STATE OF INDIANA

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December 27, 2010

Mr. Joseph L. Weingarten
14066 Deer Stone Ln.
Fortville, IN 46040

Re: Formal Complaint 10-FC-317; Alleged Violation of the Open Door Law by Fall Creek Township

Dear Mr. Weingarten:

This advisory opinion is in response to your formal complaint alleging Fall Creek Township (the "Township") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* I granted your request for priority status under 62 Ind. Admin. Code 1-1-3(3).

BACKGROUND

This is the fourth formal complaint you have filed with this office against Fall Creek Township alleging violations of the ODL. *See Ops. of the Public Access Counselor 10-FC-316; 10-FC-303; 10-FC-287.* In this complaint, you allege that on December 14, 2010, a notice for a December 20th public meeting was published in *The Indianapolis Star*. On December 15th, a notice was published on the door of the Township offices that the meeting was to be held at Fishers Town Hall. A notice on the Fishers Town Council ("Council") website stated that the meeting was a public *hearing* rather than a public *meeting*. Accordingly, you argue that the December 20th hearing was illegal because the Township did not post notice of it 10 days in advance.

Attorney Stephen Buschmann responded to your complaint on behalf of the Township. Mr. Buschmann states that the Township published a notice of the December 20th reorganization hearing on December 14th. The published notice was erroneous insofar as it listed the wrong location of the meeting, but the correct location was posted on the door of the Township's office, on the Town of Fishers' ("Town") website, and was published by the Town. The locations are 4.1 miles away with an estimated driving time of eight minutes. He argues that the error notwithstanding, the notice substantially complied with Ind. Code § 5-3-1-2.3(a).

Mr. Buschmann also avers that the Township published sufficient notice of the meeting by doing so more than five days in advance. He argues that Ind. Code § 36-1.5-4-19 (five-day requirement) governs the timing of publishing notices for reorganization meetings rather than the general law for publishing public hearings: Ind. Code § 5-3-1-2(b) (10-day requirement).

ANALYSIS

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. Ind. Code § 5-14-1.5-5(a). The question here is one of first impression for this office: whether notice of reorganization plan hearings must be published 10 days in advance pursuant to Ind. Code § 5-3-1-2(b), or five days in advance pursuant to Ind. Code § 36-1.5-4-19.

According to the Indiana Supreme Court, the "first task in statutory interpretation is to harmonize two conflicting statutes." *State v. Universal Outdoor, Inc.*, 880 N.E.2d 1188, 1191 (Ind. 2008), *citing Bd. of Trs. of Ind. Pub. Employees' Ret. Fund v. Grannan*, 578 N.E.2d 371, 375 (Ind. Ct. App. 1991), *trans. denied*. "So long as two statutes can be read in harmony with one another, we presume that the Legislature intended for them both to have effect." *Id., quoting Burd Mgmt., LLC v. State*, 831 N.E.2d 104, 108 (Ind. 2005). "And, while the latter of two repugnant statutes will control and operate to repeal the earlier to the extent of the repugnancy, such implied repeal should be recognized 'only when a later act is so repugnant to an earlier one as to render them irreconcilable, and a construction which will permit both laws to stand will be adopted if at all possible.'" *Id., quoting Grannan*, 578 N.E.2d at 375. "Where possible, if conflicting portions of a statute can be reconciled with the remainder of the statute, every word in the statute must be given effect and meaning, with no part being held meaningless." *Id.*, *citing Noble County Bd. of Comm'rs v. Fahlsing*, 714 N.E.2d 1134, 1136 (Ind. Ct. App. 1999), *trans. denied*, 735 N.E.2d 225 (Ind. 2000).

Ind. Code § 5-3-1-2(b) requires that "[i]f the event is a public hearing or meeting concerning any matter not specifically mentioned in subsection (c), (d), (e), (f), (g), or (h) [of section 2], notice shall be published one (1) time, at least ten (10) days before the date of the hearing or meeting." The intent of subsection 2(b) appears to be one of general application; where no specific notice time limit applies, the default rule is 10 days. The subsections listed in section 2 apply to various reasons for holding public hearings, but none of them apply to reorganization hearings specifically. The language of the section indicates that where another provision requires notice to be published within a certain amount of time prior to a public hearing (i.e., a matter that *is* "specifically mentioned" in another statute), that provision controls over subsection 2(b).

