

IN THE
INDIANA COURT OF APPEALS

CASE NO. 25A-PL-01574

GARY LEE,	)	
	)	Appeal from
Appellant-Plaintiff,	)	Lake Superior Court, Civil Division Room 6
	)	
v.	)	Cause No.: 45D10-2408-PL-499
	)	
LITTLE CALUMET RIVER BASIN	)	The Honorable Rehana R. Adat-Lopez, Judge
DEVELOPMENT COMMISSION,	)	
	)	
Appellee-Defendant.	)	

APPELLANT'S BRIEF

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LITTLE CALUMET RIVER BASIN	)	The Honorable Rehana R. Adat-Lopez, Judge
DEVELOPMENT COMMISSION,	)	
	)	
Appellee-the Commission.	)	

APPELLANT'S BRIEF

STATEMENT OF ISSUES

I. Did the trial court err in granting the Little Calumet River Basin Development Commission's motion for judgment on the pleadings under Trial Rule 12(C) on Gary Lee's Open Door Law claim by making findings contrary to facts alleged in the complaint and interpreting the Open Door Law as prohibiting discovery into the content of executive sessions?

II. Did the trial court err in granting the Commission's motion on the pleadings as to Gary Lee's claim that two Commission members are barred from serving because they are employees of their respective municipalities by making findings contrary to the facts alleged in the complaint and misconstruing the term "employee" under the Commission's enabling statute?

III. Did the trial court err in granting the Commission's motion for judgment on the pleadings on Gary Lee's claim that the Commission lacked authority to lease its public property to a private company to build a solid waste processing facility?

STATEMENT OF THE CASE

A. Nature of the Case

The Appellant-Plaintiff, Gary Lee, appeals the trial court's order granting the motion of the Defendant-Appellee, Little Calumet River Basin Development Commission ("Commission"), for judgment on the pleadings as to all three of his claims.

B. Course of Proceedings

On August 1, 2024, Gary Lee filed his complaint against the Commission in Lake Superior Court asserting three claims. (App. Vol. II p. 33) The first claim asserts the Commission violated Indiana's Open Door Law, Ind. Code § 5-14-1.5, by holding private "executive sessions" to discuss pending litigation during which the Commission members discussed public matters that are inappropriate for an executive session (the "Open Door Law claim"). The second and third claims assert that the Commission violated two provisions of its enabling statute and seek declaratory judgment under Ind. Code § 34-14-1. Specifically, the second claim seeks declaratory judgment that two Commissioners, who serve on boards of their respective municipalities, are ineligible to be members of the Commission under Ind. Code § 14-13-2-7(d)(3), which prohibits a Commission member from being "an employee or elected official of a city, town, or county governmental unit" ("member ineligibility claim"). The third claim seeks declaratory judgment that the Commission lacked authority to lease property to a private company to build and operate a solid waste processing facility contrary to the Commission's statutory purpose ("improper purpose claim"). On October 3, 2024, the Commission filed its answer and affirmative defenses. (App. Vol. II p. 58) Gary Lee subsequently amended his complaint with two paragraphs alleging additional facts in support of his standing to bring the action. (App. Vol. II p. 74)

Brief of Appellant Gary Lee

On November 1, 2024, Mr. Lee served written discovery on the Commission. (App. Vol. III p. 170) His first interrogatory requested the Commission identify all pending lawsuits discussed during each executive session during the past 12 months. (*Id.* p. 174) In response, the Commission produced a printout of cases and matters, none of which were “pending” during five of the executive sessions held during 2024. (App. Vol. III pp. 31-105, 108) After the Commission made clear that it would not provide a substantive response, Mr. Lee filed a motion to compel. (App. Vol. III pp. 2, 155-156) The Commission opposed the motion and moved for a protective order to prevent any discovery of its communications during executive sessions. (App. Vol. III p. 158)

On November 1, 2024, the Commission filed a motion for judgment on the pleadings. (App. Vol. II p. 100) On November 25, 2024, Gary Lee responded in opposition to the Commission’s motion. (App. Vol. II p. 126) On December 12, 2024, the Commission replied. (App. Vol. II p. 165) On January 14, 2025, the trial court, *sua sponte*, scheduled a hearing on the Commission’s motion for judgment on the pleadings, which it later rescheduled. (App. Vol. II pp. 185, 186) On March 18, 2025, the trial court heard oral argument from counsel on the motion for judgment on the pleadings and the next day ordered the parties to submit proposed findings of fact and conclusions of law. (App. Vol. II p. 187) On April 21, 2025, both parties submitted proposed findings of fact and conclusions of law. (App. Vol. II pp. 188, 201)¹

On June 18, 2025, the trial court granted the Commission’s motion and entered judgment on the pleadings against Gary Lee on each of his three claims. (App. Vol. II pp. 8, 31-32) The trial court also denied the parties’ discovery motions without discussion. *Id.* Instead, the trial court concluded that Mr. Lee had not alleged a violation of the Open Door Law because the notices of the Commissions’ executive sessions were proper. (*Id.* pp. 12-15) Having made that finding, the

¹ Gary Lee received the Commission’s Proposed Findings of Fact and Conclusions of Law through the court’s automated filing and notification system. (App. Vol. II p. 201) However, the filing does not appear on the Clerk’s Chronological Case Summary. (*Id.* p. 2)

trial court then held that the Open Door Law prevented Mr. Lee from discovering any communications made during the executive sessions. (*Id.* pp. 15-16) As to Gary Lee’s member ineligibility claim, the trial court found as a matter of fact and law that the Commission members who hold offices with their respective municipalities are not “employees” of those municipalities. (*Id.* pp. 17-23) And as to Mr. Lee’s improper purpose claim, the trial court held that four subsections of the Commission’s enabling statute authorized the Commission to lease its public property for a solid waste processing operation. (*Id.* pp. 24-31)

Gary Lee timely noticed this appeal on June 27, 2025. On July 3, 2025, the Lake Superior Court clerk filed a six-page certified Chronological Case Summary. (App. Vol. II pp. 2-7)

STATEMENT OF FACTS²

The Commission is “a public body corporate and politic” established by the Indiana General Assembly in 1980 for the purposes of “[p]romot[ing] the general health and welfare of citizens of Indiana” and “[p]roviding for the creation, development, maintenance, administration, and operation of park, recreation, marina, flood control and other public works projects, including levees.” (App. Vol. II pp. 75-76; ¶8 (quoting Ind. Code §§ 14-13-2-4 and -5)). To carry out these purposes, the Commission annually collects approximately \$7.5 million in special assessments from Lake County residents and businesses within the Little Calumet River watershed. (*Id.* pp. 78-79; ¶27) The Commission admits it is subject to the requirements of Indiana’s Open Door Law. (*Id.* pp. 59-60; Answer ¶7)

² In ruling on a motion for judgment on the pleadings, the court looks only to the pleadings and accepts as true the well-pleaded material facts alleged by the non-movant. *Lockerbie Glove Co. Town Home Owner’s Assoc., Inc. v. Indianapolis Historic Preservation Comm’n*, 194 N.E.3d 1175, 1181 (Ind. Ct. App. 2022). Unless otherwise indicated, the Statement of Facts relies on the pleading allegations in Gary Lee’s Amended Complaint with pin cites to the relevant paragraphs.

