STATE OF INDIANA

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CURTIS T. HILL, JR.
ATTORNEY GENERAL

February 1, 2018

OFFICIAL OPINION NO. 2018-2

Bryce H. Bennett, Jr., Chairman
State of Indiana Election Commission
Indiana Government Center South, Room E-204
302 West Washington Street
Indianapolis, Indiana 46204

RE: Indiana Election Commission/Lake County Small Precinct Consolidation

Dear Chairman Bennett:

We hereby acknowledge receipt of your inquiry regarding the legal duties attaching to, and the legal recourse available to, the Indiana Election Commission in response to an apparent persistent deadlock among the Commission's four (4) voting members. We are pleased to offer the following synthesis and analysis, hoping that it proves helpful to you and your fellow Commission members, as you attempt to gauge and act upon the lawful and appropriate means of moving forward.

ISSUES PRESENTED

1. Does the Indiana Election Commission (the "Commission") and/or its Chairman have standing to request a published election law-related advisory opinion from the Office of the Indiana Attorney General?

2. What options are available to the Commission where, as here, the Lake County Board of Elections & Registration and its Small Precinct Committee have failed to produce proposed findings and a recommended order of precinct consolidation?

    A) In order to comply with the law while achieving the policy goals, fairness, efficiencies and cost-savings contemplated by the re-adopted Small Precinct Consolidation statute for Lake County, what actions *must* the Indiana Election Commission take under the circumstances cited above?

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B) What actions *should* the Commission take in order to effectuate the initiative of precinct consolidation for Lake County, as has been successfully accomplished in several of Indiana's largest counties?

BRIEF ANSWERS TO ISSUES PRESENTED

1. The Indiana Election Commission and/or its Chairman have standing to request an advisory opinion of the Attorney General on a matter pertaining to the duties of the Commission.

2. A) Since a proposed precinct establishment order was not submitted by the Lake County Board, the Commission must adopt an order for Lake County that it considers will realize savings for the county, and which does not impose unreasonable burdens on the ability of the voters to vote at the polls.

   B) The Commission's obligation to issue a precinct establishment order for Lake County is a continuing one, and it is mandatory. A single vote on each of two proposals properly submitted to it by other parties is not sufficient to fulfill the Commission's obligation, which would include constructing its own plan giving due consideration to any plans properly and timely submitted. The Chairman pursuant to statute should reconvene the Commission for this purpose, and it should remain in session until such time as an order is developed and agreed upon, with appropriate staff of the Election Division tasked with effectuating and fact-checking the plan in light of statutory boundary rules. No further opportunity for public comment or testimony from outside parties need be extended, as this has been done. If the Commission continues to be deadlocked and fails to issue a valid precinct establishment order for Lake County, the Commission should be aware that under appropriate circumstances, including but not limited to petition from Indiana voters, the Governor may consider calling the commission back into session pursuant to Ind. Code §3-6-4.1-12, until such time as their duty to issue an order is fulfilled.

REQUESTOR STANDING

The Indiana Election Commission (the "Commission") was created by statute in 1995, replacing the former Indiana State Election Board. *See* Public Law 8-1995; Ind. Code §3-6-4.1.

The Commission is comprised of four members, evenly divided between the two major political parties in Indiana. Ind. Code §3-6-4.1-2. The Chair and Vice-Chair are required to be of different political parties. Ind. Code §3-6-4.1-6. All members of the Commission are statutorily entitled to the same *per diem* and reimbursements as are members of other state boards or commissions. Ind. Code §3-6-4.1-11. The Commission has rulemaking authority under Ind. Code §4-22-2, which includes emergency rulemaking authority under Ind. Code §§3-6-4.1-14(a)(2), and 16. Only an entity that may properly be considered an "agency" of the State, exercising some executive or administrative power of state government, may promulgate rules under the statutes cited above. *See* Ind. Code §4-22-2-3(a).

The Commission since 1995 has been charged with the administration of Indiana's election laws. Ind. Code §3-6-4.1-14(a)(1). It also has a statutory grant of investigative and

adjudicative authority, including the power to administer oaths, issue subpoenas, and levy fines. Ind. Code §§3-6-4.1-19, -20, -21, and -25.

