



# STATE OF INDIANA

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July 15, 2013

Mr. and Mrs. George and Betty Dotlich  
6745 East 250 North  
Grovertown, Indiana 46531

*Re: Formal Complaint 13-FC-173; Alleged Violation of the Open Door Law by  
the Starke County Board of Zoning Appeals*

Dear Mr. and Mrs. Dotlich:

This advisory opinion is in response to your formal complaint alleging the Starke County Board of Zoning Appeals ("Board") violated the ODL. Martin Bedrock, Attorney, responded in writing to your formal complaint. His response is enclosed for your reference.

## BACKGROUND

In your formal complaint you provide that on May 23, 2013, the Board held an executive session to "Discuss Pending Legal Matters." You maintain that the Board did not have the authority to conduct an executive session pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B) as there was no litigation that was considered to be "pending" at that time.

By way of background, in February 2012, you appealed a decision of the Starke County Zoning Administrator to issue a building permit to Ms. Julia Povilaitis-Ford. After the Board denied your appeal, you appealed the decision to the Starke County Circuit Court ("Court"). On January 22, 2013, the Court ordered the Board's Findings of Fact and Decision ("Decision") to be vacated and remanded the case back to the Board for the purpose of issuing a new Decision consistent with the Court's opinion, all within 45 days. Neither party appealed the Court's order.

On February 21, 2013, the Board at a public meeting adopted the Court's findings. In addition to the adoption of the new Decision, the Board further ordered the removal of the structure by June 1, 2013, and submitted documentation to the Court of such actions on February 26, 2013. The Board's new Decision was not appealed by any party. As the Board has adopted the Court's findings and neither party appealed the Board's subsequent Decision, you maintain that the litigation was officially terminated at that time.

Three months after adopting the Court's findings, at a Board public meeting held on May 16, 2013, the Board discussed whether to issue a building permit to Ms. Ford. Ms. Ford and her husband provided new information to the Board regarding the same structure that was subject to the Court's order and the Board's prior Decision. The issue was not on the Board's agenda and was not part of the public hearing that occurred as a result of a denial of a new permit or any other type of appeal to the Board. The subject of the new permit had not been discussed by the Starke County Planning Commission ("Commission") and issuing building permits is not a function of the Board, other than when granting a variance in those instances when the Commission and Zoning Administrator do not have such authority. During the May 16, 2013 public meeting, the Board members discussed their desire to review, in executive session, the information that had been provided by Ms. Ford related to the structure, which would then be followed by a special meeting to further address the subject. The Board chairman allowed all parties to provide any further information for the Board to consider. The Board then scheduled an executive session for May 23, 2013 to discuss the issue and review the new information that was provided.

The Board thereafter held an executive session on May 23, 2013 to "discuss pending legal matters." On May 29, 2013 the Board held a special meeting, where the Board chairman stated that the Board had reviewed additional evidence at the May 23, 2013 executive session and had decided to adopt the judge's orders, but that the deadline for removal of the structure had been extended from June 1, 2013 to June 15, 2013. You believe the Board did not have the authority to discuss the issues presented in executive session, as the litigation that had previously been filed had completed, neither party had appealed the Court's January 22, 2013 order or the Board's subsequent February 21, 2013 Decision, and the time limit to appeal any order in connection with the matter had passed.

In response to your formal complaint, Mr. Bedrock advised that the Board held a public meeting on May 16, 2013. During the course of the meeting, Mr. Bedrock believed that the Board was contemplating taking action that would have been contrary to the Court's order. Mr. Bedrock suggested that the Board hold an executive session so that the parties could discuss the Court's order, which was eventually held on May 23, 2013. Mr. Bedrock believed that an executive session was proper since there was an existing Court order to be carried out, and until the order was carried out, the legal matter was still pending. The purpose of the executive session was to advise the Board of the possible consequences of not complying with the Court's order. No action was taken during the executive session except for calling a special meeting of the Board for May 29, 2013. At the May 29, 2013 special session, the Board voted to comply with the Court's order and to grant Mr. and Mrs. Ford an extension of time to comply. The Board believed that an extension of time was necessary, as the Fords possibly had been misled at a prior meeting of the Board into thinking that their structure could remain on the property.

## 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).

Executive sessions, which are meetings of governing bodies that are closed to the public, may be held only for one or more of the instances listed in I.C. § 5-14-1.5-6.1(b). The only official action that cannot take place in executive session is a final action, which must take place at a meeting open to the public. *See* I.C. § 5-14-1.5-6.1(c). "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).

