

STATE OF INDIANA ) IN THE MONROE CIRCUIT COURT  
 ) ss:  
COUNTY OF MONROE ) CAUSE NO. 53CO1-2110-PL-002222  
  
SEVEN OAKS CLASSICAL )  
SCHOOL, INC., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MONROE COUNTY BOARD )  
OF COMMISSIONERS and )  
MONROE COUNTY HEALTH )  
DEPARTMENT, )  
 )  
Defendants. )

**DEFENDANTS’ AMENDED BRIEF IN SUPPORT OF  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendants, Monroe County Board of Commissioners (“Board”) and Monroe County Health Department<sup>1</sup> (“Health Department”), by counsel, submit this brief in support of their motion for partial summary judgment, which will establish that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law against plaintiff, Seven Oaks Classical School, Inc. (“Seven Oaks”).

**I. Undisputed Facts**

1. On March 6, 2020, the Governor, pursuant to Indiana Code chapter 10-14-3, issued an executive order declaring “that a public health disaster emergency exists in Indiana attributable to COVID-19.” Executive Order 20-02.

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<sup>1</sup> The Health Department is a local government agency that is administratively responsible to the Board. *See* Ind. Code § 16-20-1-2. The Health Department has no existence separate and apart from the Board; therefore, it does not have the capacity to sue or be sued. *See* Ind. Code § 36-1-2-10 (defining “municipal corporation”). Thus, the Health Department is not a proper party to this action.

2. On May 12, 2021, the Board adopted Monroe County Code chapter 307, which prescribes the appellate procedures for local health enforcement actions filed under Indiana Code chapter 16-20-5.5. *See* Ordinance 2021-20.

3. On July 29, 2021, the Governor made schools “responsible for implementing local measures and restrictions to address the impact and spread of COVID-19 in their buildings, facilities, and grounds.” Executive Order 21-19.<sup>2</sup>

4. On August 4, 2021, the Board adopted an emergency order of the Monroe County Health Officer and Monroe County Board of Health requiring people in Monroe County to “wear a face shield, face covering, or mask . . . over their nose and mouth when in an indoor public place” to reduce the spread of COVID-19. *See* Public Health Regulation and Order (effective August 5, 2021) (“Public Health Order”).<sup>3</sup>

5. On August 19, 2021, the Health Department took enforcement action against Seven Oaks for non-compliance with the Public Health Order. *See* Complaint/Notice of Violation (Ticket #1879).

6. On August 25, Seven Oaks appealed the health enforcement action to the Board. *See* Appeal of Ordinance Violation.

7. On September 8, 2021, the Board voted to grant consideration of Seven Oaks’ appeal and scheduled the matter for a public hearing. *See* Appeal Decision.

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<sup>2</sup> Seven Oaks is subject to the requirements of the Governor’s executive orders and the health laws, ordinances, orders, rules, and regulations of the local board of health and superior boards of health. *See* Ind. Code § 20-26-5-6.

<sup>3</sup> The Board had authority to adopt a public health order imposing more restrictive requirements than the Governor’s Executive Order. *See* Ind. Code § 16-20-1-21.5(f)(1) (a “local order [that] is issued by the health department of a county” that is “approved by the county legislative body” may “addresse[] an aspect of a declared emergency more stringently than an executive order”); *see also* Executive Order 21-24, ¶ 9 (“unless prohibited by an Executive Order, local ordinances, directives, and orders may be more restrictive provided they comply with Ind. Code §§ 16-20-1-21.5 and 16-22-8-31.3.”). The Board adopted an order that provided exceptions for, among other things, children under the age of two, people with disabilities or medical conditions, people engaged in indoor exercise, work, and dining activities. *See* Public Health Order, ¶ 2.

8. A public hearing of Seven Oaks’ appeal was held on September 20. *See* Appeal Decision.

9. During a public meeting held on September 23, 2021, the Board voted to deny Seven Oaks’ appeal.

10. On September 29, the Board issued a written decision which affirmed the health enforcement action, but waived the fine imposed for violation of the Public Health Order. *See* Appeal Decision.

11. On October 12, Seven Oaks filed a formal complaint with the Office of the Public Access Counselor, alleging that the Board violated Indiana’s Open Door Law in the manner that it decided Seven Oaks’ appeal.

12. On October 25, Seven Oaks filed this action with the Court.

## **II. Standard of Review**

Summary judgment should be granted “if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Ind. Trial Rule 56(C).

The party moving for summary judgment bears the burden of making a prima facie showing that there is no issue of material fact and that it is entitled to judgment as a matter of law. The burden then shifts to the non-moving party to show the existence of a genuine issue.

*Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020).