Despite ample indicia of being a "state agency" fully eligible and with appropriate standing to seek advisory opinions of the OAG, it appears that neither the Commission nor its Chair previously requested or received an official attorney general opinion. Its predecessor agency did seek such opinions, however, and in fact on regular occasions received formal responses to those requests. *See, e.g.,* 1958 Op. Ind. Att'y Gen. 12; 1962 Op. Ind. Att'y Gen. 20.

For his part, Indiana law directs the Attorney General to offer an official legal opinion upon request from certain described officials or entities, including any "state officer . . . touching upon any question or point of law concerning the duties of the officer...". The term "state officer" has been interpreted to encompass an executive official of a "state agency." *See* Ind. Code §4-6-2-5. The term "state agency" is specifically defined by statute (at Ind. Code §4-6-3-1) to include "an administration, agency, authority, board, bureau, *commission*, committee, council, department, division, institution, office, officer, service, or other similar body of state government created or established pursuant to law." *Id. (emphasis supplied).*

Thus, it is evident that the Commission, established pursuant to state statutory enactment some 22 years ago, is a "commission" and therefore a "state agency" within the meaning of Ind. Code §4-6-2-5. As the Chairperson of that Commission, the requestor in this matter is qualified to seek an advisory opinion on behalf of the Commission as a collective body. Moreover, the subject-matter of his inquiry not only "touch[es] upon [a] question or point of law concerning... [his] duties," it rests squarely on the Commission's very conduct and boundaries of authority, and upon a defined set of tasks placed before it by law where others have failed to act. On this basis we proceed.

ADDRESSING THE ISSUES

It will be helpful to know something about the first round of this twilight struggle, for it will instruct us about how Lake County arrived, legislatively and politically, at the current impasse now presenting itself.

The basic structure for administering elections in Lake County is rather unique. Unlike other counties in Indiana, Lake County boasts its own County Board of Elections and Registration (the "County Board")—statutorily created, separately codified, uniquely staffed, with plenary responsibility for organizing Lake County's elections. *See* State v. Buncich, 51 N.E.3d 136, 139 (Ind. 2016); *see also* Ind. Code §3-6-5.2-6 (2005). The County Board has five members: the Circuit Court Clerk, and two members of each major political party, appointed by their respective party chairmen. Ind. Code §3-6-5.2-4; Buncich, *supra*, at 139.

LAKE COUNTY PRECINCT CONSOLIDATION, I
["LAKE PRECINCTS 1"]

In March, 2014, the General Assembly enacted Indiana Code, Section 3-11-1.5-3.4 (Supp. 2015), which created another local political sub-structure known as the "Lake County

Small Precinct Committee." The purpose of this committee was to identify and issue a statistical snapshot of small precincts (defined as having fewer than 500 active voters) that were amenable, or at least susceptible as a matter of mathematical fact, to being consolidated with other precincts into larger precincts, but not (initially) to exceed 1,200 active voters per precinct.

The idea, for some the principal idea behind the consolidation law, was to reduce the costs of administering elections in Lake County which comprised, by itself, over 15% of all of the small precincts in the entire state. Buncich, *supra*, at 138.

The Small Precinct Committee created by the 2014 legislation would consist of the five county election board members, plus any number of party staffers unanimously appointed by the members. Ind. Code §3-11-1.5-3.4(c), (d). Once formed, this committee had a direct set of instructions to follow. They would (1) identify the County's "small precincts" as defined by law; (2) determine which small precincts might be conjoined without violating the standards set forth in basic precinct boundary rules; and (3) estimate the cost savings expected to be generated by consolidation pursuant to the proposal. Buncich, *supra*, at 139; Ind. Code §3-11-1.5-3.4(c).

The county election board duly constituted the Small Precinct Committee in June of 2014. The Small Precinct Committee actually met several times and, having conducted their research and analysis as the law prescribed, determined that there were 76 small precincts eligible for consolidation without violating boundary rules, and that consolidation on this scale would generate an estimated $435,000.00 in taxpayer savings over the next five years. Buncich, *supra*, at 139.

At this point, everything appeared to be moving forward as the statutory framework for consolidation had contemplated. However, before the county election board could meet to adopt the committee's findings and a plan built on those numbers, the process came to a halt. The Lake County Democratic Central Committee had filed suit to stop the consolidation process, seeking declaratory and injunctive relief on the grounds that the statutes, in singling out Lake County, were unconstitutional "special legislation," and violated the doctrine of separation of powers.

