



STATE OF INDIANA

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February 1, 2013

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

*Re: Formal Complaint 13-FC-07; Alleged Violation of the Open Door Law by the
Ogden Dunes Plan Commission*

Dear Mr. Costanza:

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

BACKGROUND

In your formal complaint you provide that in mid-December 2012, the Commission called a meeting regarding a building project for 34 Diana Road. You allege that the Commission met, discussed the project, recessed, and then called for a continuance of serial meetings at a site meeting. The site meeting was attended by Commission members, the owner of the property, builder, and project engineer. You allege the site inspection was followed by a second full Commission meeting, five days after the original meeting. You further allege that at the site meeting, Commission member Mike Falk ordered you, as the builder, out of the meeting and off the property. This was enforced by Town Marshall James Reeder, who was in attendance. Between the scheduled site meeting and the second full meeting of the Commission, you allege that there was an apparent closed-door meeting where a 6-1 vote was taken to allow for construction. Subsequently, the second full meeting was cancelled. You further provide that a fifth serial meeting on the same topic has been called for January 7, 2013 with no notification being provided to the builder or owner of the property regarding the deliberation of issues leading to a decision.

In response to your formal complaint, Mr. Parkinson advised that you are a resident of the Town of Ogden Dunes ("Town") and a member of the Town Council ("Council"). You are also a contractor who has been retained to construct a retaining wall at 34 Diana Road ("Project"). The Town's Building Commissioner imposed a stop work order on the Project. On December 10, 2012, the Commission held a special

meeting in order to discuss lifting the stop work order on the Project. Proper notice was provided for the special meeting. You were in attendance along with all seven (7) members of the Commission. The sole item of business was a discussion of the retaining wall at the Project. During the meeting, you submitted a revised drawing for the Project, which raised certain questions that the Commission believed could be answered by conducting a site visit. The Commission requested that the results be returned by December 14, 2012 and voted 7-0 to partially lift the stop work order, except on what was referred to as the "lower wall." The lower wall would be reviewed at the site visit.

On December 11, 2012, two members of the Commission, Mr. Falk and Mr. Allen Johnson, along with the Ogden Dunes Building Commissioner, Ed Hewitt, visited the Project. You were also in attendance along with property owner, Donna Penn. Marshall Reeder was also asked to attend because of a history of friction between you and Mr. Falk. In the course of the site visit, you and Mr. Falk began to argue, and Ms. Penn requested that you retreat to the garage. After retreating to the garage, you asked the Marshall whether you could listen to what was being discussed. The Marshall responded by stating "I don't have anything to do with that, Charlie, your boss (e.g. Ms. Penn) ordered you to the garage, not me." You then proceeded to return to the garage while the site visit concluded.

After the site visit, on December 17, 2012, you submitted revised plans for the lower wall. The Commission met again on January 7, 2013 to review the Project. The Town's Clerk-Treasurer sent electronic notice on Thursday, January 3, 2013 at 3:07 p.m. of the meeting to the media outlets who had previously requested that notice be provided. On the same date, the Clerk-Treasurer posted notice of the meeting at the Town Hall. Although you allege that proper notice was not provided to the builder or owner, you were in attendance at the meeting on January 7, 2013. The Commission voted 6-1 to approve the plans for the lower wall and allow for the Project to be completed.

As to your allegation that the Commission took a vote at a "secret" meeting, held sometime between December 10, 2012 and the tentatively scheduled (but never held) December 14, 2012 meeting, Mr. Parkinson has spoken with Greg DePorter, Chairman of the Commission, and Mr. Johnson, President of the Council and member of the Commission. Both individuals advised that the Commission did not conduct any meeting between December 10, 2012 and January 7, 2013. No "secret" vote was taken as no meeting occurred, and the actual vote was taken at a properly noticed meeting, which you attended.

As to the allegation regarding the site visit, you allege that you were denied access to the meeting when you "ordered" by Mr. Falk to leave the meeting. The Marshall is alleged to have "enforced" the order. Your recollection of the event varies greatly from that of the Marshall and others in attendance. The Marshall has provided that Ms. Penn, the property owner, asked that you to go to the garage, as you had been arguing with Mr. Falk. Further, Mr. Parkinson advised that site visit cannot be considered a meeting as a majority of the members of the Commission were not in attendance.

As to your last allegation, you provide that the owner and contractor were not provided with notice of the January 7, 2013 meeting. You filed your formal complaint with the Public Access Counselor on January 6, 2013, one day prior to the Commission meeting, and you were in attendance at the January 7, 2013 meeting. All members of the media who had requested notice were provided as such and the Town's Clerk-Treasurer posted notice of the meeting at the Town Hall. Both occurred within 48 hours prior to the meeting.

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).

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 prohibits governing bodies from conducting serial meetings. *See* I.C. § 5-14-1.5-3.1. As applicable here, I.C. §§ 5-14-1.5-3.1(a), (c), and (d) provides the following regarding serial meetings:

Sec. 3.1. (a) Except as provided in subsection (b), the governing body of a public agency violates this chapter if members of the governing body participate in a series of at least two (2) gatherings of members of the governing body and the series of gatherings meets all of the following criteria:

(1) One (1) of the gatherings is attended by at least three (3) members but less than a quorum of the members of the governing body and the other gatherings include at least two (2) members of the governing body.