## **III. Argument**

In its three-count complaint, Seven Oaks seeks the following remedies, among others, against the Board and Health Department: (1) an award of attorney’s fees, court costs, and other reasonable expenses of the litigation for the alleged violation of the Open Door Law (Count 1); and (2) a judicial determination (presumably, declaratory judgment) whether Monroe County Code § 307-5 “was properly promulgated” by the County’s executive body (Count 2).

**1. Seven Oaks may not be awarded attorney’s fees, court costs, and other reasonable expenses of the litigation**

The “Board of Health is authorized to pass regulations to protect, preserve and promote the public health and the environment.” Monroe County Code § 305-1. Local health officers are required to “enforce the health laws, ordinances, orders, rules, and regulations of the officer’s own and superior boards of health.” Ind. Code § 16-20-1-19(a); *see also State ex. rel. Horne v. Beil*, 157 Ind. 25, 30, 60 N.E. 672, 674 (1901) (“Local boards of health are created and authorized by the legislature and duty bound to adopt and enforce rules and regulations for the arrest and prevention of contagious and infectious diseases in their respective jurisdictions whenever the necessity therefor arises.”). On August 19, 2021, the Health Department took enforcement action against Seven Oaks for non-compliance with the Public Health Order issued in response to the Governor’s public health disaster emergency declaration.

A local health enforcement action<sup>4</sup> taken under I.C. § 16-20-1-19(a), “in response to . . . a disaster emergency declared by the governor under IC 10-14-3-12[,] is appealable under IC 16-20-5.5.” I.C. § 16-20-1-19(b)(2).<sup>5</sup> An appeal under Indiana Code chapter 16-20-5.5 (“Chapter 5.5”) must be initiated “in a manner prescribed by the legislative body.” Ind. Code § 16-20-5.5-2(a). When the Legislature adopted Chapter 5.5, it also reserved to the legislative body the responsibility of adopting specific procedures for the review, consideration, and hearing of an appeal. *See* Ind. Code § 16-20-5.5-3(b). The Board “operates a local board of health under IC 16-20-2[.]” Ind. Code § 16-20-5.5-1(1)(A). Thus, for purposes of Chapter 5.5, the Board is a

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<sup>4</sup> An “[e]nforcement action”, for purposes of IC 16-20 and IC 16-22-8, includes an order, mandate, citation, administrative notice, business closure, or other action taken by the local board of health or the local health officer.” Ind. Code § 16-18-2-114.8.

<sup>5</sup> In 2021, the Legislature added Chapter 5.5 to Indiana Code article 16-20. *See* P.L. 219-2021, § 10, effective May 10, 2021 (codified as Ind. Code §§ 16-20-5.5-1 through -5).

legislative body. To meet the requirements of Chapter 5.5, the Board adopted Monroe County Code chapter 307.

When a legislative body decides to consider an appeal, it must set the matter for a public hearing. I.C. § 16-20-5.5-3(a). Chapter 5.5 does not define “public hearing.” However, in this context, the Indiana Supreme Court has observed that “[t]he most common understanding of a ‘hearing’ is that the appropriate members of the agency *hear* the facts, the characterization of facts, and argument about the facts.” *Marion County Sheriff’s Merit Bd. v. Peoples Broadcasting Corp.*, 547 N.E.2d 235, 238 (Ind. 1989), *reh’g denied*. This aspect of a hearing is public. *See id.* However, deliberations are a different matter. *See id.* Our Supreme Court explained:

Practical human experience indicates that private discussions permit greater candor among board members in evaluating their judgments. Their judgment will still contain all the necessary elements for rigorous public scrutiny: the evidence presented, the evidence debated and the final decision explained by findings of fact in writing.

*Id.* at 238-39 (internal footnote omitted). Here, the Board’s judgment on the evidence and argument presented during the public hearing was explained by the written decision that the Board was required to issue after the hearing. *See* Ind. Code § 16-20-5.5-5(a). Seven Oaks disagrees.

Seven Oaks contends that the Board was subject to the Open Door Law during health enforcement action appeal proceedings under Chapter 5.5. In advance of the public hearing of Seven Oaks’ appeal, counsel to the Board contacted the public access counselor to discuss the applicability of the Open Door Law to appellate review of local public health enforcement actions, *see* PAC Response to Formal Complaint (21-FC-167), which are governed by the requirements of Chapter 5.5 and reviewed, considered, and heard under procedures developed by the legislative body – the Board. *See* I.C. § 16-20-5.5-3(b). The public access counselor advised that “the appeals procedure could reasonably be considered a quasi-judicial function,

deliberations about which would not fall under the Open Door Law (ODL).” PAC Response to Formal Complaint (21-FC-167). The public access counselor’s advice may or may not have been erroneous. *See id.*

“The Indiana Open Door Law, Ind. Code §§ 5-14-1.5-1 to -8, seeks to assure that government business be conducted openly so that the general public may be fully informed.” *Lake County Trust Co. v. Advisory Plan Comm’n*, 904 N.E.2d 1274, 1279 (Ind. 2009) (internal marks omitted).<sup>6</sup> For purposes of the Open Door Law, the Board<sup>7</sup> is a governing body, *see* Ind. Code § 5-14-1.5-2(b), of a public agency, *see id.* § 5-14-1.5-2(a)(2). As such, when the Board takes official action on public business, it is subject to the requirements of the Open Door Law. *See* Ind. Code § 5-14-1.5-1. Seven Oaks contends that the Board violated the Open Door Law in the manner that it decided its health enforcement action appeal.