Notice of an executive session must be given 48 hours in advance of every session and must contain, in addition to the date, time and location of the meeting, a statement of the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held. *See* I.C. § 5-14-1.5-6.1(d). This requires that the notice recite the language of the statute and the citation to the specific instance; hence, "To discuss a job performance evaluation of an individual employee, pursuant to I.C. § 5-14-1.5-6.1(b)(9)" would satisfy the requirements of an executive session notice. *See Opinions of the Public Access Counselor 05-FC-233, 07-FC-64; 08-FC-196; and 11-FC-39.*

The Board's notice for the May 23, 2013 executive session provided:

"There will be an executive session of the Starke County Board of Zoning Appeals on Thursday, May 23, 2013 at 6:30 p.m. in the County Government Meeting Room to discuss pending legal matters."

Although not alleged in your formal complaint, regardless of the appropriateness of the discussions held by the Board at the executive session, the notice that was issued did not comply with the requirements of the ODL as it failed to provide the statutory enumerated instance that would allow the Board to meet in executive session and the language of said instance. A proper notice would have provided:

"There will be an executive session of the Starke County Board of Zoning Appeals on Thursday, May 23, 2013 at 6:30 p.m. in the County Government Meeting Room. The executive session will be held pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B) for a discussion of strategy with respect to the initiation of litigation or litigation that is either pending or has been threatened in writing."

As to the discussions held by the Board at the May 23, 2013 executive session, I.C. § 5-14-1.5-6.1(b)(2)(B) provides::

- “(b) Executive sessions may be hold only in the following instances:  
(2) For discussion of strategy with respect to any of the following:  
(B) Initiation of litigation or litigation that is either pending or has been threatened in writing.

However, all such strategy discussions must be necessary for competitive or bargaining reasons and may not include competitive or bargaining adversaries.”<sup>1</sup>

As applicable here, compliance with the ODL turns on whether the litigation was still considered to be “pending” at the time the Board held an executive session on May 23, 2013. On January 22, 2013, the Court issued its order, vacating the Board’s previous Decision and remanding the issue back to the Board. The Order required the Board to enter a new Decision within 45 days. There has been no showing that the Court’s January 22, 2013 order was appealed. Pursuant to the Court’s order, the Board held a public meeting on February 21, 2013 and adopted a new Decision consistent with the Court’s prior order. The Board’s February 21, 2013 Decision was not appealed by any party. There has been no showing that the parties were to continually update the Court on its activities or that there were any future hearings to be held by the Court in relation to this matter. *See Advisory Opinion of the Public Access Counselor 12-FC-287(a)*. The Board has provided in response that the executive session was called as a result of the Board’s attorney being fearful that the Board was going to act contrary to the Court’s order at the Board’s May 16, 2013 meeting. However, in light of the fact that neither party appealed the Court’s January 22, 2013 Order or the Board’s February 21, 2013 Decision, the Board had previously adopted the Court’s Order at its February 21, 2013 public meeting after receiving legal advice from its attorney at the public meeting, and that at the time of the executive session there was no requirement of either party to provide further information to the Court regarding compliance with its order, it is my opinion that the litigation was not “pending” at the time the Board held an executive session on May 23, 2013. Accordingly, it is my opinion that the issues discussed by the Board at its May 23, 2013 executive session pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B) were improper.

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<sup>1</sup> It should be noted that effective July 1, 2013, I.C. § 5-14-1.5-6.1(b)(2)(B) was amended to include “As used in this clause, "litigation" includes any judicial action or administrative law proceeding under federal or state law.” Prior to the amendment, “litigation” was not defined under the ODL, and the Public Access Counselor applied the dictionary definition, which provided litigation to be “lawsuit or a contest in a court of law for the purpose of enforcing a right or seeking a remedy.” *See Opinions of the Public Access Counselor 01-FC-16; 12-INF-33; 13-INF-45*. Administrative hearings were not considered to be “litigation” by the Public Access Counselor prior to the July 1, 2013 amendment.

## CONCLUSION

Based on the foregoing, it is my opinion that the Board failed to provide proper notice for its May 23, 2013 executive session. Further, it is my opinion that the issues discussed by the Board at the executive session held pursuant to I.C. § 5-14-1.5-6.1(b)(2)(B) were improper, as the litigation was no longer pending at the time the executive session occurred.

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: Martin Bedrock