



# STATE OF INDIANA

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July 12, 2011

Mr. Craig Klugman  
*The Journal Gazette*  
600 West Main Street  
Fort Wayne, IN 46802

Re: *Formal Complaint 11-FC-145; Alleged Violation of the Open Door Law by the Huntertown Town Council*

Dear Mr. Klugman:

This advisory opinion is in response to your formal complaint alleging the Huntertown Town Council (the "Council") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.* The Council's response to your complaint is enclosed for your reference.

## BACKGROUND

In your complaint, you allege that the Council violated the ODL by taking final action in a non-public meeting. On May 16, 2011, the Council sent *The Journal Gazette* a news release stating that the Council had unanimously agreed on a new location for its proposed wastewater treatment plant (the "Plant") and new utility rates for Huntertown Utility customers. Specifically, the release reads that "the entire council supports this new facility." The release further stated that the Council would present its plans to the public at a regularly-scheduled public meeting at 6:00 p.m. on May 16th.

On April 4, 2011, the Town of Huntertown ("Town"), through its consultants, Engineering Resources, Inc., filed an application for approval of the wastewater treatment plant with the Indiana Department of Environmental Management ("IDEM"). A few days before the Town filed its application, a reporter for *The Journal Gazette*, Vivian Sade, asked Council President Jim Fortman about the new location for the Plant. On March 30, 2011, Mr. Fortman told the reporter, "We are still in the investigation stage but are looking at several sites. All of them are within the town's corporate limits." Mr. Fortman made similar statements to the reporter on April 1st. On May 17th, the Town's clerk-treasurer, Dave Rudolph, told reporter Stacey Stumpf, "This council -- to my knowledge and I'm speaking as the clerk-treasurer and I'm not privy to a lot of that --

they've never taken a vote in public for the location of this sewer system." Stumpf asked Mr. Fortman why the Town filed the IDEM application more than a month before disclosing the decision to Huntertown residents after a June 6, 2011, Council meeting. Mr. Fortman stated that the Council was unable to disclose the new location of the Plant because it was in litigation with the City of Fort Wayne at the time.

*The Journal Gazette* argues that the Council's decisions to build the Plant, set utility rates, and file the application with IDEM happened outside of any public meeting and that the Council violated the letter and the spirit of the ODL.

Mr. Fortman responded to your complaint on behalf of the Council. He states that the Council denies any violation of the ODL and states that "[t]he assumptions made by The Journal are erroneous. . . . It is important to note that the allegations made by The Journal are only general allegations supported with mere recitations of subsections of the ODL . . . in addition to their own assumptions but do not include any specific factual allegations concerning improper notice or meetings actually held during which impermissible official or final action was taken." The Council acknowledges that no meetings have been held to take action regarding the Plant or utility rates, but Mr. Fortman notes that "[q]uite simply, Huntertown does not dispute these facts because no final action has ever been taken with regard to either issue. The location of the [Plant] is still open for public comment and debate." He points to quotes from him in *The Journal Gazette* articles dated June 7, 2011, and June 16, 2011, stating that "the council will continue having discussions with the public about the proposed facility . . . until we make a final decision," and that the "council is open to other options if available land can be found." Further, the utility rate included in the press release was the projected rate provided to the Council by Engineering Resources, Inc., after it conducted a rate study. Mr. Fortman states that no rate has been established, and that it would only be established after a recommendation from the Town's Utility Board to the Town Council, which would then establish the rates by ordinance after a public hearing.

Mr. Fortman denies that any "secretive 'poll'" of the Council members occurred and resulted in the statement in the press release that "the entire council supports this new facility." Rather, the statement was drawn from the fact that Council members voted for resolutions regarding the Plant at a February 1, 2010, public meeting, and from the "continuous reporting and discussion concerning these issues during the regularly scheduled council meetings [where] there has been unanimous support expressed by the current council members with regard to the need for the construction of such a facility."

Mr. Fortman notes that the "only issue upon which there has been any debate is the best location for the facility," and states that the Council has conducted two executive sessions to discuss the acquisition of property. During those sessions, the Council received information and advice from its engineers regarding the prospective cost and feasibility of several prospective locations. The Council claims that such executive sessions were proper and permissible under Ind. Code § 5-14-1.5-6.1(b)(2)(D), which permits executive sessions "[f]or discussion of strategy with respect to . . . [t]he purchase

or lease of real property by the governing body up to the time a contract or option to purchase or lease is executed by the parties.”

Finally, Mr. Fortman states that the Council did not take any action to being the application process with IDEM. The original application was submitted to IDEM on March 30, 2010, because it was “implicit in [the engineers’] contract to do so,” and that contract was authorized by the resolution adopted at the Council’s February 1, 2010, regular meeting. He assumes that the more recent submission that *The Journal Gazette* refers to as an “application” was “merely a supplement to Hometown’s prior submission and was in response to a request from IDEM for more information. . . .”

## 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. 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. I.C. § 5-14-1.5-3(a).

Here, *The Journal Gazette* alleges that the Council made decisions regarding the Plant, the utility rates, and the IDEM application in secret that should have been made during an open meeting. The ODL requires that a final action must be taken at a meeting open to the public. I.C. § 5-14-1.5-6.1(c). “Final action” means a vote by a governing body on a motion, proposal, resolution, rule, regulation, ordinance or order. I.C. § 5-14-1.5-2(g). The Council, however, responds that it has not yet taken any final action regarding these items, and that the expressions of unanimous support from the Council are reflective of discussions and votes that occurred in other regularly-scheduled public meetings such as the February 1, 2010, meeting at which resolutions on these projects were approved unanimously by the Council. Under those circumstances, it does not appear that the Council violated the ODL because no final action occurred absent a public meeting.

Generally, the fact that some or all members of a governing body have made a decision regarding a specific issue does not necessarily mean that the Council secretly conducted official action regarding that issue. Individual members of governing bodies might announce their support or opposition to various projects independently of what the Council does as a whole. The Indiana Court of Appeals determined that governing bodies may make decisions in executive session as long as the corresponding final action (i.e., vote) is taken at a public meeting. *See Baker v. Town of Middlebury*, 753 N.E.2d 67 (Ind. Ct. App. 2001). In *Baker*, Town Marshal Baker alleged that during an executive session to discuss his job performance, the town council had violated the ODL by compiling a list of persons to be rehired and keeping his name off the list. The list was later used in a public meeting to make decisions on who would be rehired. The court held that the compilation of the list was not “final action” and that creating the list did not go

beyond the scope of the General Assembly's expressed intent to permit governing bodies the ability to meet privately to discuss certain personnel matters. Instead, the court said the "final action" consisted of the council's vote at the public meeting. *Id.* at 71. Similarly, any decisions made by the Council during executive session in the present matter would not constitute final action because the ODL permitted the Council to discuss strategy regarding the acquisition of the Plant's property in executive session. I.C. § 5-14-1.5-6.1(b)(2)(D). Final action regarding the Plant (as well as the utility rates and IDEM application<sup>1</sup>), however, must occur at a meeting that is open to the public, and the Council's response to your complaint acknowledges the same.

#### CONCLUSION

For the foregoing reasons, it is my opinion that the Council did not violate the ODL if it has not yet taken final action regarding the Plant, the utility rates, or the IDEM application.

Best regards,



Andrew J. Kossack  
Public Access Counselor

cc: Jim Fortman

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<sup>1</sup> Future final action regarding the IDEM permit, presumably, would pertain to the submission of a National Pollutant Discharge Elimination System permit after final selection of the Plant's location.