OFFICE OF THE ATTORNEY GENERAL

February 9, 2005
Originally issued June 23, 2003

OFFICIAL OPINION 2004-6

State Senator Jeff Drozda
200 West Washington
Indianapolis, Indiana 46204

RE: Existing and Planned Runways

Dear Senator Drozda:

This letter is in response to your request for an opinion on the following question:

1. Does Indiana Code section 8-21-10-3(b) apply to both existing and planned runways?

BRIEF ANSWER

It is the opinion of this office that the permit requirements set out at Indiana Code section 8-21-10-3(b) apply to the construction of buildings used for noise sensitive purposes when the building is to be constructed within the specified area of either an existing runway or a planned runway which has not yet been constructed, but has been included in the approved airport site plan. Interpreting "runways" to include both existing and planned runways advances the goal of the legislature to preserve unobstructed conditions for the safe flight of aircraft and to promote the comfort and safety of the citizens of the state. In addition, the broad interpretation of the term corresponds with existing statutory language regarding runways in the same chapter.

ANALYSIS

State law regarding aeronautics may be found at Indiana Code chapter 8-21-1 and Indiana Code chapter 8-21-10 sets out regulations for tall structures in the state in order to ensure that unobstructed conditions exist for the safe flight of aircraft. The state regulates the location and height of structures and the use of land related to those structures. By law, those who build structures of certain heights and in certain locations must obtain a permit from the Indiana Department of Transportation (INDOT). Ind. Code §§ 8-21-10-1 to 3. State permit requirements also apply to the construction of buildings around airports if the buildings are used for "noise sensitive purposes." Ind. Code §§ 8-21-10-2, -3(b), -3(c). "Noise sensitive purpose" is defined as the use of a building as a residence, school, church, childcare facility, medical facility, retirement home, or nursing home. Ind. Code § 8-21-10-2. Your question concerns the section of the statute at Indiana Code section 8-21-10-3 dealing with permit requirements for construction in a noise sensitive area:

8-21-10-3 Permit requirements

Sec. 3.
...

(b) Unless:

(1) a permit for construction in a noise sensitive area has been approved by the department;

(2) the holder of a permit for construction in a noise sensitive area has filed a copy of the permit for construction in a noise sensitive area with the county recorder of the county in which the structure is located, as provided in subsection (d); and

(3) a certified copy of the recorded permit for construction in a noise sensitive area, with the recording data from the county recorder on the copy of the permit, has been received by the department; *a person may not erect a building used for a noise sensitive purpose within an area lying one thousand five hundred (1,500) feet on either side of the centerline and the extended centerline of a runway for a distance of one (1) nautical mile from the boundaries of any public use airport.*

...

(d) A person applying for a permit for construction in a noise sensitive area under subsection (b) must provide notice, at the time of the filing of the application for a permit, to the owner of a public use airport if the public use airport is located within a distance of one (1) nautical mile from the boundary of the property that contains the building used for a noise sensitive purpose.

(e) Notice under subsections... (d) must be sent by certified or registered mail, with return receipt requested, and must include the:

(1) name, telephone number, and a contact person for the:

(A) applicant;

(B) department; and

(C) plan commission that has jurisdiction over the site of the structure;

(2) location of the structure, including a legal description;

(3) height of the structure; and

(4) Federal Aviation Administration aeronautical study number assigned to the application, if applicable to the type of permit for which notice is required.

(f) The applicant for a permit under subsection (b) shall record each permit issued by the department in the office of the county recorder for the county where the structure is located, not later than five (5) business days after the department issues the permit. If a structure is located in more than one (1) county, the county that contains the majority of the structure is the county in which the permit must be filed.

(g) A permit issued under subsection (b) is valid only after the department receives a certified copy of the recorded permit with the recording data from the county recorder of the county in which the structure is located.

(h) A permit issued under subsection (b) must contain the following statement:

"The permittee acknowledges for itself, its heirs, its successors, and its assigns, that the real estate described in this permit experiences or may experience significant levels of aircraft operations, and that the permittee is erecting a building designed for noise sensitive use upon the real estate, with the full knowledge and acceptance of the aircraft operations as well as any effects resulting from the aircraft operations.".

(emphasis added).