Brief of Appellant Gary Lee

Gary Lee lives near and recreates along the Little Calumet River. (App. Vol. II p. 75; ¶7) He pays an annual assessment to the Commission on his property, pursuant to Ind. Code § 14-13-2-18.5(c). (*Id.*; ¶5.) In addition, the Commission has an easement across Gary Lee’s property used to convey stormwater and groundwater through a ditch for purposes of flood control. (*Id.*; ¶6) Because Mr. Lee lives and owns property in the Little Calumet River Basin (“the River Basin”), his property is affected by the Commission’s decisions. (*Id.*)

The Commission holds monthly meetings to conduct official business and take final actions. (*Id.* p. 79; ¶¶31, 32) Specifically, the Commission held public meetings on December 11, 2023; January 17, 2024; February 21, 2024; March 20, 2024; April 17, 2024; May 15, 2024; June 20, 2024; and July 17, 2024. (*Id.*; ¶32) Prior to each of these public meetings, the Commissioners met privately behind closed doors in “executive session,” purportedly “for the discussion of pending litigation.” (*Id.* pp. 79-80; ¶¶33-36) The Commission’s notices of these executive sessions do not identify the pending litigation to be discussed, nor do they provide a “specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b)” as required by Ind. Code § 5-14-1.5-6.1(d). (*Id.*)

Gary Lee disputes that the Commissioners discussed only pending litigation in their executive sessions. (*Id.*; ¶35) Indeed, Mr. Lee has reason to believe that the Commission routinely discusses matters that should be discussed in open meetings so that the public may observe and record as required by the Open Door Law. (App. Vol. III pp. 198-206) In particular, Mr. Lee has observed several meetings in which the Commission appears to have changed its decision based on its private discussions had during its executive session. (*Id.* p. 198)

In addition, Mr. Lee questions the eligibility of two members of the Commission. Specifically, a Commission member “may not be an employee or elected official of a city, town, or county governmental unit.” Ind. Code § 14-13-2-7(d)(3). Commissioner William Baker is

president of the Plan Commission for the City of Munster. (App. Vol. II p. 82; ¶53) Commissioner Tom Wichlinski is Secretary of the Board of Zoning Appeals for the Town of Griffith. (*Id.*; ¶54) As such, it is Gary Lee's position that these Commissioners are not eligible to serve on the Commission because they are employees of a city, town, or county governmental unit. (*Id.*; ¶55)

Finally, Mr. Lee questions the authority of the Commission to authorize commercial development outside the scope of the Commission's statutory purposes. On January 17, 2017, the Commission entered into a license agreement with Maya Energy, LLC. (*Id.* p. 83; ¶¶58-59) The agreement is a 50-year lease allowing Maya Energy to construct and operate a solid waste processing facility on 35 acres owned by the Commission south of the Little Calumet River. (*Id.* p. 83, 88-99; ¶60 & Exh. B) It is Gary Lee's position that the Commission lacked authority to enter into this commercial lease agreement and, as such, it is invalid. (*Id.* p. 83; ¶63)

SUMMARY OF ARGUMENT

The trial court erred in dismissing each of Gary Lee's three claims. First, the court failed to apply the applicable standard of review for a motion for judgment on the pleadings under Ind. Tr. R. 12(C) by making findings contrary to the material facts alleged in Mr. Lee's amended complaint. Specifically, as to the Open Door Law claim, the trial court failed to accept as true Mr. Lee's allegation that the Commission privately discussed subjects in "executive sessions" that should have been discussed openly, in public. The trial court also failed to accept as true Mr. Lee's allegation that the Commission's notices that executive sessions were called "for the discussion of pending litigation" was not accurate.

Second, the trial court was wrong to conclude that Commissioners Baker and Wichlinski are not "employees" of their respective municipalities prohibited from serving on the Commission. The trial court misinterpreted the meaning of "employee" in the Commission's enabling statute and made findings in disregard of well-pled facts alleged in Gary Lee's complaint.

Finally, the trial court erred in concluding that the Commission had statutory authority to lease property to Maya Energy for a solid waste processing facility. The plain language of the Commission’s enabling statute authorizes the Commission to engage in activities for the purpose of creating and developing “park, recreation, marina, flood control and other public works projects, including levees” within the river basin. It does not authorize the Commission to get into the solid waste business. Indeed, that is what the Lake and Porter County solid waste management districts are for. For these reasons, detailed further below, this Court should reverse the trial court’s erroneous dismissal of Gary Lee’s claims.

ARGUMENT

A. STANDARD OF REVIEW ON APPEAL

A motion for judgment on the pleadings pursuant to Trial Rule 12(C) attacks the legal sufficiency of the pleadings. *Oukbu v. Amazon*, 244 N.E.3d 463, 466 (Ind. App. Ct. 2024), *trans. denied* (citing *Davis v. Ford Motor Co.*, 747 N.E.2d 1146, 1149 (Ind. Ct. App. 2001), *trans. denied*); *KS&E Sports v. Runnels*, 72 N.E.3d 92, 898 (Ind. 2017) (Trial Rule 12(C) motion “tests the sufficiency of a claim or defense presented in the pleadings[.]”). In ruling on a Tr. R. 12(C) motion, the court views the challenged pleading in the light most favorable to the non-moving party and “with every intendment regarded in his favor,” to determine whether the pleading “is sufficient to constitute any valid claim.” *Brugh v. Milestone Contractors*, 202 N.E.3d 1091, 1094 (Ind. Ct. App. 2023), *trans. denied*. The Court of Appeals reviews a trial court’s decision on a motion for judgment on the pleadings *de novo*. *Oukbu*, 244 N.E.3d at 467 (citing *Murray v. City of Lawrenceburg*, 925 N.E.2d 728, 731 (Ind. 2010)).

“In reviewing a motion under 12(C), the court must ‘base [its] ruling solely on the pleadings’ and ‘accept as true the material facts alleged in the complaint.’” *Bayer Corp. v. Leach*, 147 N.E.3d 313, 315 (Ind. 2020) (alteration in original) (quoting *KS & E Sports*, 72 N.E.3d at 898).

The court is to consider only the pleadings and any facts subject to judicial notice, with all well-pled facts alleged in the complaint taken as true. *Waldrip v. Waldrip*, 976 N.E.2d 102, 110 (Ind. Ct. App. 2012). The moving party is deemed to have admitted well-pled facts in favor of the nonmovant, and all reasonable inferences are drawn in favor of the nonmovant. *Transcontinental Ins. Co. v. J.L. Manta, Inc.*, 714 N.E.2d 1277, 1280 (Ind. Ct. App. 1999). A motion under Trial Rule 12(C) is appropriate only when it is clear from the face of the pleadings that one of the parties cannot in any way succeed under the operative facts and allegations made. *Id.*

Contrary to this established standard, the trial court here ignored the allegations of Gary Lee's amended complaint and instead adopted the Commission's version of events at every turn. For that matter, the trial court adopted the Commission's proposed findings of fact and conclusions of law almost verbatim, including misspellings and factual errors.³ As such, this Court should have little confidence that the trial court's decision is "the result of considered judgment." *Redd v. Redd*, 901 N.E.2d 545, 549 (Ind. Ct. App. 2009) (quoting *Safety Nat'l Cas. Co. v. Cinergy Corp.*, 829 N.E.2d 986, 993 n. 6 (Ind. Ct. App. 2005), *trans. denied*).