With regard to reorganization hearings specifically, Ind. Code § 36-1.5-4-19 requires that "[t]he legislative body of each of the reorganizing political subdivisions

shall (3) [conduct] a public hearing on the plan of reorganization: (A) not sooner than five (5) days after notice of the public hearing is published under IC 5-3-1; and (B) before the legislative body takes final action on the resolution to adopt the plan of reorganization. If the Legislature had intended to require 10 days' notice prior to reorganization hearings, it would have had no reason to include subsection 19(3)(A) in the provisions pertaining to reorganizations. And while requiring only five days' notice for reorganization hearings would eviscerate Ind. Code § 5-3-1-2(b), rules of statutory construction require that "specific statutory provisions take priority over general statutory provisions." *White v. Indiana Parole Board*, 713 N.E.2d 327, *329 (Ind. App. 1999), citing *Ezzell v. State*, 246 Ind. 268, 271, 205 N.E.2d 145, 146 (Ind.1965). Because I decline to interpret the two statutes in such a way as to eviscerate the meaning of subsection 19(3)(A), *Universal Outdoor, Inc.*, 880 N.E.2d at 1191, it is my opinion that notices for reorganization hearings that are published at least five days in advance in accordance with Ind. Code § 36-1.5-4-19 are valid. An agency might opt to publish such a notice 10 days in advance in accordance with both statutes, but in my opinion it would not be required to do so.

As to the error in the Township's published notice, Ind. Code § 5-3-1-2.3 provides:

> A notice published in accordance with this chapter or any other Indiana statute is valid even though the notice contains errors or omissions, as long as:
>
> (1) a reasonable person would not be misled by the error or omission; and
>
> (2) the notice is in substantial compliance with the time and publication requirements applicable under this chapter or any other Indiana statute under which the notice is published.

Ind. Code § 5-3-1-2.3. Thus, the first prong of the test set forth in Ind. Code § 5-3-1-2.3 is whether a reasonable person would be misled by the error or omission. *See* I.C. § 5-3-1-2.3. The statute does not define a "reasonable person," but the Indiana Court of Appeals analyzed this provision in a 2001 decision:

> Undefined words in a statute are given their plain, ordinary and usual meaning. Ind. Code § 1-1-4-1(c). Courts may consult English language dictionaries to ascertain the plain and ordinary meaning of a statutory term. *State Bd. of Accounts v. Indiana Univ. Found.*, 647 N.E.2d 342, 348 (Ind. Ct. App. 1995), *trans. denied*. Omitting tautological definitions, "reasonable" is defined, in relevant part, as "amenable to reason; just . . . using or showing reason or sound judgment; sensible . . . not extreme, immoderate, or excessive." WEBSTER'S NEW WORLD DICTIONARY 1118 (3d college ed. 1988). Furthermore, "mislead" is defined, in relevant part, as "to lead into error (of judgment); deceive or delude." WEBSTER'S NEW WORLD DICTIONARY at 867.

Turner v. Board of Aviation Comm'rs, 743 N.E.2d 1153, 1162 (Ind. Ct. App. 2001). Here, Mr. Buschmann notes that the correct meeting location was posted on the door of

the Township's office, on the Town's website, and was published by the Town in the newspaper. Most of the meeting's attendees, therefore, would have received the correct notice about the meeting's location. Even those who showed up at the wrong location, however, had to drive less than 10 minutes to get to the correct location. Although the Township has acknowledged its error, nothing before me indicates that a member of the public was *actually* deprived of the opportunity to attend the hearing. Consequently, it is my opinion that a reasonable person would not have been misled by the Township's error such that he or she would be deprived of the opportunity to attend.

The second prong of the statutory test is whether the publication substantially complies with the applicable time and publication requirements. *See* I.C. § 5-3-1-2.3. *Turner*, 743 N.E.2d at 1162. The information before me indicates that the Township otherwise complied with I.C. § 5-3-1. Thus, it is my opinion that the Township's notice substantially complied with Ind. Code § 5-3-1. As such, it was valid as matter of law.

CONCLUSION

For the foregoing reasons, it is my opinion that the Township did not violate the ODL.

Best regards,

Andrew J. Kossack
Public Access Counselor

cc: Terry Michael
Stephen R. Buschmann, Esq.