

STATE OF INDIANA)
) SS: IN THE HAMILTON SUPERIOR COURT
COUNTY OF HAMILTON) CASE NO.: 29D05-1809-PL-008614

SAVE THE NICKEL PLATE, INC.,)
)
 Plaintiff,)
)
 v.)
)
CITY OF FISHERS BOARD)
OF PUBLIC WORKS AND SAFETY,)
)
 Defendant.)

**PROPOSED ORDER GRANTING MOTION FOR JUDGMENT
ON THE PLEADINGS AND MOTION FOR ATTORNEYS' FEES AND COSTS**

This matter is before the Court on the Motion for Judgment on the Pleadings and Motion for Attorneys' Fees and Costs filed by Defendant, City of Fishers Board of Public Works and Safety, against Plaintiff, Save the Nickel Plate, Inc. The Court, having reviewed the submissions of the parties and having heard oral argument on April 9, 2019, and being duly advised, now enters the following Order:

Findings of Fact

1. Plaintiff, Save the Nickel Plate, Inc. ("STNP"), is a domestic nonprofit corporation that conducts business in Hamilton County, Indiana, and maintains its principal office in the City of Fishers.

2. According to STNP's website, its stated purpose is to "protect historic railroads from destruction," and it notes that it is currently "working to preserve the track between Fishers, IN and Noblesville, IN." <http://www.savethenickelplate.org/>.

3. The Defendant, City of Fishers Board of Public Works and Safety (the "Board"), is comprised of three (3) members, including (i) Board Chairman, City of Fishers Mayor, Scott Fadness, (ii) Board Member, Jeff Lantz, and (iii) Board Member, Jason Meyer.

4. On July 31, 2017, the Board held a joint public meeting in Noblesville City Hall with the City of Noblesville Board of Public Works and safety (the "Noblesville Board"), as well as with the Hamilton County Board of Commissioners (the "Commissioners") (collectively referred to as the "July 2017 Meeting").

5. The notice the Board provided to the public for the July 31, 2017 joint public meeting is attached as "Exhibit C" to STNP's Complaint, it states the date, time, and location of the meeting, and STNP does not allege in its Complaint that this notice violates any specific requirement of Indiana's Open Door Law, Indiana Code § 5-14-1.5 *et seq.*

6. During the July 2017 Meeting, the Board discussed and approved two resolutions regarding the Nickel Plate Railroad and Nickel Plate Trail.

7. On September 10, 2018, the Board also held a meeting in the City of Fishers City Hall (the "September 2018 Meeting").

8. STNP did not attach a copy of the Board's notice for this meeting to its Complaint, and STNP also does not allege in its Complaint that the Board violated any specific requirement of Indiana's Open Door Law in providing notice for this meeting.

9. During the September 2018 Meeting, the Board discussed and approved two Resolutions, R091018 and R09101B, that were reciprocal resolutions approving service contracts for two companies to work together to collect data and offer proposed designs for the Nickel Plate Trail.

10. This Court took judicial notice of these resolutions during the April 9th hearing on this matter at the Board's request and without objection by STNP.

11. STNP filed its Complaint on September 13, 2018, against the Board (as well as against the Noblesville Board and the Commissioners), alleging in relevant part that the Board's notices for both the July 2017 Meeting, as well as the September 2018 Meeting, were governed by Indiana Code § 36-9-6.1 *et seq.*, (the "Thoroughfare Project Chapter"), which in turn required the Board to provide notice under Section 7 of that chapter as follows:

After publication of notice in accordance with IC 5-3-1, the works board shall hold a public hearing on the resolution adopted under section 4 of this chapter. The notice must:

- (1) fix the date of the hearing;
- (2) state that the resolution will be considered at the hearing; and
- (3) state that persons interested in or affected by the proposed project may speak at the hearing.

Ind. Code § 36-9-6.1-7; see Complaint ¶¶33-35.

12. As is clear from its Complaint, STNP's entire lawsuit is based on its contention that it had a statutory right to receive prior written notice of a *right to speak* at the two meetings, as well as a corresponding ultimate *right to speak* at both meetings.

13. And according to STNP, the Board's public notices for both the July 2017 Meeting and the September 2018 Meeting "constituted violations of Ind. Code § 36-9-6.1-7." Complaint ¶35.)

STNP's Complaint then concludes: "Due to [the Board's] violations of Indiana law, the Plaintiffs [sic] are entitled to relief under Ind. Code §5-14-1.5-7," which is the "Violations; remedies; limitations; costs and fees" section of Indiana's Open Door Law, which is not referenced or mentioned anywhere in the Thoroughfare Project Chapter, and which commonsensically only provides remedies for violations of Indiana's Open Door Law.