B. THE TRIAL COURT ERRED IN DISMISSING MR LEE'S OPEN DOOR LAW CLAIM

In dismissing the Open Door Law claim, the trial court adopted the Commission's mischaracterization of Mr. Lee's claim as challenging only the notices of monthly executive sessions. (App. Vol. II pp. 13-15; Order ¶¶10-35)⁴ The crux of Mr. Lee's claim, however, is that the notices are not truthful and that the Commission discussed matters in its monthly executive sessions that the Open Door Law requires to be open to the public. (App. Vol. II pp. 80-81) Taking

³ For example, the Commission's proposed conclusion of law ¶110 and the trial court's conclusion of law ¶94 both reference an unidentified "Mr. Turner." (App. Vol. II pp. 22, 222) The Commission's proposed conclusion of law ¶112 and the trial court's conclusion of law ¶96 both misspell the word "does" as "dos." *Id.*

⁴ Citations to the trial court's order that is the subject of this appeal include both the Appendix citation and the numbered paragraphs in the order.

official action behind closed doors on matters that do not qualify for an executive session is itself a violation of the Open Door Law, regardless of whether the Commission provided notice. Ind. Code § 5-14-1.5-3. Yet, by putting form over substance, the trial court failed to address this key aspect of Gary Lee's claim.

Instead, having found the executive sessions were properly noticed, the trial court then held that Mr. Lee was barred from conducting any discovery into the Commission's discussions during an executive session. The case cited by the trial court for this proposition, however, does not hold that the Open Door Law creates such an iron-clad discovery privilege. Moreover, the trial court erred in concluding that the notices of the Commission's monthly executive sessions satisfied the Open Door Law, a conclusion that is contrary to the well-pleaded allegations of the complaint. Because the trial court ignored the crux of Mr. Lee's allegations, mischaracterized others, drawing inferences *against* Mr. Lee, and misapplied the law, its dismissal of the Open Door Law claim must be reversed.

1. Gary Lee Pled a Colorable Claim that the Commission Violated the Open Door Law

The trial court dismissed Gary Lee's Open Door Law claim, concluding that the Commission properly noticed its monthly executive sessions and finding that Mr. Lee's "complaint does not address the notices and does not allege the Commission failed to provide notice as is required to plead a Claim under the Open Door Law." (App. Vol. II p. 13; Order ¶¶10-11) By focusing on the notices, the trial court failed to address the material allegations Gary Lee pled in support of his Open Door Law claim. Those are that the Commission justified its private "executive sessions" as exclusively "for the discussion of pending litigation" when in fact the Commission used some or all of these private meetings to discuss public matters and take "official action on public business" that should have been done in open meeting. (*Id.* pp. 80-81; ¶¶35, 44, 46) And also that the Commission's notices of its executive sessions "do not identify any pending litigation,

nor do they provide a ‘specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b)’ as required by Ind. Code § 5-14-1.5-6.1(d).” ((*See Id.* p. 80; ¶36) Taken as true, as required by Trial Rule 12(C), these allegations state a viable claim under the Open Door Law.

Indiana’s Open Door Law requires “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.” Ind. Code § 5-14-1.5-3(a). This includes any meeting where the majority of the governing body receives information, deliberates, makes recommendations, establishes policy, makes decisions or takes final action. Ind. Code § 5-14-1.5-2(c) -2(d). The primary purpose of the Open Door Law is to keep citizens fully informed of an agency’s activities. *Gary Community School Corp v. Lardydell*, 8 N.E.3d 241, 245 (Ind. Ct. App. 2014), *trans. denied*. Thus, while the Commission may meet in executive session outside of public view, it must be for *a proper purpose* authorized by the statute. Ind. Code § 5-14-1.5-6.1(b).

The Commission denies that it discussed inappropriate matters in executive session. (App. Vol. II p. 65; Answer ¶33) But that blanket denial merely raises a genuine factual dispute that should be fleshed out in discovery. The denial does not invalidate Gary Lee’s claim at the pleading stage that the Commission did discuss matters of public concern behind closed doors. Indeed, “Indiana is a notice pleading state.” *Houin v. Bremen State Bank*, 495 N.E.2d 753, 757 (Ind. Ct. App. 1986); Ind. R. Trial P. 8(A). “Under notice pleading all that is required in a complaint is a clear and concise statement that will put the defendant on ‘notice’ as to what has taken place and the theory that the plaintiff plans to pursue.” *Id.* Since “both parties will have ample opportunity in discovery to learn all facts necessary to fully represent the interests of their clients, . . . the elements required to state a cause of action are not required and the plaintiff is heavily favored so far as getting into court.” *Id.*; Ind. R. Trial P. 8(F).

Accordingly, “a complaint is sufficient if it states any set of allegations, no matter how unartfully pleaded, upon which the trial court could . . . grant relief.” *See McQueen v. Fayette County Sch. Corp.*, 711 N.E.2d 62, 65 (Ind. Ct. App. 1999), *trans. denied*; *see also Sekerez v. Gehring*, 419 N.E.2d 1004, 1007 (Ind. Ct. App. 1981) (Indiana’s liberal notice pleading standard serves to avoid dismissals due to technicalities or human error in drafting the complaint). A complaint that survives this “limited scrutiny” states a claim for relief “even if there may lurk on the horizon an unassailable defense” because the “plaintiff ‘need not anticipate [the defense] . . . and plead matter[s] in avoidance in the complaint.’” *Bellwether Properties, LLC v. Duke Energy Indiana, Inc.*, 87 N.E.3d 462, 464, 466 (Ind. 2017) (quoting *Nichols v. Amax Coal Co.*, 490 N.E.2d 754, 755 (Ind. 1986)).

Here, Mr. Lee plainly alleged that the Commission violated the Open Door Law by privately discussing matters of public concern under the guise of executive sessions held to discuss pending litigation. Those allegations are sufficient to put the Commission “on notice” of Gary Lee’s claim. The trial court’s conclusion otherwise was error and should be reversed by this Court.

2. The Trial Court Erred in Concluding that Gary Lee is Barred by the Open Door Law from Conducting *Any* Discovery into Executive Session Discussions

The trial court erroneously dismissed the crux of Gary Lee’s Open Door Law claim in part by concluding that even if Mr. Lee could proceed, he could not conduct discovery necessary to prove his claim. According to the trial court, the Open Door Law precludes discovery into *all* discussions during executive sessions. (App. Vol. II pp. 15-16; Order ¶¶36-45) In support, the trial court reasoned that since the Open Door Law “protects all of the private and confidential discussions occurring in executive sessions,” that means “litigants [are prevented] from intruding on the privileged communications in an executive session.” (*Id.* p. 16; Order ¶¶41, 44) But this mischaracterizes Mr. Lee’s allegations and disregards the law.