“A person who alleges a violation of the Open Door Law has several reporting options. A person may file either a complaint or an informal inquiry with the public access counselor under Indiana Code Section 5-14-5-6.” *Gary v. Maclin*, 772 N.E.2d 463, 470 (Ind. Ct. App. 2002). Filing a formal complaint with the public access counselor is not a prerequisite to bringing a civil action to redress a violation of the Open Door Law. *See id.* at 470-71 (citing Ind. Code § 5-14-5-4). “However, in order to be awarded fees and costs, a plaintiff must first seek and receive ‘an informal inquiry response or advisory opinion from the public access counselor.’” *Id.* at 471 (quoting Ind. Code § 5-14-1.5-7(f)).

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<sup>6</sup> In 1977, the Legislature passed the Open Door Law (Ind. Code § 5-14-1.5-1, as added by Acts 1977, P.L. 57, § 1; P.L. 67-1987, § 1). *See Ross v. Bartholomew County Drainage Bd.*, 995 N.E.2d 1051, 1056 (Ind. Ct. App. 2013), *trans. denied*, 5 N.E.3d 371 (Ind. 2014).

<sup>7</sup> The Board is the county executive. *See* Ind. Code § 36-2-3.5-3; *see also* Ind. Code § 36-2-2-2 (“The three (3) member board of commissioners of a county elected under this chapter is the county executive.”). The Board “‘is the corporate entity representing the county through which it acts, and is in legal contemplation the county.’” *Waldrip v. Waldrip*, 976 N.E.2d 102, 118 (Ind. Ct. App. 2012) (quoting *Owen County Council v. State*, 175 Ind. 610, 619, 95 N.E. 253, 256 (1911)).

On October 12, Seven Oaks filed a formal complaint with the public access counselor, alleging that the Board violated the Open Door Law by taking official action outside of a public meeting. Seven Oaks filed this action on October 25, before it received an advisory opinion from the public access counselor. The public access counselor is not authorized to “issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under [the Open Door Law].” Ind. Code § 5-14-4-10(6). Consequently, in this case, there is no circumstance in which Seven Oaks may be awarded reasonable attorney’s fees, court costs, and other reasonable expenses of litigation, as it did not receive an advisory opinion from the public access counselor before it filed this action. *See* I.C. § 5-14-1.5-7(f). As such, the Board and Health Department are entitled to a judgment as a matter of law.

**2. Monroe County Code § 307-5 was properly adopted and put into effect by the Board**

Seeking judicial review of the Board’s decision, Seven Oaks alleges, for the first time, “[t]hat upon information and belief MCC 307-5 was not properly promulgated as required under Indiana Law.” *Verified Complaint*, ¶ 69. It asks the Court to “determine whether or not MCC 307-5 was properly promulgated under Indiana law.” *Id.* ¶ 70. In its complaint, Seven Oaks acknowledges that, “[w]hile the Commissioners may act as a quasi-judicial body, its powers are legislative and administrative in nature[.]” *Id.* ¶ 54. The Board agrees with Seven Oaks. However, “a party who fails to raise an issue before an administrative body has waived the issue on appeal.” *Cunningham v. Review Bd. of Indiana Dep’t of Workforce Dev.*, 913 N.E.2d 203, 205 (Ind. Ct. App. 2009) (citing *Nat’l Rural Utils. Coop. Fin. Corp. v. Pub. Serv. Comm’n of Ind.*, 552 N.E.2d 23, 28 (Ind. 1990)).

Waiver notwithstanding, the Board adopted Monroe County Code § 307-5 in accordance with Indiana law. Indiana’s Home Rule Act, Ind. Code §§ 36-1-3-1 through -13, applies to local

government units.<sup>8</sup> Home Rule grants units all the powers necessary to effectively conduct the affairs of local governance. Ind. Code § 36-1-3-2. “A unit may adopt, codify, and enforce ordinances.” Ind. Code § 36-1-4-11. When the county executive adopts an ordinance, it must comply with the requirements of Indiana Code chapter 36-2-4, which governs legislative proceedings. Ind. Code § 36-2-4-2. The procedures for adopting an ordinance are set forth under Indiana Code § 36-2-4-8. “An ordinance, order, or resolution is considered adopted when it is signed by the presiding officer. If required, an adopted ordinance, order, or resolution must be promulgated or published according to statute before it takes effect.” Ind. Code § 36-2-4-8(a) (P.L. 152-2021, § 39, effective July 1, 2021).