(2) The sum of the number of different members of the governing body attending any of the gatherings at least equals a quorum of the governing body.

(3) All the gatherings concern the same subject matter and are held within a period of not more than seven (7) consecutive days.

(4) The gatherings are held to take official action on public business.

For purposes of this subsection, a member of a governing body attends a gathering if the member is present at the gathering in person or if the member participates in the gathering by telephone or other electronic means, excluding electronic mail.

(c) A gathering under subsection (a) or (b) does not include:

(1) a social or chance gathering not intended by any member of the governing body to avoid the requirements of this chapter;

(2) an onsite inspection of any:

(A) project;

(B) program; or

(C) facilities of applicants for incentives or assistance from the governing body;

(3) traveling to and attending meetings of organizations devoted to the betterment of government;

(4) a caucus;

(5) a gathering to discuss an industrial or a commercial prospect that does not include a conclusion as to recommendations, policy, decisions, or final action on the terms of a request or an offer of public financial resources;

(6) an orientation of members of the governing body on their role and responsibilities as public officials, but not for any other official action;

(7) a gathering for the sole purpose of administering an oath of office to an individual; or

(8) a gathering between less than a quorum of the members of the governing body intended solely for members to receive information and deliberate on whether a member or members may be inclined to support a member's proposal or a particular piece of legislation and at which no other official action will occur.

(d) A violation described in subsection (a) or (b) is subject to section 7 of this chapter.

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). “Final action” is defined as a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order. *See* I.C. § 5-14-1.5-2(g). “Final action” must be taken at a meeting that is open to the public. *See* I.C. § 5-14-1.5-6.1(c). A rule, regulation, ordinance, or other final action

adopted by reference to the agenda number or item alone is void. *See* I.C. § 5-14-1.5-4(a).

The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. As with your previous formal complaint, the parties' description of the factual circumstances surrounding the events varies greatly. *See Opinion of the Public Access Counselor 12-FC-357*. 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 initially allege that between the scheduled site meeting and the second full meeting of the Commission, the Commission conducted an apparent closed-door meeting where a 6-1 vote was taken regarding the project. In response, Mr. Parkinson advised that he had spoken with Mr. DePorter, Chairman of the Commission, and Mr. Johnson, President of the Council and member of the Commission. Both individuals advised that the Commission did not conduct any meeting between December 10, 2012 and January 7, 2013. No "secret" vote was taken as no meeting occurred, and the actual vote was taken at a properly noticed meeting, which you attended. As such, if the Commission took final action on all issues related to the Project at open, public meetings and did not hold a "secret" meeting; the Commission did not violate the ODL.

In your second allegation you provide that at the site inspection, Mr. Falk ordered you out of the meeting and off the property. This was allegedly enforced by the Marshall. In response, Mr. Parkinson advised that you were asked by the property owner, Ms. Penn, to withdraw to the garage as you had been arguing with Mr. Falk. Regardless of the factual circumstances of the issue, a majority of the Commission was not present at the site inspection. Even if a majority had been present, the ODL provides that an onsite inspection of a project or program is not considered to be a "meeting." *See* I.C. § 5-14-1.5-2(c)(2). As such, the Commission could not have violated the ODL as a "meeting", as defined under I.C. § 5-14-1.5-2(c), did not occur during the site inspection.

As to your inferred allegation that the Commission violated the prohibition against serial meetings, the Commission has provided that proper notice was provided to the meetings that occurred on December 10, 2012 and January 13, 2013. Further, the onsite inspection that occurred on December 11, 2013 was not considered a "meeting" pursuant to I.C. § 5-14-1.5-2(c), as a majority of the Commission was not in attendance, and such "meetings" are exempt pursuant to I.C. § 5-14-1.5-2(c)(2) and I.C. § 5-14-1.5-3.1(c)(2). The parties dispute the existence of a "secret" meeting conducted by the Commission between the December 10, 2012 meeting and the January 13, 2013 meeting. Regardless, from what you have provided it is my opinion that the Commission did not violate the prohibition against serial meetings.

Lastly, you provide that the Commission failed to provide proper notice for the January 7, 2013 meeting. In response, Mr. Parkinson advised that all media had who had requested notice of the Town's meetings had been provided with notice via email correspondence. Further, the notice of the meeting was posted at the Town Hall. Both

actions were conducted 48 hours, excluding weekends and holidays, prior to the start of the meeting. In addition, Mr. Parkinson noted that you were in attendance at the meeting. Accordingly, if the Commission provided notice in the manner described by Mr. Parkinson in response to your formal complaint, it is my opinion that the Commission did not violate the ODL.

CONCLUSION

For the foregoing reasons, if the Commission took final action on all issues related to the project at open, public meetings and did not hold a “secret” meeting, then it is my opinion that the Commission complied with the ODL. It is my opinion that the Commission did not violate the ODL as it related to the onsite inspection and that it did not violate the prohibition against serial meetings. Lastly, if the Commission provided notice in the manner described by Mr. Parkinson in response to your formal complaint, it is my opinion that the Commission did not violate the ODL.

Best regards,

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

Joseph B. Hoage
Public Access Counselor

cc: Charles Parkinson