After an evidentiary hearing, the trial court[1] ruled in favor of the Democratic Central Committee, and issued an injunction barring any further activities toward precinct consolidation. The State filed a direct appeal to the Indiana Supreme Court, which reviewed the case under a *de novo* standard.

On March 22, 2016, the Supreme Court announced its decision. The trial court was reversed, and the small precinct consolidation statute was upheld as constitutionally sound. But even this decision, announced by Justice Massa, appeared to be too little, too late. The enactment which had been upheld by the Court had "sunsetted" and been rendered null and void by its own terms only weeks before the Court's decision, on January 1, 2016.

[1] Circuit Court of Lake County, Hon. George C. Paras, presiding.

LAKE COUNTY PRECINCT CONSOLIDATION, II
["LAKE PRECINCTS 2"]

The Supreme Court had confronted the issue of whether the small-precinct consolidation plan prescribed for Lake County had been a constitutionally proper measure for addressing seriously aberrant voting statistics in that county. Justice Massa, writing for the Court in Lake Precincts 1, concluded firmly that it had. In the course of arriving at that conclusion, the justices took a deep dive into the numbers concerning the composition of precincts in Lake County as well as statewide.

The Court cited the following facts of record, among others introduced below at the trial:

- At the hearing in Circuit Court, the evidence showed that 174 of Lake County's 520 precincts (33.46%) qualified as "small";[2]

- This number of small precincts was double the average small-precinct number in any other county, including all counties at any size;[3]

- The county with the *next highest* number of small precincts was Allen County, with 57 small precincts out of 338 (16.9%);[4]

- Marion County had only 19 small precincts of a total of 600 (3.2%), the numbers and costs having been improved by that county's completion of a consolidation process similar to that required of Lake County;[5]

- To the argument made by the Lake County Democratic Party Central Committee that other counties in Indiana also had as many as 33% "small precincts," the State countered that the comparisons offered by the Democrats were off the mark. Clearly, (the State argued). "Lake County is a larger, predominantly urban county with 'an inordinate number of [small] precincts given its relatively dense population."[6]

- The Court weighed into this debate by noting that, of the 27 other counties with 33% or more "small precincts," all but one have fewer than 40 total precincts, and with its 520 total precincts, Lake County has seven times the greater number of precincts than the next highest county in this largely rural, low-population county group. The next highest county in this group is Kosciusko County, with 23 small precincts out of a total of 69.

Based on the foregoing facts established at trial, the State's highest court found ample cause for concern about a disparity so pronounced that it had become a "defining characteristic" of that county's voting system. For the Supreme Court under Buncich, the question was one "of degree." Lake County was "not unique merely because it [*had*] small precincts, but [for

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[2] Buncich, *supra,* at 140.
[3] *Id.*
[4] *Id.* at 139.
[5] *See id.,* at 143.
[6] *Id.*

purposes of determining whether the statute constituted unlawful "special legislation"] at what point [did] the sheer number of small precincts in Lake County become a *defining characteristic* such that it [*justified*] special legislation?" Buncich, *supra*, 51 N.E.3d at 143 (emphasis supplied).

Strengthened by the Court's analysis in Lake Precincts 1, the General Assembly passed a new law, codified at Ind. Code §3-6-5.2-10, re-establishing the sunsetted Small Precinct Committee for Lake County. This new enactment featured both a fairly minor difference and a major difference from the previous statutory design.

The fairly minor difference was that the definition of a "small" precinct had been changed from fewer than 500 active voters to fewer than 600 active voters.[7]

The *major* difference was that the drafters of the new law appeared unwilling to assume that the basic process set forth in the sunsetted statute (Lake Precincts 1, Ind. Code §3-11-1.5-3.4) would enjoy full cooperation between evenly matched, opposed parties, and from there a smooth launch. Laying the first consolidation statute against the second statute, one readily sees that the newer enactment is more heavily armed. The newer statutory procedure makes clear that if all else fails at the county level, the Commission at the state level *must act*. Moreover, should the Commission become deadlocked and fail to act, then still the Commission *must act*. Again. The issue of Commission deadlocks is discussed in full below.

IMPASSE?

The drafters of the new statute had, with some prescience, predicted the likelihood that all would not run smoothly in the implementation of the new precinct consolidation law. In fact, the ride was even bumpier this time around. In this, their second trip down the aisle in an attempt to marry plans together into an acceptable precinct map for Lake County, matters fell apart more quickly and definitively.