On May 12, 2021, the Board adopted Monroe County Code chapter 307, which prescribes the appellate procedures for local health enforcement actions filed under Indiana Code chapter 16-20-5.5. *See* Ordinance 2021-20. Monroe County Code chapter 307 does not prescribe a penalty or forfeiture for a violation; therefore, it was not required to be promulgated or published upon adoption by the Board in order to be effective. *See* I.C. § 36-2-4-8(b). Monroe County Code § 307-5 is presumptively valid. *See Town of Avon v. W. Cent. Conservancy Dist.*, 957 N.E.2d 598, 607 (Ind. 2011) (“Like statutes, ordinances are presumptively valid and the party challenging an ordinance bears the burden of proving invalidity.” (quoting *Hobble ex rel. Hobble v. Basham*, 575 N.E.2d 693, 697 (Ind. Ct. App. 1991))).

It is Seven Oaks’ burden to prove the invalidity of this ordinance. *See id.* Indiana law is clear that the Board is not required to prove “the ordinance is valid unless validity is controverted by affidavit.” Ind. Code § 34-28-5-1(b) (previously codified Ind. Code § 34-4-32-1(b)). Indiana Code § 34-28-5-1(b) “relieves the municipality from the necessity of proving that . . . an

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<sup>8</sup> A county is a unit. Ind. Code § 36-1-2-23.



ordinance was validly enacted in the absence of a verified contention controverting such validity.” *Gonon v. State*, 579 N.E.2d 614, 615 (Ind. Ct. App. 1991); *Maish v. Schererville*, 486 N.E.2d 1 (Ind. Ct. App. 1985).<sup>9</sup> Seven Oaks has not submitted an affidavit supporting its allegation that Section 307-5 is invalid. An allegation on “information and belief” is insufficient. *Cf. Cunningham v. Mid State Bank*, 544 N.E.2d 530, 533 (Ind. Ct. App. 1989) (explaining that affidavit made on information and belief is not based on affiant’s personal knowledge), *trans. denied*; *Celina Mut. Ins. Co. v. Forister*, 438 N.E.2d 1007, 1011-12 (Ind. Ct. App. 1982) (explaining that affidavits made on an affiant’s information and knowledge do not establish that the affiant is competent to testify to the matters stated in the affidavit).

Putting aside waiver and the fact that Seven Oaks has offered nothing more than “information and belief,” Seven Oaks is unable to meet its burden of proof. A request was made by the County Legal Department to have Ordinance 2021-20 placed on the agenda of the Board’s public meeting scheduled on May 5, 2021. *See* Board Agenda Request. The request was approved, *see* Board Agenda, p. 4, ¶ N (May 5, 2021), and, on May 12, 2021, the Board adopted and signed May 12, 2021, the Board unanimously adopted and signed Ordinance 2021-20, thereby adding Chapter 307 to the Monroe County Code of Ordinances. These facts are material and they are undisputed. Chapter 307 is a valid ordinance. As such, the Board and Health Department are entitled to a judgment as a matter of law.

### **Conclusion**

The designated evidence shows there are no genuine issues of material fact and the Board and Health Department are entitled to a judgment as a matter of law against Seven Oaks. As such, their motion for partial summary judgment must be granted.

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<sup>9</sup> These cases were superseded on other grounds when Evidence Rule 201(b) was adopted by the Indiana Supreme Court. Rule 201(b) authorizes courts to “judicially notice . . . the existence of . . . ordinances of municipalities[.]”

Respectfully submitted,

/s/ David B. Schilling

David B. Schilling	2255-12
Lee F. Baker	19257-53
Marjorie K. Rice	19731-53
E. Jeff Cockerill	22930-53

Counsel for Defendants,  
Monroe County Board of Commissioners and  
Monroe County Health Department

Monroe County Legal Department  
100 W. Kirkwood Avenue  
Room 220  
Bloomington, Indiana 47404

**CERTIFICATE OF SERVICE**

I certify that on December 10, 2021, I served the foregoing document by the Indiana E-Filing System upon the following:

Carl Paul Lamb  
Carl Lamb & Associates, P.C.  
1101 W. Second Street  
Bloomington, Indiana 47403

/s/ Lee F. Baker

Lee F. Baker

Monroe County Courthouse  
100 W. Kirkwood Avenue  
Room 220  
Bloomington, Indiana 47404