

STATE OF INDIANA) MONROE CIRCUIT COURT
) SS:
COUNTY OF MONROE) CAUSE NO. 53C08-2205-MI-000940

DAVID ASKINS)
)
)
) Plaintiff,)
)
)
) v.)
)
)
) BLOOMINGTON PLAN COMMISSION)
)
)
) Defendant.)

**DEFENDANT'S ANSWER AND AFFIRMATIVE DEFENSES TO
PLAINTIFFS' VERIFIED COMPLAINT**

Comes now the Defendant City of Bloomington, by counsel Michael Rouker, and submits its Answer and Affirmative Defenses to Plaintiffs' Verified Complaint. Any allegation not specifically responded to below, including allegations that appear in headings, is denied. Bloomington states as follows:

1. Bloomington's Plan Commission is a public agency subject to Indiana's Open Door Law [IC 5-14-1.5].

ANSWER: Defendant admits the allegations contained in paragraph 1.

2. Plaintiff David Askins is a resident of Bloomington, Indiana.

ANSWER: Defendant is without sufficient knowledge and information to form a belief as to the truth of the allegations in paragraph 2.

3. Askins has standing to bring action against the Bloomington Plan Commission for declaratory judgment that the Commission violated Indiana's Open Door Law, so that the Bloomington Plan Commission might be prevented from future violations of the Open Door Law.

ANSWER: Defendant denies the Askins has standing to bring an action against the Bloomington Plan Commission on Counts I and II of his complaint. Defendant is without sufficient knowledge and information to form a belief as to the truth of the remaining allegations in paragraph 3.

4. On March 14, 2022, the Bloomington Plan Commission gathered to convene a regular monthly meeting to conduct several items of business.

ANSWER: Defendant admits the allegations contained in paragraph 4.

5. The gathering on March 14, 2022 was supposed to be a so-called "hybrid" meeting, which means that some members of the plan commission were physically present (in person) and some attended by using a connection to a video conference platform. The term used by Indiana's Open Door Law to describe such a meeting is an "electronic meeting."

ANSWER: Defendant admits that some members of the Plan Commission attended the March 14, 2022 meeting in person and others attended using a connection to a video conference platform. Indiana's Open Door Law speaks for itself, and no answer is required.

6. Attending in-person on March 14, 2022 were plan commissioners Jillian Kinzie, Andrew Cibor, Tim Ballard, and Karin St John. Participating via Zoom video conference were Flavia Burrell and Chris Cockerham. Absent were Ron Smith, Israel Herrera, and Brad Wisler. Also absent was a tenth non-voting member, Trohn Enright-Randolph.

ANSWER: Defendant admits the allegations contained in paragraph 6.

7. Appearing on the plan commission's agenda was an item called "Fee Schedule" that changed various fees listed out in a table with the title "Plan Commission I Plat Committee Filing Fees (Application Fees)."

ANSWER: Defendant admits that allegation contained in paragraph 7.

8. The changes to the "Fee Schedule" included several fee increases, among them an increase in the filing fee for a rezone to single-family from \$250 + \$25/Acre to \$500 + \$25/Acre.

ANSWER: Defendant admits the allegation contained in paragraph 8.

9. The fee increases enacted on March 14, 2022 by the plan commission are part of the plan commission's rules of procedure, which do not need any other approval, and take effect immediately upon approval by the plan commission.

ANSWER: Defendant denies the allegations contained in paragraph 9.

10. On April 11, 2022, the Bloomington Plan Commission gathered to convene a regular monthly meeting to conduct several items of business, which it did.

ANSWER: Defendant admits the allegations contained in paragraph 10.

COUNT I: BLOOMINGTON PLAN COMMISSION VIOLATED THE OPEN DOOR LAW BECAUSE IT VIOLATED IC 5-14-1.5-3.5(i)

11. Plaintiff repeats and realleges each and every allegation contained in paragraphs one through 10 above, as if fully set forth herein.