The precinct consolidation process had begun reasonably well during Lake Precincts 1. The Small Precinct Committee had been duly formed, appropriate staff had been added as a fact-gathering resource, meetings among adversaries had been held, data had been gathered and voter analysis had been undertaken. Results from that process were produced and ready to be delivered to the county board configured in a way that could have led to the adoption of an implementation plan, just as the statute required.

Then on July 31, 2014, the Democratic Party Central Committee's lawsuit challenging Lake Precincts 1 was filed. There matters stood, incapable of further movement until March 22, 2016, when the Supreme Court handed down its decision upholding the statute. In the normal course, the Court's opinion would have compelled the parties to take up once again the issue of precinct consolidation, and to continue moving ahead as it had once appeared it was capable of doing.

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[7] By other legislation, the cap on the number of active voters in a precinct had been raised from 1,200 to 2,000, largely due to decreased reliance on individual polling places, and a trend toward consolidated "voting centers" and a higher rate of absentee balloting. *See* Public Law 169-2015, §88.

However, recall that in the first round, legal and practical considerations had already intervened to prevent forward motion, including the first statute's self-timed implosion pursuant to its "sunset" limitation. Legally, the statute forming the basis for Lake Precincts 1 could not be revived; new legislation would have to be enacted in order for any resuscitation to occur.

The course of events that next unfolded reflected significantly fewer discussions and less collaboration than in the first round. To those who might have hazarded the notion that the state's high court, having pointedly addressed the principal objections to the consolidation effort, would lend a note of urgency to the remaining efforts, they would have been sorely disappointed. Little progress was made in bringing the parties together as contemplated by the newly revived statute.

Small Precinct Committee members were duly appointed, but met for a *total* of about two and ½ hours in the course of two or three meetings.[8] In contrast to Lake Precincts 1, wherein the Committee identified 76 good consolidation targets and over $400,000.00 in savings, this time the Committee as a whole produced no report, no findings, and no plan or recommendations to the Lake County Election Board. There appeared to be no dispute about this when the matter came on for a hearing before the Commission in late summer, 2017.

The current consolidation statute, born to some degree of previous efforts fallen short, tasks the Commission to take over and arrive at *its own precinct establishment order* based on the statutory standards provided in the law itself, and taking into account any properly drafted and submitted other plans submitted for the Commission's consideration.

IN THE INDIANA ELECTION COMMISSION

With no locally-generated agreed plan having been submitted, the action shifted to the Commission in accordance with the statute. Ind. Code §3-6-5.2-10(e) and (f) provide as follows:

> (e) Not later than noon June 1, 2017, the board shall:
> (1) adopt a proposed precinct establishment order implementing the committee's proposed plan...; and
> (2) file the proposed order with the election division not later than noon August 1, 2017.
> (f) **If a proposed precinct establishment order is not filed as provided** under subsection (e), **the commission shall adopt** a precinct establishment order for the county **not later than September 1, 2017**, based on the committee's proposed plan. **If the commission does not have the committee's plan and findings available**, the commission **shall adopt an order** the commission considers will do both of the following:
> (1) realize savings for the county.
> (2) not impose unreasonable obstacles on the ability of the voters of the county to vote at the polls.

Ind. Code §§3-6-5.2-10(e), (f) (emphasis supplied).

[8] Testimony of Dan Dernulc, Indiana Election Commission hearing transcript (Aug. 9, 2017), at 35;20-25

Thus, the Commission was left with the task of adopting a precinct establishment order for the county by September 1, 2017. That order preferably would be based on the Small Precinct Committee's original proposed plan. *See* Ind. Code §3-6-5.2-10(f). But since the Commission "[did] not have the [small precinct] committee's plan and findings available," the Commission was left to adopt an order in accordance with the simple two-pronged statutory standard, and ready to go into effect by September 1, 2017.

Although neither of the local political parties, nor the Lake County Board of Elections and Voter Registration, nor indeed the Libertarians nor the Small Precinct Committee were entitled to any more due process than what the statute had given them, nonetheless, the Commission's Chair (the requestor of the present opinion) set up a framework in an order issued June 23, 2017, to afford all and sundry their meaningful opportunity to be heard. *See Lake County Small Precinct Consolidation, Indiana Election Commission Procedures and Deadlines* (June 23, 2017) ("Procedural Requirements").

