Post Tribune* requesting media notification pursuant to I.C. § 5-14-1.5-5(b), it is my opinion that it did not violate the ODL by not providing notice to the *Post Tribune* for the January 23, 2012 meeting.

A governing body of a public agency is not required to use an agenda, but if it chooses to utilize one, the agency must post a copy of the agenda at the entrance to the location of the meeting prior to the meeting. See I.C. § 5-14-1.5-4(a). If a public agency chooses to utilize an agenda, the ODL does not prohibit it from changing or adding to the agenda during the meeting. See *Opinion of the Public Access Counselor 09-FC-40*. It is my opinion that the Council did not violate the ODL by failing to utilize an agenda at the January 23, 2012 meeting.

CONCLUSION

It is my opinion that the Council acted contrary to the requirements of the ODL by holding an emergency meeting pursuant to I.C. § 5-14-1.5-5(d) on January 23, 2012. As to all other issues, it is my opinion that the Council did not violate the ODL.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is written in a cursive style with a large initial "J" and a distinct "Hoage" following.

Joseph B. Hoage
Public Access Counselor

cc: Charles F.G. Parkinson