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Gary Lee has never argued that he should be able to conduct discovery into *privileged* communications, which are outside the scope of discovery regardless of the Open Door Law's protections for such communications. Ind. R. Trial P. 26(B)(1) (allowing parties to "obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action." (emphasis added)). Indeed, Mr. Lee's discovery requests anticipated that privileged communications would be withheld. (App. Vol. III p. 172) Rather, Mr. Lee sought discovery on whether "official actions" or other public business of the Commission were taken or discussed during executive sessions. Such discovery is not privileged, is relevant to Mr. Lee's Open Door Law claim, and thus is within the scope of permissible discovery.

Nevertheless, the trial court's ruling presumes that *everything* discussed in executive session is privileged and therefore *any* discovery into what was discussed is off limits. (App. Vol. II p. 16; Order ¶41) If allowed to stand, the ruling not only frustrates the purpose of the Open Door Law, but it violates Indiana's liberal discovery rules intended to ensure that litigation is a fair contest rather than a game of concealment or ambush. *See Nail v. Smith*, 178 N.E.3d 801, 806 (Ind. Ct. App. 2021) ("the purpose of pretrial discovery is to 'make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent'") (quoting *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 76, 77 (Ind. 2006); *Waterfield v. Waterfield*, 61 N.E.3d 314, 333 (Ind. Ct. App. 2016), *trans. denied* ("although 'concealment and gamesmanship were [once] accepted as part and parcel of the adversarial process,' we have unanimously declared that such tactics no longer have any place in our system of justice.") (quoting *Outback Steakhouse*, 856 N.E.2d at 77).

For that matter, the trial court's ruling ignores the fact that "Indiana generally disfavors bare assertions of privilege in the context of discovery." *Minges v. State*, 192 N.E.3d 893, 899 (Ind. 2022). For this reason, Indiana Trial Rule 26(B)(5) places the burden on the party

“withhold[ing] information otherwise discoverable . . . by claiming that it is privileged . . . [to] make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself . . . will enable other parties to assess the applicability of the privilege.” No such showing was made here.

The trial court relied on *Warren v. Bd. of Sch. Trustees of Springs Valley Cmty. Sch. Corp.*, 49 N.E.3d 559 (Ind. Ct. App. 2015) in holding that the Open Door Law precludes litigants from “conduct[ing] discovery about conversations during an executive session.” (App. Vol. II p. 16; Order ¶45) But the trial court’s reliance on *Warren* is misplaced. First, the Indiana Court of Appeals in *Warren* did not determine that *all* conversations during executive session are privileged and off-limits. To the contrary, the court made clear that “the facts of [that] case [did] not require [it] to decide whether discussions during executive sessions are privileged.” *Id.* at 569.

Instead, the *Warren* court rejected the plaintiff’s discovery requests to the school board that fired her, for information about “the substance of the [school board’s] communications about her during [its] executive session and how the determination was reached to terminate her position.” *Id.* The court held that such discovery was out-of-bounds because it went to the “deliberative processes of the School Board and its members,” contrary to the “general bar against probing the mental processes involved in administrative decision-makers.” *Id.* at 570. Nowhere in the opinion does the court say that *all* conversations during executive session are *always* privileged or even presumed privileged. The trial court’s conclusion otherwise has no foundation in the law or facts of this case.

3. The Trial Court Erred in Finding the Commission’s Monthly Notices of Executive Sessions to “Discuss Pending Litigation” Satisfied Open Door Law Requirements

The trial court rejected Gary Lee’s claim that the Commission’s public notices of its monthly executive sessions failed to meet the notice requirements of Ind. Code § 5-14-1.5-6.1(d).

(App. Vol. II pp. 12-15; Order ¶¶9-10, 27-33) Gary Lee’s Amended Complaint alleges that “[s]ince at least December 2023, the Commission has justified its private meetings prior to its public monthly meetings by noticing them as an Executive Session ‘for the discussion of pending litigation,’ . . . [without] providing ‘specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b)’ as required by Ind. Code § 5-14-1.5-6.1(d).” (App. Vol. II pp. 80-81; ¶¶36, 47) Taken as true, this allegation plainly states a valid claim under Indiana’s Open Door Law.

The trial court ruled against Mr. Lee by making a raft of factual findings contrary to the well-pled allegations of the complaint. Not only did the trial court ignore the fact that the notices failed to reference the statutory basis for the executive session under Ind. Code § 5-14-1.5-6.1(b), *see Gary/Chicago Airport Bd. of Auth. v. Maclin*, 772 N.E.2d 463, 468 (Ind. Ct. App. 2002), it failed to consider Mr. Lee’s allegation that the purported basis for the executive sessions listed on the notices was false. Instead, the trial court misconstrued Gary Lee’s complaint as making “a handful of procedural arguments” challenging the Commission’s notices of executive session. (*Id.* p. 13; ¶12) By adopting the Commission’s proposed order in whole cloth, the trial court overlooked Mr. Lee’s primary challenge to the notices – the crux of his Open Door Law claim – that the stated purpose of the executive session was a ruse. As discussed above, Mr. Lee alleges that the Commission routinely discussed subjects in executive sessions unrelated to “pending litigation” and required to be open to the public. Given this allegation – taken as true on a motion for judgment on the pleadings – a notice that erroneously states that executive sessions are being held only to discuss pending litigation is a violation of the Open Door Law.

Nevertheless, the trial court concluded that Gary Lee failed to state a claim because Indiana’s Public Access Counselor (“PAC”) found the Commission’s “notices are in order” and “that the Commission did not violate the Open Door Law.” (*Id.* pp. 10, 15; ¶¶13, 35) There are

several problems with this. First, the PAC only has authority to issue “advisory opinions.” Ind. Code § 5-14-4-10(6). And those advisory opinions are not binding on the trial court or this Court. *Tutt v. Evansville Police Dept.*, 204 N.E.3d 305, 310 (Ind. Ct. App. 2023) (citing *Carroll Cnty. E911 v. Hasnie*, 148 N.E.3d 996, 1004 (Ind. Ct. App. 2020)). Moreover, the PAC does not, and did not, take sworn testimony or evidence on whether the Commission discussed matters of public concern during executive sessions. (App. Vol. II p. 86) Accordingly, the PAC did not make any determination as to the disputed issue at the heart of Gary Lee’s Open Door Law Claim.

Finally, to the extent the PAC’s advisory opinion addressed relevant matters of law, this Court need not give it any deference. Ind. Code § 4-21.5-5-11 (directing courts reviewing an agency action to “decide all questions of law, including any interpretation of a federal or state constitutional provision, state statute, or agency rule, *without deference to any previous interpretation made by the agency*” (emphasis added)). Thus, the trial court’s reliance on the PAC’s advisory opinion was entirely misplaced.

In sum, Gary Lee’s amended complaint states a cause of action under the Open Door Law. The trial court’s conclusion otherwise was error and should be reversed by this Court.

C. THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON GARY LEE’S CLAIM THAT TWO COMMISSIONERS ARE MUNICIPAL EMPLOYEES AND THUS PROHIBITED FROM SERVING ON THE COMMISSION

The trial court dismissed Gary Lee’s claim that two of the Commission’s members – Mr. Baker and Mr. Wichlinski – are “employees” of their respective municipalities and thus barred from serving on the Commission. (App. Vol. II pp. 17-23; Order ¶¶47-106) The Commission’s enabling statute prohibits “an employee or elected official of a city, town, or county governmental unit” from serving on the Commission. Ind. Code § 14-13-2-7(d)(3). However, the trial court concluded as a matter of fact and law that “[n]either Mr. Baker nor Mr. Wichlinski are ‘employees’

of any municipality.” (App. Vol. II pp. 11, 17; Order ¶¶18-19, 49) The trial court’s conclusion is wrong on both fronts.

As to the facts, the trial court is wrong that these two Commissioners are not employees because Gary Lee’s amended complaint alleges that they are—that Commissioner Baker is an employee of the City of Munster and Commissioner Wichlinski is an employee of the Town of Griffith. (*Id.* p. 82; ¶¶53-55) Under the applicable Trial Rule 12(C) standard of review, these pleading allegations are deemed admitted, and thus the trial court erred in making factual findings to the contrary.

As to the law, the trial court’s legal conclusion that these two Commissioners are not “employees” of their respective municipalities misconstrues of term “employee” under the relevant statute – here, the Commission’s enabling statute. Instead, the trial court considered the meaning of the term as used in the Open Door Law, which is a different statute with a different purpose.

Interpretation of statutory language necessarily starts with whether the relevant language is clear and unambiguous. *Sees v. Bank One, Indiana, N.A.*, 839 N.E.2d 154, 157 (Ind. 2005). Words and phrases are to be interpreted using their plain, ordinary and usual meanings. *Young v. Hood’s Gardens, Inc.*, 24 N.E.3d 421, 424-25 (Ind. 2015). Statutory language should be examined and interpreted *as a whole*, “giving common and ordinary meaning to words used in the English language and not over-emphasizing a strict literal or selective reading of individual words.” *City of Merrillville v. Blanco*, 687 N.E.2d 191, 196 (Ind. Ct. App. 1997), *trans. denied* (citing *Simon v. Auburn, Bd. of Zoning Appeals*, 519 N.E.2d 205, 211 (Ind. Ct. App. 1988)).

Here, the Commission’s enabling statute does not define the term “employee,” thereby creating ambiguity because the term has different meanings in different contexts. Indeed, the legislature has used the term to mean different things to carry out the disparate goals of varied pieces of legislation. *See, e.g.*, Ind. Code § 22-2-2-3 (setting out lengthy definition of term

“employee” for wage and hour purposes with 17 exceptions); 5-10-13-2 (“employee” defined for public employee disability benefits); 23-1-20-9 (“employee” defined for purposes of the Indiana Business Corporation Law); 6-5.5-1-8 (“employee” defined for purposes of the taxation of financial institutions). Thus, to determine the meaning of the term “employee” for purpose of the Commission’s enabling statute, the court must look to the legislative intent of that specific law, not the Open Door Law as the trial court did in his case.

To determine legislative intent, a court must “consider the goals of the statute, and the reasons and policy underlying the statute’s enactment.” *Indiana State Police Dep’t. v. Turner*, 577 N.E.2d 598, 601 (Ind. Ct. App. 1991), *trans. denied*. Here, the purpose of the Commission’s enabling statute is to “promote the general health and welfare of citizens of Indiana” and “[p]rovide for the creation, development, maintenance, administration, and operation of park, recreation, marina, flood control and other public works projects, including levees.” Ind. Code § 14-13-2-4. It is for that public benefit that the Commission has authority to annually collect millions of dollars from residents and businesses in the Little Calumet River watershed. Ind. Code § 14-13-2-18.5.

In 2009, the legislature amended the Commission’s enabling statute to prohibit members of the Commission from being an “employee or elected official of a city, town, or county governmental unit.” P.L. 181–2009, Sec. 1. This prohibition furthers the Commission’s statutory purpose by reducing the potential for Commissioners to act only for the benefit of their municipalities, thereby ensuring that the Commission’s public works projects benefit everyone in the watershed. In other words, the prohibition ensures that Commissioners owe no particular fealty to one of the municipalities within the watershed and can act in the best interests of all residents in the Little Calumet River Basin.

The trial court summarily rejected this reading of the Commission’s enabling statute and instead determined that it was bound to follow the distinction between an “employee” and a “public

officer” recognized by the Indiana Court of Appeals in *Common Council of City of Peru v. Peru Daily Trib., Inc.*, 440 N.E.2d 726 (Ind. Ct. App. 1982). (App. Vol. II p. 20; Order ¶¶73-75) The trial court reasoned that since the Commissioner’s enabling statute does not define the term “employee,” the term “must be construed to have its commonly understood meaning,” which “includes the settled definitions of a term created by the courts.” (*Id.* p. 22; Order ¶¶89-90) The trial court then made the giant leap that the legislature adopted the “settled definition” of the term “employee” as created by the court in *Peru*, for purposes of the Commission’s enabling statute. (*Id.* pp. 20, 22; Order ¶¶77-78, 90-93) The trial court’s application of the *Peru* decision is wrong.

As an initial matter, the issue in *Peru* was whether a city council could hold executive sessions to interview applicants for appointment to the city’s utility service board under the Open Door Law’s public meeting exception for “interviews with *prospective employees*.” 440 N.E.2d at 728 (emphasis added). Considering the enabling statute of the city’s utility service board, the *Peru* court held that applicants for membership on that board were not “prospective employees” of the city, but rather prospective officers. *Id.* at 729, 731-732. That is not the situation here.

Commissioner Baker is the president of the City of Munster’s Plan Commission, while Commissioner Wichlinski is the Secretary of the Town of Griffith’s Board of Zoning Appeals. (App. Vol. p. 82; ¶¶53-54) Thus, the relevant question is not whether a member of a city’s utility service board is a city employee for purposes of the Open Door Law, but whether members of a plan commission and zoning appeal board are employees for purposes of the Commission’s enabling statute.

On that front, Ind. Code § 34-6-2-38(a) could not be more clear that an “employee” and “public employee” is “a person presently or formerly acting on behalf of a governmental entity, whether temporarily or permanently or with or without compensation, including members of *boards*, committees, *commissions*, authorities, and other instrumentalities of governmental

entities.” (emphasis added). Ind. Code § 34-13-3-5 reinforces this meaning by stating that members of government commissions and boards are deemed to be “acting within the scope of their employment” when performing their duties as commission and board members.

The trial court disregarded this authority reasoning that “the General assembly incorporated Ind. Code § 34-6-2-38 into other provisions of Title 14 but did not do so for the statutes governing the Commission.” (App. Vol. II p. 21; Order ¶¶86) According to the trial court, this means the General Assembly did not intend for the term “employee” to include “public officers” when it created the Commission because when interpreting a statute courts “presume that the General Assembly is aware of the existing common law and does not intend to change it.” (*Id.* pp. 21-22; Order ¶¶88-91 (quoting *Johnson v. Wysocki*, 990 N.E.2d 456, 466 (Ind. 2013))) The problem with this is that the Commission’s enabling statute is not “in derogation of common law.” Nor do any of its provisions preclude application of Ind. Code § 34-6-2-38 or mandate the adoption of the definition of “employee” in the *Peru* case.