14. On September 25, 2018, about two weeks after STNP had filed its Complaint on September 13, 2018, counsel for the Board wrote to counsel for STNP, asking STNP voluntarily to dismiss its Complaint because it failed to state a claim for two reasons.

15. First, STNP's claim that it has a remedy under Indiana's Open Door Law with respect to the July 2017 Meeting had no basis in fact or law because it was time-barred by many months under the plain requirement of the 30-day statute of limitations contained in Indiana Code § 5-14-1.5-7, which had just then been recently confirmed to STNP by Indiana's Public Access Counselor ("PAC") in dismissing STNP's Formal Complaint, 18-FC-111.

16. The Board's attorney also reminded STNP that it had no right to ask the Court for reimbursement of its fees or other expenses related to any claim moored in the July 2017 Meeting because the PAC had dismissed its untimely formal complaint. See Ind. Code §5-14-1.5-7(f).

17. Second, STNP's claim that the Board had violated the Thoroughfare Project Chapter's notice requirements with respect to both the July 2017 and September 2018 Meetings – somehow entitling it to a remedy under the Indiana's separate Open Door Law – also had no basis in fact or law because Indiana's Open Door Law does not contain a right to speak at public meetings and that was the only basis for STNP's remedy with respect to either meeting. As authority for this position, the Board directed STNP to PAC Opinion 08-FC-149, as well as to the Indiana Court of Appeals' opinion in Brademas v. South Bend Cmty. Sch. Corp., 783 N.E.2d 745, 751 (Ind. Ct. App. 2003), trans. denied.

18. The Board's attorney closed his September 25, 2018 letter to STNP asking it to dismiss its Complaint by noting, "Taxpayers should not be forced to fund defense costs for frivolous litigation" and warning STNP, and its attorney, that either may ultimately be responsible for the Board's attorney fees under Ind. Code § 5-14-1.5-7(D)(2) and/or Indiana Code § 34-52-1-1.

19. STNP did not voluntarily dismiss its Complaint.

20. After seeking an extension of time, the Board answered STNP's Complaint on October 30, 2018.

21. On November 9, 2018, counsel for the Board again wrote to counsel for STNP, asking him to voluntarily dismiss STNP's Complaint for failure to state a claim.

24. This time, counsel for Board gave STNP a deadline by which voluntarily to dismiss its Complaint, November 24, 2018, after which it would be "filing a dispositive motion, and subsequently, for recovery of fees and costs."

25. STNP did not voluntarily dismiss its Complaint.

26. The Board filed its Motion for Judgment on the Pleadings on January 10, 2019, repeating its arguments that STNP's claim regarding the July 2017 Meeting was time-barred by the 30-day statute of limitations for claims under the Open Door Law, that the Thoroughfare Project Chapter (LC. § 36-9-6.1 *et seq.*) did not apply to either the July 2017 Meeting or the September 2018 Meeting, and that even if the separate Thoroughfare Project Chapter was violated, it would not allow for recovery under Indiana's Open Door Law (IC. § 5-14-1.5-7).

27. Also on January 10, 2019, as it told STNP it would do, the Board filed its Motion for Attorneys' Fees and Costs claiming that STNP's Complaint was frivolous, unreasonable, groundless, or brought in bad faith in violation of Indiana Code § 34-52-1-1(b) and/or Indiana

Code § 5-14-1.5-7(f). Attached to that motion were both letters that counsel for the Board had previously sent to counsel for STNP on September 25th and November 9th, 2018.

28. On January 14, 2019, this Court set the Board's motions for a hearing on April 9, 2019.

29. On February 4, 2019, STNP responded to both motions filed by the Board. Notably, neither of STNP's responses addressed the Board's argument that STNP's "Open Door Law"-remedy-based claim was untimely by months as it concerns the Board's July 2017 Meeting. Just as notably, neither STNP response addressed the Board's argument that STNP's Thoroughfare Project Chapter claim relative to the September 2018 Meeting cannot succeed under any circumstances because the Open Door Law does not contain a right to speak at public meetings and that was the only basis for a remedy of STNP's alleged violation of the Thoroughfare Project Chapter's noticing requirements.

30. On February 27, 2019, the Board moved for leave to file a reply in support of both of its pending motions, also tendering a reply.

