



STATE OF INDIANA

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January 8, 2013

Charles J. Costanza
68 Ski Hill Road
Ogden Dunes, Indiana 46368

Re: Formal Complaint 12-FC-357/13-INF-1; Alleged Violation of the Open Door Law by the Ogden Dunes Architectural Review Committee

Dear Mr. Costanza:

This advisory opinion is in response to your formal complaint alleging Ogden Dunes Architectural Review Committee (“Committee”) violated the Open Door Law (“ODL”), Ind. Code § 5-14-1.5-1 *et seq.* Charles Parkinson, Attorney, responded on behalf of the Committee. His response is enclosed for your reference.

BACKGROUND

In your formal complaint you provide that the Committee is a governing body as defined under ODL and for years has continually conducted closed-door meetings in violation of the law.

In response to your formal complaint, Mr. Parkinson advised that the Ogden Dunes Town Code establishes a number of boards and commission. Section 32.01 refers to an “Architectural Advisory Board” that has not been active for many years. That section of the Town Code does not reference an “Architectural Review Committee”, although the Committee is referenced in Section 152.200. Section 152.200(A) authorizes the Town’s Plan Commission to “delegate to the Architectural Review Committee the review and certification of the plans and specifications of any proposed building, structure, or other property improvement requiring approval, as defined herein, for permit eligibility.” The same section also permits the Plan Commission to “revoke any duties so delegated as above and recall them to the Commission.”

The Committee is a three (3) member committee comprised of two (2) Plan Commission members, and at least one person who must be a recognized, experienced architect or engineer, but not necessarily a resident of the Town. Members of the Committee are appointed by the Town Council, upon recommendation of the Plan Commission, for one year terms. At the Town Council’s February 6, 2012 meeting, when annual appointments to various boards and committees occur, there were no

appointments made to the Committee. A copy of the minutes from the Council's February 6, 2012 meeting is enclosed. The Plan Commission has reviewed plans and specifications on its own, or by members of the Plan Commission.

In response to your allegation that Mr. Mike Falk is the presiding officer of the Committee, Mr. Parkinson advised that Mr. Falk, a licensed public engineer, is a member of the Plan Commission, but he is not the "presiding officer" of the Committee, since the Town Council had never appointed anyone to the Committee. Like other members of the Plan Commission, Mr. Falk reviews plans and specification on pending matters. Mr. Parkinson further provided that your formal complaint failed to reference a single Committee meeting date, location of the alleged meetings, any decisions made by the Committee, or any other actions performed.

Mr. Parkinson advised that the Committee's functions exist only to the extent that the Plan Commission has not "recalled" such functions. Among those functions are the review and certification of plans and specifications for property improvements requiring approval by the Plan Commission. Mr. Falk reviews plans as a member of the Plan Commission, not as a member of any other governing body, including the Committee. The review of plans and specifications has been reserved by the Plan Commission; there currently is no Committee, properly appointed by the Town Council, to perform such functions. For these reasons, it is impossible for there have to have been a meeting of the Committee or violation of the ODL.

ANALYSIS

As an initial matter, I.C. § 5-14-5-7 provides that a person that chooses to file a formal complaint with the Public Access Counselor must file the complaint not later than thirty days after the denial or the person filing the complaint receives notice in fact that a meeting was held by a public agency, if the meeting was conducted secretly or without notice. Your formal complaint fails to identify any date on which the Committee allegedly met to take official action upon public business. As such, you would not have standing to file a formal complaint. However, you are entitled to make an informal inquiry about the state's public access laws. The substance of your complaint will thus be addressed as an informal inquiry. *See* I.C. § 5-14-4-10(5).

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).

A meeting is defined under the ODL as a gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business. *See* I.C. § 5-14-1.5-2(c). "Official action" means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* I.C. § 5-14-

1.5-2(d). "Public business" means to any functions upon which the public agency is empowered or authorized to take official action. *See* I.C. 5-14-3-2(e).

The ODL requires that public notice of the date, time, and place of any meetings, executive sessions, or of any rescheduled or reconvened meeting, shall be given at least forty-eight hours (excluding Saturdays, Sundays, and legal holidays) before the meeting. *See* I.C. § 5-14-1.5-5(a). The notice must be posted at the principal office of the agency, or if not such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notices nothing, requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2).

In order for the ODL to apply, the meeting must be held by a governing body of a public agency. A governing body is defined as:

- (b) "Governing body" means two (2) or more individuals who are:
 - (1) a public agency that:
 - (A) is a board, a commission, an authority, a council, a committee, a body, or other entity; and
 - (B) takes official action on public business;
 - (2) the board, commission, council, or other body of a public agency which takes official action upon public business; or
 - (3) 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. An agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of this chapter. *See* I.C. § 5-14-1.5-2(b)

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If the facts are in dispute, the public access counselor opines based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.*

You have alleged that the Committee has been "meeting for years in closed meetings, denying the public the opportunity to hear the debate leading to a decision." In response, Mr. Parkinson advised that there is no Committee, properly appointed by the Council, to take official action upon public business. Further, Mr. Falk is not the Committee's presiding officer as the Town Council has never appointed a Committee; Mr. Falk reviews plans and specifications on pending matters as a member of the Plan Commission, which you have not alleged has violated the ODL. If the Committee was appointed by the Town Council, it is my opinion that it would be considered a governing body under the ODL. However, the parties do not agree whether the Committee is a

currently functioning governing body under the ODL. As noted *supra*, the Public Access Counselor is not a finder of fact. If the Committee, properly appointed by the Council, conducted secret meetings without posting notice, issuing memoranda, etc, the Committee would be in violation of the ODL. However, if the Committee has never been properly appointed by the Council or even for the sake of argument, if it had been properly appointed by the Council but had never met in secret, then it would not have acted contrary to the requirements of the ODL.

Please let me know if I can be of any further assistance.

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 long, sweeping underline.

Joseph B. Hoage
Public Access Counselor

cc: Charles Parkinson