ANSWER: Defendant incorporates its prior responses as if fully set forth herein.

12. Under IC 5-14-1.5-3.5(i) "A member of a governing body may not participate in a meeting of the governing body by electronic communication if the governing body is attempting to take final action to: ... (4) establish or increase a fee; . . ."

ANSWER: Indiana Code § 5-14-1.5-3.5(i) speaks for itself, and no answer is required.

13. Under IC 5-14-1.5-3.5(i), the participation of plan commissioners Chris Cockerham and Flavia Burrell in the March 14, 2022 meeting was unlawful, because they participated in the meeting by electronic communication, even though the plan commission was attempting to take final action to increase fees.

ANSWER: Defendant denies the allegations contained in paragraph 13.

14. The requirement in IC 5-14-1.5-3.5(i) was enacted by the Indiana General Assembly in 2021. That means it is not an ancient dusty law unearthed by the Plaintiff, which no citizen volunteer member of a governmental group could be expected to be aware of. It is also not so new a law that Bloomington Plan Commission members and their legal counsel could not have been aware of the requirement in IC 5-14-1.5-3.5(i).

ANSWER: Defendant denies the allegations contained in paragraph 14.

15. In fact, on March 14, 2022, a majority of Bloomington Plan Commission members were specifically aware of the specific prohibition in IC 5-14-1.5-3.5(i) against participation through electronic communication in a meeting where final action was being taken to increase a fee. That awareness was based on a majority vote of the Bloomington Plan Commission on June 14, 2021 to adopt for the Bloomington Plan Commission a policy for electronic meetings, that incorporates exactly the prohibition stated in IC 5-14-1.5-3.5(i). Therefore, on March 14, 2022, a majority of the individual members of the Bloomington Plan Commission could have and should have been aware of the requirements of

Indiana's Open Door Law, which disallow participation through electronic communication at a meeting when the purpose of the meeting is to increase a fee.

ANSWER: Defendant denies the allegations contained in paragraph 15.

16. Based on his correspondence to the public access counselor on March 14, 2022, before the Bloomington Plan Commission's meeting on the same day, Bloomington city attorney Mike Rouker reviewed the new electronic meetings section of Indiana's Open Door Law on or about the same day as the Bloomington Plan Commission was scheduled to meet, but before it met.

ANSWER: Plaintiffs allegations relate to matters covered by the attorney-client privilege and no response to said allegations is appropriate. To the extent a response to paragraph 16 is appropriate, Defendant denies the allegations.

17. Bloomington city attorney Mike Rouker personally attended the March 14, 2022 meeting of the Bloomington plan commission by being physically present in the city council chambers.

ANSWER: Defendant admits the allegations contained in paragraph 17.

18. Bloomington city attorney Mike Rouker witnessed the Bloomington Plan Commission vote on the fee increase. At no time during the March 14, 2022 meeting nor at any time after that meeting, has Rouker taken any action to ensure that the Bloomington Plan Commission remedy the defective March 14, 2022 vote on the fee increase. The reason that Rouker has taken no action to ensure a remedy is that when he witnessed the Bloomington Plan

Commission's March 14 vote on a fee increase, he did not perceive the vote to be in violation of IC 5-14-1.5-3.5(i), even though it clearly was.

ANSWER: Defendant admits that Mike Rouker attended the March 14 Plan Commission meeting. Defendant denies the remaining allegations contained in paragraph 18.

19. Therefore, without additional encouragement, neither the members of the Bloomington Plan Commission nor their legal counsel can be relied upon in the future to ensure compliance with the plain requirements of Indiana's Open Door Law.

ANSWER: Defendant denies the allegations contained in paragraph 19.

COUNT II: BLOOMINGTON PLAN COMMISSION VIOLATED ITS RULES OF PROCEDURE BY FAILING TO HAVE THE AUTHORIZING VOTES OF AT LEAST FIVE (5) MEMBERS TO ENACT FEE INCREASES

20. Plaintiff repeats and realleges each and every allegation contained in paragraphs one through 19 above, as if fully set forth herein.