31. On February 28, 2019, this Court denied the Board's request.

32. On April 5, 2019, STNP entered into a joint stipulation with the Noblesville Board and the Commissioners ("Joint Dismissal Stipulation"), whereby STNP would dismiss its claims with prejudice against these two co-defendants – as it concerned the July 2017 Meeting in which they both participated – if they would in turn dismiss their then pending requests for attorney fees and costs.¹

33. On April 8, 2019, this Court entered the Joint Dismissal Stipulation.

¹ During the course of the above-described litigation, the Noblesville Board and the Commissioners had joined in the relief sought by the Fishers' Board in its motion for judgment on the pleadings, as well as in the Board's motion for fees and costs.

34. On April 9, 2019, STNP and the Board appeared by counsel before the Court to offer argument in support of their respective positions.

35. Before offering argument in support of its separate motions for judgment of the pleadings and attorney fees and costs, counsel for the Board once again asked counsel for STNP voluntarily to dismiss his lawsuit. Counsel for STNP refused.

Conclusions of Law

36. A Rule 12(C) motion for judgment on the pleadings attacks the legal sufficiency of the pleadings and should be granted when there are no genuine issues of material fact and the facts shown by the pleadings establish that the non-moving party cannot succeed under the allegations therein. Eskew v. Cornett, 744 N.E.2d 954, 956 (Ind. Ct. App. 2001). A court reviewing a motion for judgment on the pleadings may look at the pleadings and any facts about which the court may take judicial notice. Consol. Ins. Co. v. Nat'l Water Servs., LLC, 994 N.E.2d 1192, 1196 (Ind. Ct. App. 2013).

37. Both parties agree upon the salient facts presented above, leaving the determination as to the application of Indiana's Open Door Law (LC § 5-14-1.5 *et seq.*), the Thoroughfare Project Chapter (LC. § 36-9-6.1 *et seq.*), and the fee recovery statute (LC. § 34-52-1-1) as pure questions of law appropriate for this Court's determination. See Marion-Adams Sch. Corp. v. Boone, 840 N.E.2d 462, 468 (Ind. Ct. App. 2006) (interpreting Indiana's Open Door Law and stating "[r]esolution of this issue would involve the interpretation of the statute, a pure question of law"); Vanderburgh Cty. Election Bd. v. Vanderburgh Cty. Democratic Cent. Comm., 833 N.E.2d 508, 510 (Ind. Ct. App. 2005) ("Statutory interpretation is a question of law reserved for the court.").

38. Regarding STNP's claim that the Board's notice of the July 2017 Meeting violated the Thoroughfare Project Chapter and thus provided a remedy under Indiana's Open Door Law, the Open Door Law provides in relevant part that "any action to declare any policy, decision, or final action of a governing body void . . . shall be commenced . . . within 30 days of . . . the date the act or failure to act complained of . . . or the date that the plaintiff knew or should have known that the act or failure to act complained of had occurred." Ind. Code § 5-14-1.5-7.

39. In seeking a remedy under the Open Door Law, STNP "knew or should have known" about the allegedly faulty public notice on the date it occurred on July 31, 2017, see I.C. § 5-14-1.5-7(b), and was statutorily determined to "have known" about it not later than the date that meeting minutes were "first available for public inspection," I.C. § 5-14-1.5-7(b), which STNP's own Complaint establishes occurred on August 14, 2017. See (Complaint Ex. E. at 4.)

40. Because STNP's Complaint pursuing a remedy under this statute was not filed until more than a year later on September 13, 2018, as a matter of law its claim regarding the July 2017 Meeting is clearly time-barred by the 30-day statute of limitations found in Indiana Code § 5-14-1.5-7. See City of Jeffersonville v. Env'tl. Mgmt. Corp., 954 N.E.2d 1000, 1011 (Ind. Ct. App. 2011) (open door law complaints against city and city's sewer board were barred where they were filed more than 30 days after the plaintiff should have known about alleged violations); see also Pettit v. Indiana Alcoholic Beverage Comm'n, 511 N.E.2d 312, 316 (Ind. Ct. App. 1987) (Indiana open door law claim dismissed because "action to declare the acts of a governing body null and void must be taken within 30 days of the act or failure complained of').

41. Regarding STNP's second claim that the Open Door Law provides a remedy for a violation of the Thoroughfare Project Chapter as it concerns the September 2018 Meeting, it too clearly fails as a matter of law even though it was timely.²

42. Nowhere in Thoroughfare Project Chapter does it state that a violation of that Chapter would lead to recovery under the separate statutory regime of Indiana's Open Door Laws (Indiana Code § 5-14-1.5 *et seq.*).