Instead, the purpose of the Commission’s enabling statute dictates the meaning of the term “employee.” Indeed, the potential conflict of interest posed by a member of a city plan commission or zoning board serving on the Commission, like Commissioners Baker and Wichlinski here, is identical to that posed by any other city employee or elected official. City employees, like plan commission and zoning board members, could be directed by their municipal employer to act only in the interest of the city. Similarly, elected officials have a superior duty to act in the best interests of their constituents.

By virtue of their appointment to the Plan Commission and the Board of Zoning Appeals, Commissioners Baker and Wichlinski owe a heightened responsibility to their municipalities that could affect their judgment on the Commission. *See* Ind. Code § 35-44.1-1-4 (public servants cannot knowingly or intentionally have a pecuniary interest in, or derive profit from, a contract or

purchase connected with an action by the governmental entity served by the public servant).⁵ Thus, the underlying purpose of the Commission's enabling statute is served by interpreting the term "employee" to protect against such potential for divided loyalties among members of the Commission. The trial court's conclusion otherwise would frustrate this purpose. And at a minimum, there is a factual dispute yet to be resolved in discovery, as to whether the appointed positions held by Commissioners Baker and Wichlinski present the potential for the type of divided loyalty sought to be avoided by the Commission's enabling statute.

Yet again adopting the Commission's argument, the trial court concluded that the purpose of the statutory prohibition on employees is not about preventing potential conflicts of interest but "to eliminate disputes about whether service on the Commission amounts to dual lucrative employment under Article 9 of the Indiana Constitution." (App. Vol. II p. 22; Order ¶97) This misunderstands that Constitutional prohibition. A person who is a mere "employee" of a municipality may also hold a separate lucrative office because an employee does not hold a "lucrative office." *Thompson v. Hays*, 867 N.E.2d 654, 659 (Ind. Ct. App. 2007), *trans. denied* (holding that a County Sheriff's Deputy was an employee and not barred by Article 9 from also holding the elected office of County Commissioner). As a result, prohibiting an employee (not a lucrative office) from serving on the Commission (a lucrative office) is unnecessary to prevent violations of the Constitutional prohibition on dual lucrative employment. The trial court's conclusion otherwise misstates the law.

Regardless of the legal definition of "employee" that applies here, determining whether Commissioners Baker and Wichlinski meet the definition will ultimately require factual findings

⁵ Because plan commissions and boards of zoning appeals deal with the development of valuable property rights, the legislature enacted specific provisions to prevent conflicts of interest, including a prohibition on holding any other appointed office in municipal, county, or state government. Ind. Code §§ 36-7-4-216(b), 223, 905(a), and 909.

on evidentiary issues ranging from the nature of the Commissioners’ relationship with their respective municipalities, their duties and compensation to their scope of work, independence, and oversight. As such, the trial court’s conclusory findings of fact that these Commissioners are not employees – findings that are directly contrary to the factual allegations in Gary Lee’s amended complaint – are also unsupported by any material evidence. If allowed to stand, the trial court’s dismissal of Mr. Lee’s claim at the pleading stage violates Trial Rule 12(C) and precludes Mr. Lee from having his day in court. Because such an erroneous dismissal “undermine[s] the policy of deciding causes of action on their merits,” *McQueen*, 711 N.E.2d at 65, this Court should reverse.

D. THE TRIAL COURT ERRED IN ENTERING JUDGMENT ON THE PLEADINGS AS TO THE IMPROPER PURPOSE CLAIM BY CONSTRUING THE COMMISSION’S ENABLING STATUTE AS GIVING IT UNFETTERED AUTHORITY

The trial court dismissed Gary Lee’s claim that the Commission lacked the authority to enter into a lease for the construction and operation of a solid waste processing facility on property within the river basin. (App. Vol. II pp. 23-31; Order ¶¶107-180) This ruling was clear error for at least three reasons. First, the trial court selectively read four provisions of the Commission’s enabling statute as providing broad authorities unbounded by the purpose for which the legislature granted those authorities. Second, the trial court erroneously applied an “arbitrary and capricious” standard of review based on the false premise that Gary Lee sought judicial review of a Commission decision that it had the authority to make. And third, the trial court erred in concluding that Mr. Lee’s claim is time-barred by the six-year statute of limitations in Ind. Code § 34-11-2-9 despite the fact that the Maya lease is not a contract for the payment of money and Mr. Lee is neither a party to the lease, nor is he seeking to enforce it. Instead, this action is about whether the Commission had authority to enter into the contract—i.e., whether it is *ultra vires* and void. Thus, the trial court’s ruling should be reversed.

1. The Commission Lacks Authority to Lease Property for Development That Has Nothing to Do With the Purpose for Which the Legislature Created the Commission

Like any legislatively created body, the Commission exercises authority “subject to the confines of its enabling statute.” *Fischers Adolescent Catholic Enrichment Society, Inc. v. Bridgewater*, 23 N.E.3d 1, 3 (Ind. 2015) (citing *Stanton v. Smith*, 429 N.E.2d 224, 228 (Ind. 1981); *Howell v. Indiana-American Water Co., Inc.*, 668 N.E.2d 1272, 1275 (Ind. Ct. App. 1996), *trans. denied* (powers of administrative agencies created by the legislature “are strictly limited to those granted by their enabling statutes.”)). To that end, the General Assembly created the Little Calumet River Basin Development Commission to:

- (1) Promote the general health and welfare of citizens of Indiana.
- (2) Provide for the creation, development, maintenance, administration, and operation of park, recreation, marina, flood control and other public works projects, including levees.
- (3) Create a commission with the authority *to carry out the purposes of this chapter*.

Ind. Code § 14-13-2-4 (emphasis added). The authority granted to the Commission is necessarily limited to these purposes. “The enumeration of powers is also a limitation of powers, because ‘[t]he enumeration presupposes something not enumerated.’” *Nat’l Fed. of Ind. Business v. Sebelius*, 567 U.S. 519, 534 (2012) (quoting *Gibbons v. Ogden*, 6 L.Ed. 23 (1824)). And none of these powers contemplate the Commission getting into the solid waste business.