ANSWER: Defendant incorporates its prior responses as if fully set forth herein.

21. Under the Bloomington plan commission's rules of procedure, no vote of the commission is official unless authorized by a majority of the commission's membership, which is five (5).

ANSWER: The Bloomington Plan Commission's Rules speak for themselves, and no answer is required.

22. On March 14, 2022, the six members of the Bloomington plan commission who attended the meeting all voted in favor of the fee increases.

ANSWER: Defendant admits the allegations contained in paragraph 22.

23. But the votes of Cockerham and Burrell cannot count as part of the official vote tally in favor of the fee increase, because their participation in the meeting was not lawful.

ANSWER: Defendant denies the allegations contained in paragraph 23.

24. Without the votes of Cockerham and Burrell, the vote at the plan commission's March 14, 2022 meeting to increase filing fees was authorized by only four (4) of the commission's membership.

ANSWER: Paragraph 24 contains a hypothetical to which no answer is required, but to the extent any answer is required, Defendant denies the allegations in paragraph 24.

25. Therefore, the vote to increase fees at the March 14, 2022 Bloomington plan commission was not official.

ANSWER: Defendant denies the allegations contained in paragraph 25.

**COUNT III: BLOOMINGTON PLAN COMMISSION VIOLATED INDIANA'S
OPEN DOOR LAW BECAUSE IT VIOLATED IC 5-14-1.5-5**

26. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 25.

ANSWER: Defendant incorporates its prior responses as if fully set forth herein.

27. On April 11, 2022, Bloomington Plan Commission convened a meeting at city hall in city council chambers and transacted several items of business.

ANSWER: Defendant admits the allegations contained in paragraph 27.

28. Before the April 11, 2022 meeting, Plaintiff inspected all physical locations at city hall where public notices have been posted in the past, including all the public bulletin boards and the flip-folder at the reception desk. At none of those locations was any public notice of the April 11, 2022 Bloomington Plan Commission's meeting posted as a stand-alone posting for that specific meeting. At none of those locations was any public notice of the April 11, 2022 Bloomington Plan Commission's meeting included in any posting of the whole year's meetings, as allowed under Indiana's Open Door Law. Therefore, the Bloomington Plan Commission violated Indiana's Open Door Requirement on public notice contained in IC 5-14-1.5-5.

ANSWER: Defendant denies that it violated the public notice requirement codified at Indiana Code § 5-14-1.5-5. Defendant lacks sufficient knowledge and information to form a belief as to the truth of the remaining allegations contained in paragraph 28.

29. On March 21, 2022, Plaintiff filed a lawsuit against the Bloomington Plan Commission for violating a different section of Indiana's Open Door Law at its March 14 gathering. The cause number for that lawsuit is 53C04-2203-MI-000550.

ANSWER: Defendant admits that Plaintiff filed a separate lawsuit against the Bloomington Planning Commission on March 21, 2022 and that the cause number is 53C04-2203-MI-000550. Defendant denies the remaining allegations in paragraph 29.

30. On April 11, 2021, members of the Bloomington Plan Commission, planning department staff, and staff of the city's legal department knew that the

Bloomington Plan Commission had been sued just a few weeks earlier for violating Indiana's Open Door Law.

ANSWER: Defendant admits that some personnel may have been aware of the prior lawsuit, but denies that personnel were generally aware of any prior suit.

31. Based on their knowledge of the pending litigation, members of the Bloomington Plan Commission, planning department [sic] staff and the staff of the city's legal department were extra-sensitive to ensuring that they did not violate Indiana's Open Door Law, and applied diligence to ensure all requirements of Indiana's Open Door Law were met for the April 11, 2022 meeting.

ANSWER: Defendant admits that it endeavors to adhere to Indiana's Open Door Law at all times, including on April 11, 2022. Defendant denies the remaining allegations contained in paragraph 31.