In summary, the statute requires a person to obtain a "noise sensitive permit" from INDOT if he or she plans to construct a building used as a residence, school, church, medical facility, retirement home, or nursing home within the "noise sensitive area" of a public use airport. By statute, the "noise sensitive area" is the "area lying one thousand five hundred (1,500) feet on either side of the centerline and the extended centerline of a runway for a distance of one (1) nautical mile from the boundaries of any public use airport." Ind. Code § 8-21-10-3(b). The person seeking the permit from INDOT must, at the time the application for a permit is filed, provide notice to the owner of the public use airport. Ind. Code § 8-21-10-3(d). Notice must be sent by registered mail and contain certain information such as the name and telephone number of the applicant and plan commission having jurisdiction over the site, as well as the location of the building. Ind. Code § 8-21-10-3(e). Once issued, the permit holder must record the permit in the office of the county recorder in the county where the building is being constructed. Ind. Code § 8-21-10-3(f). The noise sensitive permit issued by INDOT contains a brief statement indicating that the permittee acknowledges that the building being constructed will be used for a noise sensitive purpose and that the permit holder fully recognizes and accepts the aircraft operations within the vicinity. Ind. Code § 8-21-10-3(h).

You asked whether the noise sensitive permit requirements apply only to the construction of a building in a noise sensitive area near an existing runway, or whether permit requirements also apply to an area where a runway does not actually exist, but is planned.

When the meaning of a statute is at issue, the rules of statutory construction are useful. First and foremost, one should determine the intent of the legislature. *MDM Inv. v. City of Carmel*, 740 N.E.2d 929, 934 (Ind. Ct. App. 2000). The words of a statute are to

be given their plain and ordinary meaning. Ind. Code§1-1-4-1(1); *Town of Merrillville v. Merrillville Conservancy Dist.,* 649 N.E.2d 645, 649 (Ind. Ct. App. 1995). One must presume that the legislature is aware of existing statutes in the same area when it enacts a statute. *Id* Differing statues should be construed together to produce a harmonious result. *Id.* The "goals of the statute and the reasons and policy underlying the statute's enactment" should be considered. *Id.*

Aircraft noise has an adverse impact on land used for residential and other noise sensitive uses. Reducing aircraft noise and promoting compatible land use around airport areas is a continuing concern of the Federal Aviation Administration (FAA). Noise Abatement Policy, 65 Fed. Reg. 43803 (July 14, 2000). In its Noise Abatement Policy 2000, the FAA noted that the adverse impact of noise threatens the construction, development, and expansion of airports. *Id.* The FAA encourages local government to reduce the impact of aircraft noise through effective land use control measures, such as planning and zoning. *Id*. at 43810. If noise sensitive land uses cannot be precluded entirely through these measures, the FAA recommends local government implement policies for the formal disclosure of noise exposure levels as part of real estate transactions for properties near airports. *Id*. at 43811. Such local policies are not required by federal law, but are strongly recommended by the FAA.

The General Assembly has indicated that Indiana's aviation laws and regulations shall be implemented in coordination with and in conformity with federal laws. Ind. Code § 8-21-1-8(b); -8(c). In 1983, the legislature included a statement of purpose when enacting Indiana Code chapter 8-21-10 indicating that the law was intended to regulate the use of land near public-use airports in order to preserve unobstructed conditions for the safe flight of aircraft and to promote the comfort and safety of the citizens of the state. Ind. Code § 8-21-10-1. Given the level of influence of the FAA, along with the statement of purpose included in chapter 10, it is likely that the General Assembly included formal disclosure requirements for the construction of noise sensitive buildings in direct response to FAA concerns or to concerns of a similar nature. Presumably, it was the legislature's intent to promote long-term compatible land use around airport areas by enacting the permit requirements for noise sensitive areas. A broad interpretation of the statute to include both existing and planned runways would advance the legislative goal of long-term compatibility in land use.

In addition, in enacting the permit requirements at Indiana Code section 8-21-10-3, one must presume that the legislature was aware of existing language contained in other sections of chapter 10. The permit requirements for noise sensitive areas apply to the building of structures near public use airports. Ind. Code § 8-21-10-1. At Indiana Code section 8-21-10-2, "public use airport" is defined as any area "utilized or *to be utilized*" for the landing and taking off of aircraft. Proposed public use airport sites must be pre-approved by INDOT and must be granted an INDOT certificate of site approval. Ind. Code § 8-21-1-10. Applications for certificates of site approval include detailed drawings of the proposed public use airport indicating the "initial and ultimate stages of airport development." 105 Ind. Admin. Code 3-3-8(a)(2). INDOT approves airport site plans with the understanding that the airport may not be fully developed for a period of time. Thus, the inclusion of the language "to be utilized" in the statute regarding permit requirements would appear to be a reference to those areas included in the public use airport's master plan or layout plan which have yet to be put into operation, but which have been approved by INDOT.[1] Such a reference would suggest the legislature intended the noise sensitive permit requirements be followed whether the building is located within the stated boundaries of a planned or an existing runway. In addition, other sections within chapter 10 establishing imaginary surface guidelines for tall structure permits make direct references to runways that have been "approved or planned" or indicated on a planning document. Ind. Code § 8-21-10-8(b).