In *Kitchell v. Franklin*, a decision relied on by the trial court (App. Vol. II pp. 26-27; Order ¶¶132, 135), the Indiana Supreme Court made clear that in construing the meaning of a statute, a court must “‘consider the objects and purposes of the statute as well as the effects and repercussions’ of [the court’s] interpretation.” 997 N.E.2d 1020, 1026 (Ind. 2013) (quoting *Bushong v. Williamson*, 790 N.E.2d 467, 471 (Ind. 2003)). As such, “legislative intent as ascertained from the provision as a whole prevails over the strict literal meaning of any word or term” such that a court may not “engraft new words . . . or add restrictions where none exist.” *Id.*

Nevertheless, the trial court seized on four provisions in the Commission's enabling statute as giving the Commission unbridled authority to do whatever it wants, untethered to its statutory purpose. These four provisions are: (a) the authority to construct facilities under 14-13-2-15; (b) the authority to make contracts and leases for facilities under 14-13-2-18(20); (c) the authority to make and enter into contracts under 14-13-2-18(9); and (d) the authority to engage in self-supporting activities under 14-13-2-18(22). (App. Vol. II pp. 25-29; Order ¶¶116-159)

Ignoring *Kitchell*, the trial court treated each of these provisions as stand-alone statutes, divorced from other provisions and the overall purpose of the legislation. Starting with Ind. Code § 14-13-2-15, the trial court construed it in isolation to conclude that "it grants the Commission the power to take action to a build a new facility," and since the "Maya Contract provides for the construction of a facility," the contract is "contemplated by *this* statute." (*Id.* p. 25; Order ¶¶116-118 (emphasis added)) There are several problems with this.

First, this provision is only part of the Commission's enabling statute. The trial court flatly ignored other provisions that make clear the Commission's power to build new facilities, like all of its other powers, must be exercised "in furtherance of the purposes of this chapter." Ind. Code § 14-13-2-15(a)(2); Ind. Code § 14-13-2-4(3) (the Commission is created "with the authority to carry out the *purposes of this chapter*" (emphasis added)). And those statutory purposes have nothing to do with building facilities to process, dispose of, or otherwise manage solid waste.

For instance, Ind. Code § 14-13-2-4(2) identifies the creation and development of "parks, recreation, marinas, flood control and other public works projects, including levees" as the "purposes of this chapter." No mention of solid waste facilities there. Similarly, Ind. Code § 14-13-2-18(11) grants the Commission power to "[c]onduct studies of the financial feasibility of the flood control and park and recreational projects and facilities, betterments, and improvements within those projects." No mention of solid waste facilities there either. Turning to Ind. Code § 14-

13-2-6, it grants the power of eminent domain to the Commission within the Little Calumet River Basin, and in certain areas outside of the basin, “to address flooding issues,” “channeling and maintenance,” and “construction of breakwaters”—but notably, any mention of solid waste facilities or anything to do with solid waste is nowhere to be found.

Nevertheless, the trial court held that the Commission can build any kind of facility it wants to because “the statute leaves it to the Commission to determine if the project is ‘appropriate.’” (App. Vol. II p. 25; Order ¶119) But that is not what the statute says. It does not give the Commission unfettered discretion to determine if a particular project is “appropriate.” Rather, the statute states the Commission may undertake projects that it “considers appropriate in *furtherance of the purposes of this chapter*.” Ind. Code § 14-13-2-15(a)(2) (emphasis added). In other words, the legislature placed limits on the Commission’s discretion, as the legislature must, to avoid running afoul of the non-delegation doctrine. *Barco Beverage Corp. v. Ind. Alcoholic Beverage Comm’n*, 595 N.E.2d 250, 253-54 (Ind. 1992) (“the legislature may constitutionally delegate rule-making powers to an administrative agency if that delegation is accompanied by sufficient standards to guide the agency in the exercise of its statutory authority”); *Taxpayers Lobby of Indiana, Inc. v. Orr*, 311 N.E.2d 814, 819 (Ind. 1974) (“the delegation of authority to administrative bodies” must be accompanied by “reasonable standards . . . to guide the administrative body” as necessary “considering the purpose to be accomplished by the statute”).

Similarly, the Commission does not have unbridled authority, as the trial court held, to “make contracts and leases for facilities and services” for any reason or purpose. (App. Vol. II p. 25; Order ¶¶121-122 (quoting Ind. Code § 14-13-2-18(20) and concluding “the General Assembly did not condition this power on anything other than the Commission’s approval”)). That enumerated power is listed among 23 other enumerated powers. And throughout that “laundry list of the Commission’s powers” (*Id.*; Order ¶121), the legislature repeatedly made clear that those

powers are to be exercised “in furtherance of the purposes of this chapter,” “consistent with the purposes of this chapter,” and “as appropriate in furtherance of the purposes of this chapter.” *See e.g.* Ind. Code § 14-13-2-18(8), (9), (13)(B), (15), (16). The fact that the legislature did not repeat that phrase 24 times does not mean the legislature intended for the Commission to have certain powers that are entirely unchecked.

Indeed, the absurdity of that outcome is revealed by the Indiana Supreme Court’s practical explanation of the canon of statutory construction known as *ejusdem generis* used to interpret the meaning of “general words” that follow a list of two or more specific things:

Suppose, for example, an invitation to a party says the menu will consist of ‘hamburgers, hot dogs, and other like food.’ Under common usage, we expect ‘other like food’ to be defined with reference to the foods listed. Hamburgers and hot dogs are casual foods, inexpensive, and easy to prepare. Because they ‘all belong to an obvious and readily identifiable genus,’ we expect that ‘the speaker or writer has that category in mind for the entire passage.’ Given the invitation’s list of specified foods, it would come as little surprise if the host also served baked beans and potato salad. But no one would expect the menu to include lobster thermidor or pheasant under glass.

O’Bryant v. Adams, 123 N.E.3d 689, 693 (Ind. 2019). Plainly, a solid waste processing facility does not belong to the same “obvious and readily identifiable genus” of “parks, recreation, marinas, flood control and other public works projects, including levees,” which are the types of projects the legislature authorized the Commission to undertake. Ind. Code § 14-13-2-4(2); Ind. Code § 14-13-2-18(11).

Even so, the trial court held that the “Maya Contract provides for the construction of a solid waste processing facility” that will serve the statutory purpose of promoting “the general health and welfare of citizens of Indiana.” (App. Vol. II p. 27; Order ¶¶138-140) But the “general health and welfare” purpose does not displace the Commission’s more specific statutory purpose. Moreover, the trial court’s support for this holding is based on a factual finding that the Maya solid waste processing facility “will remove waste and convert it to power.” (*Id.*; Order ¶139) Nothing

in the Commission’s license agreement with Maya Energy supports that finding. Yet even if true, that does not mean the Commission has authority to lease its public land for purposes of processing solid waste. That is simply not the Commission’s job.

The Commission’s job is to undertake projects that are related to *water*—namely, marinas, parks, flood control projects, levees, and the like within the “*watershed* of the Little Calumet River and Burns Waterway.” Ind. Code § 14-13-2-3.8 (emphasis added). After all, the legislature named the Commission “the Little Calumet *River* Basin Development Commission.” Ind. Code § 14-13-2-2 (emphasis added). And its jurisdiction is specifically limited by reference to *waterways*; that is, the “geographic area within and extending one (1) mile from the bank of the west arm of the Little Calumet *River* and Burns *Waterway* in Lake County and Porter County.” Ind. Code § 14-13-2-6 (emphasis added). The Commission has eminent domain powers to “address *flooding issues* within this geographic area” by undertaking flood control projects in certain areas even outside of its jurisdiction including the “*tributaries* to the Little Calumet *River* and Burns *Waterway*, including the Deep *River watershed*, within Lake County.” *Id.* (emphasis added).