32. Despite the extra diligence, Bloomington Plan Commission failed one of the most basic requirements of Indiana's Open Door Law, which is the posting of public notice of its meetings.

ANSWER: Defendant denies the allegations contained in paragraph 32.

33. Therefore, without additional encouragement, neither the members of the Bloomington Plan Commission nor their legal counsel can be relied upon in the future to ensure compliance with the plain requirements of Indiana's Open Door Law.

ANSWER: Defendant denies the allegations contained in paragraph 33.

**COUNT III [sic] BLOOMINGTON PLAN COMMISSION VIOLATED
INDIANA'S OPEN DOOR LAW BECAUSE IT VIOLATED IC 5-14-1.5·4**

34. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 33.

ANSWER: Defendant incorporates its prior responses as if fully set forth herein.

35. On April 11, 2022, Bloomington Plan Commission convened a meeting at city hall in city council chambers and transacted several items of business. The Bloomington Plan Commission used an agenda to guide its handling of the order of business.

ANSWER: Defendant admits that the Bloomington Plan Commission convened on April 11, 2022 at City Hall and that it used an agenda. Defendant denies any remaining allegations contained in paragraph 35.

36. Before the meeting, Plaintiff inspected the entrances to the city council chambers. No agenda was posted for the April 11, 2022 Bloomington Plan commission at the entrance to the city council chambers. Therefore, the Bloomington Plan Commission violated IC 5-14-1.5-4, which requires the posting of an agenda for those occasions when one is used.

ANSWER: Defendant lacks sufficient knowledge and information to form a belief as to the allegations contained in paragraph 36. Indiana Code § 5-14-1.5-4 speaks for itself, and no answer is required.

37. On April 11, 2021, members of the Bloomington Plan Commission, planning department staff, and staff of the city's legal department knew that the Bloomington Plan Commission had been sued just a few weeks earlier for violating Indiana's Open Door Law.

ANSWER: Defendant admits that some personnel may have been aware of the prior lawsuit, but denies that personnel were generally aware of any prior suit.

38. Based on their knowledge of the pending litigation, members of the Bloomington Plan Commission, planning department [sic] staff and the staff of the city's legal department were extra-sensitive to ensuring that they did not violate Indiana's Open Door Law, and applied diligence to ensure all requirements of Indiana's Open Door Law were met for the April 11, 2022 meeting.

ANSWER: Defendant admits that it endeavors to adhere to Indiana's Open Door Law at all times, including on April 11, 2022. Defendant denies the remaining allegations contained in paragraph 31.

39. Despite the extra diligence, Bloomington Plan commission failed one of the easiest requirements of Indiana's Open Door Law to meet, which is the posting of an agenda at the entrance of the location of the meeting.

ANSWER: Defendant denies the allegations contained in paragraph 39.

40. Therefore, without additional encouragement, neither the members of the Bloomington Plan Commission nor their legal counsel can be relied upon in the future to ensure compliance with the plain requirements of Indiana's Open Door Law.

ANSWER: Defendant denies the allegations contained in paragraph 40.

Affirmative Defenses

Defendant asserts the following affirmative defenses:

1. Plaintiff has failed to exhaust available administrative remedies;
2. Plaintiff has failed to state a claim upon which relief can be granted;

3. The allegations in the Complaint relate to certain procedural rules adopted by the City of Bloomington Plan Commission for its convenience in conducting internal affairs, and this court lacks jurisdiction to intervene in the matter;
4. Plaintiff's claims are precluded by the doctrines of claim preclusion, issue preclusion, and collateral estoppel;
5. Plaintiff's claims are barred as untimely because they were not been raised within the statutory limitations period;
6. Defendant City of Bloomington reserves the right to assert additional affirmative defenses as they become known.

Respectfully Submitted,

/s/ Michael Rouker

Michael Rouker, Attorney No. 28422-53

City Attorney

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2022, the foregoing document was mailed to the following parties of record:

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/s/ Michael Rouker
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