Following up on its invitation to the parties, the Commission set a deadline of July 13, 2017 for any member, director, or deputy director of the Lake County Board, or any representative of the Lake County Democratic, Republican or Libertarian party, to submit a proposed precinct plan. For his part, the Democratic Party Chair of Lake County acknowledged receiving an extension of the deadline to file a Small Precinct Consolidation plan with the Commission, but also stated that he "had no intention of filing a county plan and did not want to give any credence whatsoever to the legislation" by doing so. Remarks of James Wieser, *quoted in* C. Lyons & C. Napoleon, *Lawsuit: Indiana law forcing precinct consolidation violates voters' rights*, Gary POST-TRIBUNE (Aug. 9, 2017).

The Lake County Republican Party Central Committee submitted two proposed plans, Plan No. 1 having no precinct more than 1,391 active voters, and Plan No. 2 with no precinct having more than 1,200 active voters.

The Lake County Democratic Party Central Committee did not submit a plan, but instead directed a letter authored by its Chairman, James Wieser, to the members of the Commission. This letter dated July 13, 2017, requested "additional time for any agreed upon plan to be considered." Chairman Wieser noted his party's objection to any plan "that does not take into consideration" such information as "census tract information," "public transportation and accessibility," "disenfranchisement as a result of lack of public transportation…," "the *arbitrary nature of 600 'active voters'* as a benchmark for consolidation…," "the arbitrary nature of the removal of…precinct committeepersons," "the lack of clear economic impact that this matter has on Lake County versus the need to protect the right to vote" and, "the fact that this law only impacts Lake County, one of 92 counties in the State."

Every item raised as an objection in the party chairman's letter in response to the July 13, 2017 deadline had either been addressed by the Supreme Court in its decision under Lake Precincts 1 (*e.g.*, the fact that the legislation only affected Lake County), or by simple legislative choices articulated by the new statutory enactment itself (*e.g.*, fewer than 600 voters constituting

a "small precinct";)[9], or arguments borrowed from issues properly raised in cases of disenfranchisement through additional voting requirements, redistricting of elected public offices, etc.[10]

The Commission did extend the deadline for submission of plans by the local board to August 1, 2017. The notice extending the deadline was posted immediately on the Internet and another copy sent directly to the Lake County Board. No time limit for submission of plans by Commission members was set, as they were acting in a legislative capacity.[11]

The solicitation of outside input by the Commission concluded with only two written plans being submitted, neither of them being agreed plans. Plan No. 1 and Plan No. 2, both submitted by Lake County Republicans, were received at mid-day on July 11, 2017. [12] The Commission opened the floor to public comment, received none, and had no one in attendance to speak as a member of the public. The only response received was the above-described letter authored by the Lake County Democratic Party Chairman.[13]

Testimony having been heard on August 9, 2017, on the only two plans that had been submitted, the Commission put the issue to a vote, and as to both plans found itself deadlocked with a vote of 2-2 along party lines. The Commission therefore felt itself unable to act to adopt and implement an order of consolidation for Lake County.

Given that the Commission was designed to have only four members, two from each major political party, it would hardly have surprised the authors of this legislation to learn that the votes cast by a body so constituted would be split down the middle. And yet, we recall that

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[9] *See also* Transcript of Indiana Election Commission Hearing (Aug. 9, 2017), at 48-2 (Remarks of Vice-Chair S. Anthony Long) (attorney, Democratic Party appointee): "I know at one point there was a quarrel between – I don't know what number, but it was go to 500 or 600, the legislature spoke on that and that issue is closed in my mind. It's 600 for you to work with."

[10] It must be remembered what this matter does *not* involve. It does not involve redistricting of any elected public office, or any change in the requirements for voting, residency, or registration, or indeed any additional inconvenience of voting. This matter involves only the *consolidation* of *precinct boundaries*. The polling site locations are not involved here. The approval of polling sites is a separate matter from precinct lines. Polling sites are controlled, and all must be approved by, whatever political party controls the Circuit Clerk's office within that county, which in this case continues to be the Democratic Party. For example, in Gary alone individual polling places were moved with the approval of the County Clerk 42 times since the year 2014. Testimony of Dana Dumezich, Indiana Election Commission hearing transcript (Aug. 9, 2017), at 25: 19-23. Polling places can be located for the convenience of voters without regard to whether a particular polling place is physically located within the precinct whose votes are being cast. As an example, the City of Gary has 105 precincts, but only 60 polling sites, so that even under the current system many voters travel outside their precinct to combination sites provided for their convenience and for efficiency. Testimony of Dana Dumezich, Indiana Election Commission hearing transcript (Aug. 9, 2017), at 34: 22-23. The plans submitted by the Republican Party provided for consolidation of a significant number of precincts that were already voting at the same polling site.