Not one of the 37 sections of the Commission’s enabling statute even mentions the term solid waste or gives any indication whatsoever that the legislature created the Commission to deal with solid waste. And there is good reason for that. The legislature created other local units of government to do that job. Indeed, Lake and Porter Counties—like many other Indiana counties—have Solid Waste Management Districts that are specifically authorized by the legislature to “plan, design, construct, finance, manage, own, lease, operate, and maintain facilities for solid waste management” and enter into contracts or lease agreements “with any person” for “managing or disposal of solid waste” within their local jurisdictions. Ind. Code § 13-21-3-12(5), (6), (7). Without a doubt, the General Assembly knew the right words to use if it wanted to grant the Commission authority to deal with solid waste, but it did not.

The trial court relied on the canon of construction that the “absence [of words in a statute] must be given meaning and effect” and admonished Plaintiff for “reading words into the statute that do not exist.” (App. Vol. II pp. 26, 29; Order ¶¶132, 158) (citing *Kitchell*, 997 N.E.2d at 1026). Yet, that is precisely what the trial court did in construing the Commission’s enabling statute as authorizing it to lease its public land to Maya Energy for the construction of a waste processing facility. This court owes no deference to that unsupported and unlawful reading of the statute.⁶ Accordingly, the court should reverse the trial court and declare the lease agreement with Maya Energy *ultra vires* and void.

2. The Court Reviews *de novo* Gary Lee’s Declaratory Judgment Claim Challenging the Commission’s Statutory Authority to Enter Into the Maya License Agreement

The trial court applied an “arbitrary and capricious” standard of review, concluding that the Maya Energy lease agreement is a “legislative act” subject to the court’s deference unless “patently unreasonable.” (*Id.* p. 24; Order ¶¶ 109-112) This is wrong because the scope of the Commission’s authority is a legal determination that the trial court should have reviewed under a *de novo* standard, without *any deference* afforded to the Commission’s interpretation of its enabling statute. *See, e.g., Indiana Office of Utility Consumer Counselor v. Duke Energy Indiana, LLC*, 248 N.E.3d 1205, 1210 (Ind. 2024) (court has constitutional duty to define the limits of Indiana Utility Regulatory Commission’s authority); Ind. Code § 4-21.5-5-11 (directing courts reviewing an agency action to “decide all questions of law . . . *without deference to any previous interpretation made by the agency*” (emphasis added)).

⁶ The trial court also adopted the Commission’s assertion that leasing its property to build and operate a solid waste processing facility is a “self-supporting activity” authorized by Ind. Code § 14-13-2-18(22). (App. Vol. II pp. 28-29; Order ¶¶149-159) But that interpretation likewise ignores the Commission’s statutory purpose. And the Commission is already self-sustaining by virtue of its authority to levy special assessments on property owners within its jurisdiction. This is commercial development for private gain, plain and simple. The benefits of Maya’s solid waste processing facility inure entirely to a private company, not to the public.

Moreover, this is not an action for judicial review. It is a declaratory judgment action under Indiana's Uniform Declaratory Judgment Act, Ind. Code § 14-13-2-18, on the issue of whether the Commission has authority granted to it by the legislature through its enabling statute to lease its public property for construction of a solid waste processing facility. (App. Vol. II p. 83; ¶¶57-64) The trial court's parroting of the Commission's attempt to confuse this case with a judicial review proceeding (*Id.* p. 24; ¶¶108-114) is further indication that the trial court ignored Gary Lee's actual claims and disregarded the law that applies to those claims. The trial court erred by holding that the Commission had "sole discretion" to determine whether the lease of property to construct a solid waste processing facility was within its authority. That is a squarely legal question for a court to decide.

3. Gary Lee's Claim is Not Barred By the Six-Year Statute of Limitations Because it Does Not Apply to the Maya Lease and He is Not Seeking to Enforce a Contract

The trial court also adopted the Commission's argument that Gary Lee's improper purpose claim is barred by the six-year statute of limitations for an action related to "a written contract[] for the payment of money," citing Ind. Code § 34-11-2-9. (*Id.* p. 31; Order ¶¶173-178) But this statute of limitation applies to actions on promissory notes, bills of exchange, and other written contracts for the payment of money. It is inapplicable to contracts for the payment of money in exchange for something else, such as the lease of real property here. *See Folkening v. Van Petten*, 22 N.E.3d 818, 822 (Ind. Ct. App. 2014), *trans. denied* (holding that six-year statute of limitations in Ind. Code § 34-11-2-9 did not apply to contract for payment of money in exchange for stock shares). In any event, Gary Lee is not a party to the contract between the Commission and Maya, nor is this action on the contract itself.

Rather, this case is about the Commission's authority, or lack thereof, to enter into the contract in the first place. If it lacks that authority, then the contract is *ultra vires* and void.

Performance Servs., Inc. v. Randolph E. Sch. Corp., 211 N.E.3d 508, 511 (Ind. 2023) (explaining that “[c]ontracting parties generally have broad latitude to bind themselves to specific terms, . . . [b]ut that latitude is restricted by statute when one of the parties is a governmental entity. . . . [I]f these entities exceed their statutory authority, the contract is void and unenforceable ‘no matter what hardship it may work, or how strong the equities may appear.’”) (quoting *Pipe Creek School Twp. v. Hawkins*, 97 N.E. 936, 937 (Ind. 1912).

Thus, to the extent that any statute of limitation arguably could apply to a claim challenging the Commission’s statutory authority to enter into a license agreement, it would be the ten-year statute of limitation on written contracts provided by Ind. Code § 34-11-2-11 (“an action upon contracts in writing other than those for the payment of money . . . must be commenced with in ten (10) years after the cause of action accrues.”) The Commission entered into the Maya contract in 2017. Accordingly, Gary Lee’s claim is well within the limitations period. Because the trial court misread the limits of the Commission’s statutory authority and applied an erroneous statute of limitations to dismiss Mr. Lee’s third claim, this Court should reverse.

CONCLUSION

For the reasons stated herein, the trial court erred in granting the Commission’s motion for judgment on the pleadings on all three of Gary Lee’s claims. The trial court’s decision misapplies the standard of review for a motion under Trial Rule 12(C) and is based on findings contrary to the well-pled allegations of the complaint and erroneous interpretations of the Open Door Law and the Commission’s enabling statute. Accordingly, Gary Lee respectfully requests this Court to reverse the trial court’s order and remand this case for further proceedings.

Brief of Appellant Gary Lee

Respectfully submitted,

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APPEALED ORDER

In accordance with Appellate Rule 46(A)(12), a true and correct copy of the trial court's Order issued on June 18, 2025, is attached hereto in a separate attachment.

/s/ Michael J. Zoeller
Michael J. Zoeller

WORD COUNT CERTIFICATE

Pursuant to Appellate Rule 44(F), I verify that this Appellant's Brief contains no more than 14,000 words, excluding items listed in Appellate Rule 44(C).

/s/ Michael J. Zoeller
Michael J. Zoeller

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 10th day of September, 2025, the foregoing was electronically served through the IEFS in accordance with Rule 68(F)(1) upon all counsel of record:

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