



STATE OF INDIANA

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September 18, 2012

Ms. Kimberly A. Vessels
Assistant City Attorney
50 North Fifth Street
Richmond, Indiana 47374

Re: Informal Inquiry 12-INF-39

Dear Ms. Vessels:

This is in response to your informal inquiry regarding the City of Richmond ("City"). Pursuant to Ind. Code § 5-14-4-10(5), I issue the following informal opinion in response. My opinion is based on applicable provisions of the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et seq.*

BACKGROUND

The City wishes to hold primary Plat Committee ("Committee") meetings in accordance with I.C. § 36-7-4-701(d), which provides that the Committee may grant primary approval of certain routine subdivisions "without public notice and hearing." If a primary plat instead goes before the full Plan Commission ("Commission"), a public hearing is required by zoning law, and the additional notice requirements of I.C. § 5-3-2-1, requiring notice by publication, become applicable. As an alternative, a non-hearing is allowed in order that the Commission would not have to meet and small routine subdivisions could go before the less formal Committee to expedite the subdivision and primary plat process.

The City's subdivision control ordinance specifies that in accordance with I.C. § 36-7-4-701(d), that a public hearing before the Committee is not required. You initially inquire whether such meeting may be closed to the public because of the language "without public notice" that is provided in 701(d). As to what form of notice must be provided, you note that it could be argued that the term "public notice" is written in connection with the word "hearing", that it could be interpreted to simply allow the Committee to avoid the extra publication requirements as provided under I.C. § 5-3-1-2. Alternatively, it could be argued that the phrase "public notice" is a concept in and of itself, separate from the concept of any extra publication notices with a public hearing, and as such no public notice would be required and the meetings may be held without even regular public notice hearing requirements. You are not convinced that the later

argument would be valid in light of the requirement that the provisions of the ODL be liberally construed. You also inquire whether any statutory construction in favor of not providing notice pursuant to I.C. § 5-14-1.5-5 would violate the intent and spirit of the ODL.

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. *See* 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. *See* I.C. § 5-14-1.5-3(a).

Pursuant to the ODL, a governing body is defined as follows:

- (b) "Governing body" means two (2) or more individuals who are:
 - (1) a public agency that:
 - (A) is a board, a commission, an authority, a council, a committee, a body, or other entity; and
 - (B) takes official action on public business;
 - (2) the board, commission, council, or other body of a public agency which takes official action upon public business; or
 - (3) any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated. An agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of this chapter. *See* I.C. § 5-14-1.5-2(b)

An argument has not been made that the Committee would not be considered to be a governing body. The Committee would likely qualify as a governing body pursuant to either I.C. § 5-14-1.5-2(b)(2) or (3). Thus, minus certain specific exceptions, all Committee meetings must be open to allow the public to observe and record them.

A "meeting" is a gathering of a majority of the governing body of a public agency for the purpose of taking official action on public business. *See* I.C. § 5-14-1.5-2(c). "Official action" means to receive information, deliberate, make recommendations, establish policy, make decisions, or take final action. *See* I.C. § 5-14-1.5-2(d). "Public business" means any function upon which the public agency is empowered or authorized to take official action. 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. *See* I.C. § 5-14-1.5-5(a). The notice must be posted at the principal office of the agency, or if no such office exists, at the place where the meeting is held. *See* IC § 5-14-1.5-5(b)(1). While the governing body is required to provide notice to news media who have requested notices nothing requires the governing body to publish the notice in a newspaper. *See* I.C. § 5-14-1.5-5(b)(2). There are certain, specific meetings that are exempt from the notice requirements provided under I.C. § 5-14-1.5-5, however it has not been argued that any of the exceptions would apply here. *See* I.C. § 5-14-1.5-5(f)(1)-(2).

The City wishes to hold Committee meetings pursuant to I.C. § 36-7-4-701(d), which provides:

(d) The subdivision control ordinance may provide that the subdivision of land that does not involve the opening of a new public way and that complies in all other respects with the subdivision control ordinance and zoning ordinance, may be granted primary approval by the plat committee without public notice and hearing, subject to appeal to the plan commission.

The City's subdivision control ordinance specifies that public hearings are not required in accordance with I.C. § 36-7-4-701(d). While no public hearing is required, the Commission will conduct a "meeting", as defined under the ODL, prior to reaching a decision in order to discuss, review, and vote on findings. It is my opinion that if the Committee held a meeting pursuant to I.C. § 36-7-4-701(d), the meeting may not be closed to the public, based primarily on the plain language of the statute which provides that only public notice and hearing are not required. If the General Assembly intended for such meetings to be held closed to the public, it is my opinion it would have specifically indicated as such under subsection (d), or amended I.C. § 5-14-1.5-6.1(b) to allow for such topics to be discussed in an executive session.

The issue of what, if any, notice is required to be provided for the Committee meetings is a closer question. I.C. § 36-7-4-701(d) provides that approval may be granted without public notice and hearing; the issue raised by the City is whether the phrase "public notice" a concept in and of itself or is it written in connection with the term "hearing". If the former interpretation is accepted, Committee meetings held pursuant to 701(d), would not have to provide any form of notice, pursuant to either I.C. § 5-14-1.5-5 or I.C. § 5-1-3-2. For the latter, the Committee would still have to post notice pursuant to the general requirements of the ODL provided under I.C. § 5-14-1.5-5, but would not be required to post notice in a local newspaper pursuant to I.C. § 5-3-1-2.

Prepared under the direction of the Indiana Code Revision Commission, the Office of Code Revision of the Indiana Legislative Services Agency ("LSA") has prepared *The Form and Style Manual for Legislative Measures*. (<http://www.in.gov/legislative/files/PART1.PDF>). The analysis and interpretation provided for the term "and" is as follows:

"And" usually stands for the conjunctive, connective, or additive; "or" for the disjunctive or alternative. An ambiguity occurs where it is not clear whether the inclusive "or" (A or B, or both) or the exclusive "or" (A or B, but not both) is intended. It is also not always clear whether the several "and" (A and B, jointly or severally) or the joint "and" (A and B, jointly but not severally) is intended. To avoid this ambiguity, say the following as appropriate:

1. "A or B" where the exclusive is intended.
2. "A or B, or both" where the inclusive is intended or where jointly or severally is intended.
3. "A and B" where the conjunctive, connective, or additive is intended. Never use the term "and/or".

As provided *supra*, the Committee would still conduct a meeting, as defined under the ODL, to discuss, review, and vote on issues related to I.C. § 36-7-4-701(d). In light of the ODL's requirement that its provisions are to be liberally construed and the statutory guidance provided by the LSA, I would agree with the City's latter analysis that the Committee would not be required to publish notice in a newspaper pursuant to I.C. § 5-3-1-2. However, the Committee would still be required to post notice pursuant to I.C. § 5-14-1.5-5 as the Committee still intends to conduct a meeting, as defined under the ODL, prior to issuing a decision. It should also be noted that any decision of the Committee may be appealed to the Commission, which would be required to provide notice pursuant to I.C. § 5-3-1-2. Lastly, I would agree with the proposition that an interpretation of the applicable statutes that would result in the Committee not having to comply with I.C. § 5-14-1.5-5 would be contrary to the intent and spirit of the ODL.

If I can be of additional assistance, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink, appearing to read "J. Hoage". The signature is stylized with a large initial "J" and a cursive "Hoage".

Joseph B. Hoage
Public Access Counselor