



STATE OF INDIANA

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September 30, 2013

Ms. Jennifer A. Washburn
603 East Washington St., Ste. 502
Indianapolis, IN 46204

Re: Formal Complaint 13-FC-256; Alleged Violation of the Open Door Law by the Tipton County Board of Zoning Appeals

Dear Ms. Washburn,

This advisory opinion is in response to your formal complaint alleging the Tipton County Board of Zoning Appeals ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et. seq.* The Board has responded to your complaint through Mr. Jerry Acres, President. His response is attached for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on August 30, 2013.

BACKGROUND

Your complaint alleges the Tipton County Board of Zoning Appeals violated the Open Door Law. Specifically, you allege that on July 31, 2013 the Board held a special meeting to discuss an application from the Prairie Breeze Wind Farm, LLC. You state that at the meeting a vote was held to deny the Wind Farm's request to modify a setback condition. Furthermore, public notice of the meeting did not include an agenda item referencing a discussion of the wind farm project. Additionally, the Board denied testimony by the public, the petitioner or affected landowners at the meeting.

On September 4, 2013 the Board, through Mr. Acres, responded to your formal complaint. The response is attached for your review. In the response, Mr. Acres submits the vote taken did not require a public hearing, because it merely attempted to clarify an upcoming meeting and set "ground rules" for said meeting.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” See Ind. Code § 5-14-3-1. The Tipton County Board of Zoning Appeals is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1).

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 Ind. Code § 5-14-1.5-2(c). “Official action” means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. See Ind. Code § 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 Board contends the special meeting was not a public hearing under the ODL. The ODL does not address or define “special meetings”. There is no statute in the Indiana Code, of which I am aware, that would allow a Board of Zoning Appeals to dismiss the requirements of a public meeting as described above by holding a “special meeting”. Despite this argument of semantics, it is determined the special meeting held by the Board would fall under the purview of the ODL. To illustrate the point, it is explicitly stated in the Board’s By-Laws that “All meetings, except executive sessions, shall be open to the public.” The By-Laws do not distinguish between special meetings and public hearings for the purposes of open access and public observation. The meeting at issue was not advertised as an executive session meeting.

Both parties concede notice was posted in the Tipton County Tribune on Friday, July 26, 2013 the Board would meet on Wednesday, July 31, 2013. The notice satisfies the requirement of Ind. Code 5-14-1.5-5 *et. al.* requiring notice be posted 48 hours in advance of the meeting and the notice included the date and time of the meeting. Additionally, an agenda was circulated providing notice of the schedule and discussion topics. Specific subject matter of the meeting, however, was not addressed in the agenda. The agenda requirement is found at Ind. Code 5-14-1.5-4.

The Indiana Court of Appeals has addressed the agenda requirement of the ODL on several occasions, but has not defined agenda in terms relating to the Open Door Law. The Courts’ findings have focused on restricting interested spectators’ access to the hearing. See *Riggin v. Board of Trustees of Ball State University*, 489 N.E.2d 616 (Ind. Ct. App. 1988). The ODL does not define agenda either and does not address whether the agenda has to include reference to the specific subject matter of the meeting.

An executive session does define what the agenda shall entail. This is due to the strict requirement of the subject matter qualifying the meeting as an executive session. See Ind. Code 5-14-1.5-6.1(d). The public meeting notice statute provides no such requirement. It can be speculated because the two meetings are distinguished and there are no subject matter restrictions on public meetings, then the intent of the legislature was not to require specific subject matter notice on the agenda for regular public meetings. This conclusion

is supported by the absence of an agenda requirement for all public agencies – only those agencies who regularly utilize agendas. See Ind. Code 5-14-1.5-4(a).

It can be reasonably concluded the Board is in substantial compliance of the statute by posting an agenda absent the specific subject matter of the meeting. The meeting was open and all other notice requirements were met, despite the Board's assertion the meeting was a special meeting.¹

As to the issue of allowing public testimony, this Office adopts the finding in 13-FC-16, stating the following:

Indiana law only requires that public meetings be open; it does not require that the public be given the opportunity to speak. *See Opinion of the Public Access Counselor 08-FC-149, citing Brademas v. South Bend Cmty. Sch. Corp.*, 783 N.E.2d 745, 751 (Ind. Ct. App. 2003), *trans. denied*, 2003; *see also* I.C. § 5-14-1.5-3 (“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.”). “Indiana law does require a governing body to allow public testimony in certain instances (e.g. a hearing on a proposed budget), but as a general rule the ODL does not guarantee the right to speak at a meeting.” *See Opinions of the Public Access Counselor 08-FC-149 and 10-FC-240*. Minus a specific legal mandate, a governing body had the authority to determine whether it will receive public comment during a public meeting and if it elects to do so, the procedures that will be followed in carrying out this process.

It is clear from case law and the persuasive authority of the Opinion that public comment is not required during a public meeting. Therefore, there is no violation of the ODL in regard to this matter.

CONCLUSION

For the foregoing reasons, it is the Opinion of the Office of the Public Access Counselor the Tipton County Board of Zoning appeals violated the Open Door Law as to the agenda requirement of the statute, but did not violate the Open Door Law by not soliciting comments from the public.

Regards,

¹ It should be noted a vote on official action on public business was held during the meeting. Although it was simply setting forth the decision on hearing a modification of conditions matter, this is deemed an official action on public business.

A handwritten signature in black ink, appearing to be 'LHB', with a long, sweeping underline that extends to the left.

Luke H. Britt
Public Access Counselor

cc: Jerry Acres