[11] A judicial mandate (writ of mandamus) will issue only when the law imposes a clear duty on the respondent to perform a specific, ministerial act and the person seeking the mandamus is clearly entitled to that relief. Based on our review of the case law, and although its duty is clear in the circumstances, we have determined that the writ of mandamus would not apply and would not avail a petitioner in this case. See *Price v. Indiana Dept. of Child Svcs.* 80 N.E.3rd 170, 174 (Ind. 2017), *citing* Ind. Code §34-27-3-1(2014 Repl.).

[12] Plan No. 1 consolidated precincts, leaving no precinct smaller than 1,391 active voters, while Plan No. 2 was very similar, but leaving no precinct at less than 1,200 active voters. See Election Commission hearing transcript (Aug. 9, 2017), at pp.25-41.

[13] Election Commission hearing transcript (Aug. 9, 2017), at 19: 17 and 36: 21-23

the very genesis of this particular provision was as—a response to an unproductive earlier effort resulting in stalemate at the conclusion of Lake Precincts 1. That legislators understood that this deadlock was likely to occur, is nailed home by this statement of political mathematics, recited in the statute itself

> "[T]he affirmative vote of at least (3) members of the commission is necessary for the commission to take official action..."[14]

ANALYSIS: A RECONCILABLE DIFFERENCE

There can be little doubt that the kinds of matters and controversies generally taken up by a state election commission of this kind will be highly polarizing along political lines. Also hardly in doubt, but of moderate wonderment, is the fact that the legislature specifically chose to comprise this state's commission of a *number of individuals* who by their nature and background are likely to be politically minded, and therefore prone at times to argue from and vote toward a particular set of ideals or affiliations. Based on our experience, it would be quite rare that a body chartered to maintain a political portfolio as sensitive and yet as fundamental as this, would be assigned to a state election commission. At the same time the drafters remind us specifically, *see* Ind. Code §3-6-4.1-7(b) that it takes *three* votes—meaning at least one soul must step across the great divide—in order for the Commission to take any substantive action.

Is this statute, then, simply a "misfit toy" race car with square wheels, incapable by design of rolling forward? As lawyers, when we find ourselves tempest-tossed,[15] we often grasp at familiar principles of statutory interpretation. One of those precepts reminds us that in interpreting laws, we are to search for a "reasonable and practical construction that can be given to its language" so that doubts can be removed and enactments can be given full force and effect. *State v. Rice*, 134 N.E.2nd 219, 220 (Ind. 1956). As a corollary to this principle, we are to avoid interpretations that render an enactment "nugatory," *i.e.,* of no practical effect. *See id.* Every statute should be construed with reference to its intended scope and to the purpose of the legislature in enacting it. *Id at 221* (citations omitted).

The statutory provisions set forth in full above essentially constitute a roadmap over which Lake County must travel to join the rest of Indiana in working to streamline and modernize balloting. It is also a charter that implicitly expresses the ideals of this state when it undertakes an ambitious effort such as this, with laudable goals wrapped around a delicate set of individual rights. Those ideals, and therefore this set of statutes, remind us that: The job properly done begins with the cold, hard numbers as to where people are voting today, and how.

Next, the task becomes finding valid opportunities to consolidate sites to eliminate disparity and increase efficiency, saving taxpayer dollars while at the same time allowing ballots

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[14] Ind. Code §3-6-4.1-7.

[15] "*Send these, the homeless, **tempest-tost** to me, I lift my lamp beside the golden door!*", Emma Lazarus, *The New Colossus (Nov. 2, 1883).* The rest of this little poem can be found on the base of the Statue of Liberty. Tickets to the ferry range in cost from $24.50 to $59.00, departing from Pier 15, South Street Seaport, New York.

to be cast without rendering the process any more difficult, intimidating or burdensome on any cohort of voters.