43. In fact, the Thoroughfare Project Chapter provides its own remedy in Section 10, and it explains why STNP likely did not pursue it, see Ind. Code § 36-9-6.1-10, because it requires a party to have been "affected by an assessment" in order to have standing to bring it, *id.*; thus STNP's resort to the Open Door Law whose standing requirement is *de minimis*. See Ind. Code § 5-14-1.5-7 (a) ("An action may be filed by *any person* in *any court* of competent jurisdiction") (emphasis added).

44. STNP's lack of a remedy to support its claim should be obvious because Indiana's Open Door Law "only requires that public meetings be open; it does not require that the public be given an opportunity to speak." Brademas v. S. Bend Cmty. Sch. Corp., 783 N.E.2d 745, 751 (Ind. Ct. App. 2003) (also quoting Ind. Code § 5-14-1.5-3, which in turn provides: "[A]ll 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.>").

45. In other words, a party cannot seek a statutory remedy for the deprivation of a statutory right under a chapter of Indiana law that does not recognize that statutory right.

² This Court need not make a determination as to whether the Thoroughfare Project Chapter (I.C. § 36-9-6.1 *et seq.*) applied to the Board's September 2018 Meeting – requiring notice of, and an opportunity for, the right to speak at that meeting – because even if that Chapter did apply, a violation of it would not lead to recovery under Indiana's Open Door Law (I.C. § 5-14-1.5-7), that does not itself recognize a right to speak at public meetings.

46. Accordingly, the Board is entitled to judgment on the pleadings as it concerns STNP's entire Complaint because STNP "cannot in any way succeed under the facts and allegations" contained in its Complaint as it concerns its claims relative to the July 2017 Meeting and the September 2018 Meeting. RQAW Corp. v. Dearborn Cty., 83 N.E.3d 745, 754 (Ind. Ct. App. 2017).

47. Regarding the Board's Motion for Attorneys' Fees and Costs pursuant to Indiana Code § 34-52-1-1, this statute provides in relevant part that a party may recover attorneys' fees and costs in defending against an action that is "frivolous, unreasonable, or groundless" or was litigated in "bad faith."

48. A claim or defense is "frivolous" if it is taken primarily for the purpose of harassment, if the attorney is unable to make a good faith and rational argument on the merits of the action, or if the lawyer is unable to support the action taken by a good faith and rational argument for an extension, modification, or reversal of existing law." See In re Moeder, 27 N.E.3d 1089, 1102 (Ind. Ct. App. 2015), trans. denied.

49. A claim or defense is "unreasonable" if, based on the totality of the circumstances, including the law and the facts known at the time of filing, no reasonable attorney would consider that the claim or defense was worthy of litigation. Id.

50. A claim or defense is "groundless" if no facts exist which support the legal claim presented by the losing party. Id.

51. Finally, bad faith "is demonstrated where the party presenting the claim is affirmatively operating with furtive design or ill will." Id.

STNP's Claim Relative to the July 2017 Meeting

52. This Court finds that STNP brought and continued to litigate a frivolous and groundless claim regarding the July 2017 Meeting in that it was pursued more than a year after the statute of limitations had clearly run. See Ind. Code § 5-14-1.5-7.

53. Viewed another way, no "reasonable attorney would consider" a claim for a remedy under Indiana's Open Door Law – that is statutorily stale by over a year – to be a claim "worthy of litigation" or justified. In re Moeder, 27 N.E.3d at 1102.

54. STNP had four different opportunities to dismiss this claim and refused to do so.

55. And STNP's attempt to distance itself from this claim during the hearing – by claiming that its Complaint somehow was "not really based on the July 2017 meeting" – is essentially an admission that this claim is frivolous, unreasonable, and groundless, as STNP's own Complaint plainly seeks relief under the Open Door Law for an alleged noticing violation based on the July 2017 Meeting. Complaint ¶¶33-36.

56. Accordingly, the Court finds an award of attorneys' fees and costs to the taxpayers of the City of Fishers is warranted under these unique circumstances. See In re Moeder, 27 N.E.3d at 1103 (affirming the trial court's discretion in awarding the sum of \$106,001.28 in attorney's fees and costs for having to defend against, inter alia, a claim brought outside the statute of limitations); see also Bacompt Sys., Inc. v. Ashworth, 752 N.E.2d 140, 146 (Ind. Ct. App. 2001) (affirming award of attorneys' fees because "statute of limitations had run").