CONCLUSION

It is my opinion that the reference to "runway" at Indiana Code section 8-21-10-3(b), regarding permit requirements for the construction of buildings for noise sensitive purposes, should be interpreted as a reference to existing runways, as well as runways indicated on an airport site approval plan which are approved, but not yet put into operation.

Sincerely,

Stephen Carter
Attorney General

Rebecca Walker
Deputy Attorney General

[1] INDOT issues certificates of approval to proposed airport sites in accordance with regulations established at 105 Indiana Administrative Code 3.

OFFICE OF THE ATTORNEY GENERAL

February 9, 2005
Originally issued February 6, 2004

OFFICIAL OPINION 2004-7

Senator James Merritt, Jr.
Assistant Majority Caucus Chair
State House
200 West Washington Street
Indianapolis, Indiana 46204-2785

Re: Gambling tax revenues and historic preservation

Dear Senator Merritt:

This letter is in response to your correspondence of November 25, 2003, wherein you requested that our office issue an opinion addressing the following issue:

> When gambling tax revenues, which have been disbursed to local communities, are used to fund projects that result in the demolition, alteration or removal of a historic structure, as defined in Indiana's Historic Preservation and Archeology Act, must the project obtain the approval of the Historic Preservation Review Board?

The Indiana Historic Preservation and Archeology Act states that "a historic site... may not be altered, demolished, or removed by a project funded, in whole or in part, by the state unless the Review Board has granted a certificate of approval." Ind. Code §14-21-1-18. The issue at hand becomes whether or not gambling tax revenues constitute being "funded, in whole or in part, by the state." *Id*.

Gambling taxes are levied by the state, collected by the state and disbursed under formulas established by state law. A portion of the revenues collected as a result of those taxes is distributed to local units of government. Therefore, we conclude that such gambling revenues are state funds and that their expenditure to alter, demolish, or remove a historic structure requires a certificate of approval from the Historic Preservation Review Board[1].

BACKGROUND

Pari-mutuel wagering on horse races and riverboat gambling generate tax revenues that ultimately make their way to local governments. Under the pari-mutuel statute, admission taxes are collected for individuals "who paid an admission charge for the privilege of entering the racetrack grounds or satellite facility." Ind. Code§4-31-9-5(a). The tax is collected by the department of state revenue. Ultimately, half of the admission tax revenue is deposited in the state general fund and half of it is distributed to the city, town or county "in which the racetrack is located." Ind. Code§ 4-31-9-5(b).

Under the riverboat gambling statute, "[a] tax is imposed on admissions." Ind. Code§4-33-12-1. The admission tax goes into the state general fund and from there, a portion of the revenues makes its way to local governments under formulas contained in Indiana Code section 4-33-12-6. The state also imposes a tax on adjusted gross receipts from gambling games on riverboats. Ind. Code§4-33-13-1. Those tax revenues are deposited in the state gaming account and eventually some of that money is paid to units of local government. Ind. Code§4-33-13-5.

ANALYSIS

"A: (1) historic site or historic structure owned by the state; or (2) historic site or historic structure listed on the state or national register; may not be altered, demolished, or removed by a project *funded, in whole or in part, by the state* unless the review board has granted a certificate of approval." Ind. Code§14-21-1-18(a) (emphasis added). The common definition of the verb "fund" is to provide or place resources in a fund. Webster's Third New International Dictionary (1993). Under the mechanism established by the gambling statutes, the state is providing money to local units of government. Because the state is the ultimate source of the gambling tax revenues, a project making use of that money is funded, at least in part, by the state.

