

August 16, 2002

Mr. Ned Kovachevich  
259 Danica Drive  
Valparaiso, IN 46385-7735

Re: Advisory Opinion 02-FC-39; Alleged Violations of the Indiana Open Door Law by the Porter County Board of Zoning Appeals/Porter County Plan Commission.

Dear Mr. Kovachevich:

This is in response to your formal complaint, which was received on August 9, 2002. You have alleged that the Porter County Board of Zoning Appeals and Plan Commission ("BZA" and "Commission," and herein collectively referred to as the "BZA/Commission") have violated the Indiana Open Door Law ("ODL") Indiana Code chapter 5-14-1.5. Specifically, you allege that the BZA/Commission did not provide proper notice of, nor hold a required public hearing for, an administrative appeal of a decision by their administrator in violation of the ODL. Ms. Lily M. Schaefer, attorney for the BZA/Commission, provided a written response to your complaint. A copy of her response is enclosed for your reference. For the reasons set forth below, it is my opinion that the BZA/Plan Commission did not violate the Open Door Law with respect to its July 17, 2002 meeting. Any determinations as to whether the Board of Zoning Appeals conducted the proceeding in compliance with state zoning laws should be reviewed by a trial court under the process set up by the General Assembly under Indiana Code section 36-7-4-1003.

## BACKGROUND

According to your complaint, on May 6, 2002 Porter Development LLC ("Porter Development") filed a petition for a special exception with the BZA to locate a transfer station on certain property in the county. Mr. Steve Nigro, Interim Director of the BZA, made a determination on May 16, 2002 that this petition was identical to a petition filed and denied by the BZA in February 2002. Under the BZA's rules of procedure, any case decided adversely to a petitioner may not be placed on the BZA docket again for at least one (1) year after the date of the decision. Porter Development filed an appeal to the BZA on May 22, 2002 asking that the BZA review Mr. Nigro's decision to refuse to allow the BZA to hear Porter Development's proposal for a special exception for a waste transfer station on a property.

Between approximately May 6th and June 19th, you sent a number of letters to the BZA advising them that pursuant to their rules of procedure, they were required to advertise and hold a public hearing on the administrative appeal of Mr. Nigro's determination. On June 19th, the BZA discussed your correspondence at a public meeting and determined this administrative appeal, under the county's zoning ordinance, need only be placed on the agenda as "pending business" and that a public hearing was not required. The BZA held what you refer to as a public hearing on July 19, 2002 on the administrative appeal of Mr. Nigro's determination, and according to your complaint, did so without proper notice and without the opportunity for the public to be heard on the issue. You then filed your formal complaint with this Office.

In response to your complaint, Ms. Schaefer stated that your formal complaint is without merit under the ODL. She indicated that the BZA posted notice properly under the ODL, as is evidenced by an affidavit provided by Mr. Nigro. Ms. Schaefer opined that the duties of the Public Access Counselor are not invoked by your formal complaint since the BZA complied fully with the ODL with respect to its July 19th meeting. Further Ms. Schaefer indicated that the BZA did not violate the spirit of the ODL by failing to hold a public hearing on the issue because no statute requires a public hearing on such an administrative appeal. Since the issue was whether Mr. Nigro properly applied the one (1) year rule prohibiting resubmission of petitions, there was no reason to hold a public hearing. Further, Ms. Schaefer stated that if any member of the public was aggrieved by the BZA decision, that person has a right under Indiana Code section 36-2-7-1003 to petition for issuance of a writ or certiorari, which is the proper way to complain on such matters.

## ANALYSIS

The intent and purpose of the ODL is 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." Ind. Code § 5-14-1.5-1. The provisions of the ODL are to be "liberally construed with the view of carrying out its policy." Ind. Code § 5-14-1.5-1. The BZA and Commission are public agencies and governing bodies subject to the ODL. Ind. Code §§ 5-14-1.5-2(a) and (b).