STNP's Claim Relative to the September 2018 Meeting

57. This Court also finds that STNP brought and continued to litigate a frivolous and groundless claim regarding the September 2018 Meeting in that STNP sought a remedy under the Open Door Law for failing to receive prior written notice of a *right to speak* at this meeting,

as well as a corresponding ultimate *right to speak* at this meeting, that the Open Door Law clearly does not recognize, and thus plainly cannot be used to supply a remedy to STNP in this case under any circumstances. See Dempsey v. Belanger, 959 N.E.2d 861, 869 (Ind. Ct. App. 2011) (affirming award of attorneys' fees where the plaintiff's "entire argument for reinstatement relies on the Journey's Account Statute and TR 60(b)(7), which do not apply to the case at hand").

58. Viewed differently, no "reasonable attorney would consider" a claim under the Indiana Open Door Law -for a public speaking right that the Indiana Open Door Law specifically does not recognize -to be a claim "worthy of litigation" or justified. In re Moeder, 27 N.E.3d at 1102.

59. The Board has been warning STNP about the lack of a legal basis for this claim since September of last year, shortly after STNP filed its Complaint, but STNP has repeatedly refused to dismiss this claim.

60. This Court also finds STNP's belated attempt, during the hearing, for an "extension" of the Open Door Law's remedies due to a violation of the Thoroughfare Project Chapter violation to be equally frivolous, groundless, and unreasonable. See In re Moeder, 27 N.E.3d at 1102.

61. The General Assembly did not use any language in either statutory scheme to connect a violation of one statute to a remedy found in the other, and here, if this Court extended an Open Door Law remedy to STNP for a violation of the Thoroughfare Project Chapter, it would eviscerate that Chapter's standing requirement for seeking a remedy. See Ind. Code § 36-9-6.1-10. That is beyond the province of this Court.

62. Accordingly, the Court also finds an award of attorneys' fees and costs to the taxpayers of the City of Fishers is warranted under these unique circumstances.

63. In resisting the relief the Board has sought in its motions, STNP has contended that judgment on the pleadings for the Board is premature, and fee-shifting improper, because STNP just needs additional time to conduct discovery "to determine whether Ind. Code 36-9-6.1 [the Thoroughfare Project Chapter] applies to the actions taken by the [Board]" and that such "evidence necessary [sic] requires a discussion of whether the substance of the meeting constituted a project in order to carry out a thoroughfare plan, and if so, whether the notice provided complies with Ind. Code §36-9-6.1-7 and whether such failure constitutes a violation of Ind. Code 5-14-1.5 [the Open Door Law]." (STNP Resp. 8-9.)

64. Assuming the issue of whether a violation of one statute can be remedied under a completely different statute is a factual question – and it is not – this Court would at least expect STNP's pending discovery requests to seek information from the Board actually related to "whether the substance of [either] meeting constituted a project in order to carry out a thoroughfare plan." (STNP Resp. 9.) After all, this is the primary thrust of STNP's argument to this Court as to why it should deny both of the Board's motions.

65. However, the discovery requests that STNP attached to its Response demonstrate nothing more than a fishing expedition aimed at general discovery of communications between the City of Fishers and various persons and entities, revealing an underlying purpose for its lawsuit that is unrelated to discovering the "substance" of anything that occurred at either the July 2017 or September 2018 Meetings, confirming for this Court the unreasonable bases for STNP's Complaint.

66. When counsel for the Board raised this point during the April 9th hearing, STNP essentially responded that it was unfair that the Board was attempting to squelch public voices of "dissent" in a heavy-handed fashion by violating the "rights" of STNP.

67. To the contrary, STNP has not presented this Court with a lawsuit that recognizes any legal "right" that STNP may have under Indiana's Open Door Law.

Order

The Court, being duly advised, finds that the Board's Motion for Judgment on the Pleadings should be, and hereby is, **GRANTED**. STNP's claims are dismissed with prejudice. All future court dates are hereby vacated.

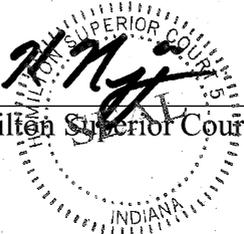
The Court, also being duly advised, finds that the Board's Motion for Attorneys' Fees and Costs, should be, and hereby is, **GRANTED**. Within ten (10) calendar days of this Order, counsel for the Board shall submit a fee and cost affidavit to verify and determine the amount of the fee and cost award imposed in the Board's favor and against STNP. STNP's legal counsel in this matter shall be jointly and severally liable for the award. See Daurer v. Mallon, 597 N.E.2d 334, 336 (Ind. Ct. App. 1992).

Dated: April 16, 2019

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Judge, Hamilton Superior Court 5


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