In engaging this second step, the statute clearly shows a preference for allowing local entities at the county level to figure it out, pointing out where the efficiencies can best be yielded. But if that opportunity is allowed to go by unfulfilled, as happened in Lake County, the law now requires the state commission to roll up its sleeves and take on the job of making a plan and giving it to Lake County for its (mandatory) use.

In accordance with the principles of statutory interpretation cited above, allowing the statute to be rendered nugatory merely by choosing not to participate in the process as the law requires, and relying on inaction from a stalemated commission of four members divided into two parties to round out the plan of inaction, cannot be the answer. Statutes must be interpreted in light of their intended purposes, which in this case were broadly remedial in nature and designed to give the county every opportunity for self-determination, but not to opt out entirely from needed consolidation and efficiency of balloting.

All of which brings us back to that square wheel, the provision requiring one member to essentially cross party lines and embrace a plan for consolidation put forth by the Commission, based on the law's articulated principles of efficiency and of not unduly burdening any cohort of voters. In light of the near certainty of an initial "gridlock" along the way, given the issues and the four-member structure of the Commission, we are of the opinion that a single vote of the Commission on two Republican-tendered plans was probably not enough. When those two measures were stalemated, the Commission retained the authority, indeed the responsibility, to build its own plan from the ground up using the two principles articulated in the statute at Ind. Code §3-6-5.2-10(f). In so doing, the process will be greatly aided by due consideration given to any plans that were properly and timely submitted, but by no means is the Commission restricted to those plans.

Viewed in this light, the need for a crossover vote, far from being a design defect, we believe was intended to ensure some measure of balance in the proposals put forth, but also to ensure that no county, by seeking a benefit from inaction in a process prescribed by law, could declare itself exempt from regulation to promote cost-effectiveness, ease and efficiency of balloting in Indiana.

The requester in this matter is the Chair of the Commission, and he is supported by a staff at the Election Division to assist the Commission in its work. Under Indiana law, the Chair shall call a meeting of the Commission whenever he considers it necessary for the performance of the Commission's duties. Ind. Code §3-6-4.1-9. Failing that, if the Commission fails to meet and discharge the duties imposed upon it by law, the Governor may order the Commission to meet in performance of the Commission's duties if the Governor: (1) considers a meeting to be necessary, or (2) receives a petition signed by at least one voter from each congressional district of Indiana. Ind. Code §3-6-4.1-12. The petition process in this instance is not particularly onerous. The Commission has a *continuing* obligation to issue an order, and the obligation is

mandatory.[16] All four members of the commission are appointed by the Governor. Ind. Code §3-6-4.1-2.

Therefore, as previously summarized, the opinion of this office is as follows:

1.) The Indiana Election Commission and/or its Chairman have standing to request an advisory opinion of the Attorney General on a matter pertaining to the duties of the Commission.

2.) A. Since a proposed precinct establishment order was not submitted by the Lake County Board of Elections and Voter Registration, the Indiana Election Commission must adopt an order for Lake County that it considers will realize savings for the county, and which does not impose unreasonable burdens on the ability of the voters to vote at the polls.

B. The Indiana Election Commission's obligation to issue a precinct establishment order for Lake County is a continuing one, and it is mandatory. A single vote on each of two proposals properly submitted to it by other parties is not sufficient to fulfill the Indiana Election Commission's obligation, which would include constructing its own plan giving due consideration to any plans properly and timely submitted. The Chairman of the Indiana Election Commission pursuant to statute should reconvene the Indiana Election Commission for this purpose, and it should remain in session until such time as an order is developed and agreed upon, with appropriate staff of the Election Division tasked with effectuating and fact-checking the plan in light of statutory boundary rules. No further opportunity for public comment or testimony from outside parties need be extended, as this has been done. If the Indiana Election Commission continues to be deadlocked and fails to issue a valid precinct establishment order for Lake County, the Commission should be aware that under appropriate circumstances, including but not limited to petition from Indiana voters, the Governor may consider calling the Indiana Election Commission back into session pursuant to Ind. Code §3-6-4.1-12, until such time as the Indiana Election Commission's duty to issue a valid precinct establishment order is fulfilled.

SUBMITTED, and
ENDORSED FOR PUBLICATION:

Curtis T. Hill, Jr.
Attorney General

Scott C. Newman, Chief Counsel

[16] Remarks of Vice-Chair Long, Transcript of Commission Hearing (Aug. 9, 2017), at 64:15-19 ("[W]e have an obligation to adopt an order; the statute is mandatory.")