You have complained that the July 19, 2002 meeting of the BZA to consider Mr. Nigro's determination on the petition filed by Porter Development on May 6th was held without proper notice under the ODL and that it should have been conducted as a public hearing. The BZA/Commission responded that proper notice was given for this meeting under the ODL and that a public hearing was not required. There are two separate, but related issues raised by your complaint, whether the BZA provided proper notice of the July 19th proceeding on the administrative appeal of Mr. Nigro's determination and whether the BZA should have held a public hearing on the matter.

### The Open Door Law

Under the ODL, a public agency is generally required to post notice of the date, time and place of its meeting at least forty-eight (48) hours in advance of the meeting, not including weekends or holidays. Ind. Code §5-14-1.5-5(a). This notice must be posted outside the principal office or meeting location and provided to any news media that has, by January 1 of any calendar year, provided a written request to receive such notices. Ind. Code §5-14-1.5-5(b). The ODL recognizes that the General Assembly has required public agencies to publish notice of meetings or public hearings in certain instances. Under Indiana Code section 5-14-1.5-5(e), the notice requirements for a public meeting under the ODL do not apply to any meetings for which notice by publication is required by statute, ordinance, rule or regulation. Ind. Code §5-14-1.5-5(e). According to Mr. Nigro's affidavit, it appears that the BZA has complied with these requirements of Indiana Code section 5-14-1.5-5(b). The BZA, therefore, did not violate the ODL meeting notice requirements with respect to the posting of the notice of their July 17th meeting.

As for the claim that the failure to hold a public hearing violated the ODL, the ODL does not provide the public with the right to be "heard." Members of the public who attend public meetings of governing bodies are permitted the opportunity to "observe and record" these meetings. Ind. Code §5-14-1.5-3(a). The ODL does not require any public hearings, such authority would come from another legal authority, such as a state statute or a local ordinance. For this reason, it is my opinion that the failure to conduct a public hearing with respect to the consideration of Mr. Nigro's determination concerning the Porter County Development petition for a special exception did not violate the ODL.

#### Notice and Public Hearing Requirements under Zoning Laws

You have alleged in your complaint and the various letters you sent to the BZA that the BZA's consideration of Porter County Development's petition to appeal Mr. Nigro's required notice and the conduct of a public hearing under Indiana Code section 36-7-4-920. You contend that since Indiana Code section 36-7-4-920 provides for hearings on administrative appeals, that public notice must be given to interested persons and to the public pursuant to Indiana Code sections 5-3-1-2 and 5-3-1-4. You also contend that the relevant zoning laws required the BZA to permit public comment on the matter being discussed concerning Porter County Development on July 17th.

In her response to your complaint to this Office, however, Ms. Schaefer states that if you wish to seek redress of the BZA's decision concerning Porter County Development, or how the proceeding was handled, you need to conform to the statutory remedy provided under Indiana's zoning statutes, not the ODL. Under Indiana Code section 36-7-4-1003, a person who is aggrieved by any decision of the BZA may seek review by certiorari in the circuit or superior court in the county in which the premises at issue are located. A petition must be filed stating that "the decision is illegal in whole or in part and specifying the grounds of the illegality."

As noted above, the failure to provide notice by publication or to hold a public hearing did not violate the ODL. You attended the July 17th BZA meeting so you were not harmed with respect to notice of the meeting; the fact is that you and others interested in the matter were not permitted to comment, which is not a matter governed by the ODL. Your complaint is that the BZA's process was illegal under the zoning laws with respect to the appeal filed by Porter Development. It is my opinion that this requires an interpretation of our state's zoning laws and that the appropriate party to do that review is a trial court under the certiorari process provided under Indiana Code section 36-7-4-1003.

#### CONCLUSION

It is my opinion that the Porter County BZA/Plan Commission did not violate the Open Door Law with respect to its July 17, 2002 meeting. Any determinations as to whether the Board of Zoning Appeals conducted the proceeding in compliance with state zoning laws should be reviewed by a trial court under the process set up by the General Assembly under Indiana Code section 36-7-4-1003.

Sincerely,

Anne Mullin O'Connor

Enclosure

cc: Ms. Lily M. Schaefer, Attorney for the PCBZA/PC w/o enclosure

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