This conclusion is reinforced by the legislature's purpose for enacting the Historic Preservation and Archeology Act. That

purpose is "to further our understanding of the state's heritage and historical culture by preserving and studying what has been left behind." *Whitacre v. State of Indiana,* 619 N.E.2d 605, 608 (Ind. App. 1993), *aff'd*, 629 N.E.2d 1236 (Ind. 1994). This broad legislative purpose militates against interpreting section 18 narrowly. In other words, section 18's requirement that the Historic Preservation Review Board approve specified projects would be frustrated by a narrow interpretation of "funded, in whole or in part, by the state." Accordingly, the better interpretation is that a project is state funded, whether the General Assembly has approved the disbursement of funds for a specific project directly or approved the expenditure indirectly by allocating state tax revenues for disbursement to local governments.

CONCLUSION

If a local unit of government undertakes a project to alter, demolish or remove a historic structure, using money obtained from gambling taxes, the project is "funded, in whole or in part, by the state," as that term is used in the Historic Preservation and Archeology Act. As a consequence, that project must obtain a certificate of approval from the Historic Preservation Review Board.

Sincerely,

Stephen Carter
Attorney General

Gordon White
Deputy Attorney General

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[1] In great part, this letter adopts the reasoning and conclusion of a prior Attorney General advisory letter to you dated November 9, 1998.

OFFICE OF THE ATTORNEY GENERAL

February 9, 2005
Originally issued May 18, 2004

OFFICIAL OPINION 2004-8

Representative Michael Ripley
Indiana House of Representatives
2990 S. 650 E
Monroe, Indiana 46772

Re: Department of Insurance Bulletin 123

Dear Representative Ripley:

This letter is in response to your correspondence of December 19, 2003. You raised a concern about how the Commissioner of the Department of Insurance ("Commissioner") interprets Indiana Code section 27-2-21-16. The statute provides in pertinent part that an insurer shall not "[d]eny, cancel, or decline to renew a personal insurance policy *solely* on the basis of credit information" or "[b]ase an insured's renewal rate for a personal insurance policy *solely* on credit information." Ind. Code § 27-2-21-16(2) & (3) (2003) (emphasis added). The Commissioner reads this language to mean that "an insurer may not deny, cancel, decline to renew or increase a renewal rate due to a credit score *unless at least one other rating factor has changed* to indicate a denial, cancellation, declination to renew or increase in the premium rate." Ind. Dep't of Ins., Use of Credit Information by Insurance Companies, Bull. 123 (Dec. 5, 2003) (emphasis added) (hereinafter Bulletin 123).[1] You contend that Bulletin 123 places restrictions on insurers that were not intended by the General Assembly when it adopted Public Law Number 201-2003 (Ind. Code ch. 27-2-21). Although the Commissioner's interpretation of Public Law Number 201-2003 is entitled to great deference, Bulletin 123 does place constraints on insurers that were not imposed by the Legislature.

BACKGROUND

In recent years insurers have used a customer's credit information to derive credit scores. They then use the credit scores to assist them in calculating premiums and making underwriting decisions for personal insurance. Insurers maintain that credit scores are an accurate predictor of loss frequency and severity.[2] But, "[q]uestions have been raised not only about the validity of credit history as a predictor of risk, but also its fundamental fairness, and the impact of credit scoring on minority and low income groups."[3] Numerous state legislatures have recently considered the use of credit scores. Last year several states, including Indiana, adopted legislation based on the National Conference of Insurance Legislators (NCOIL) "Model Act Regarding Use of Credit Information In Personal Insurance." According to NCOIL at least sixteen states have adopted the Model Act.[4] The Commissioner's interpretation of the "sole basis" language in the Model Act is not unique,[5] although NCOIL has taken the position that such an analysis is incorrect.[6]

ANALYSIS

An insurance score (credit score) is "a number or rating that is derived from an algorithm, computer application, model, or other process that is based on credit information for the purpose of predicting the future insurance loss exposure of an individual consumer." Ind. Code § 27-2-21-1-1 (2003). When underwriting or rating a risk, an insurer may not base its decisions "solely" on credit information. Ind. Code § 27-2-21-16(2), (3) (2003). In other words, an insurer may consider credit information but only along with other traditional rating factors such as age or driving record.

The Commissioner is charged with regulating the insurance industry in this state. Ind. Code § 27-1-1-1 (1985). She issued Bulletin 123 which interprets the phrase "solely on the basis" to mean "that an insurer may not deny, cancel, decline to renew or increase a renewal rate due to a credit score *unless at least one other rating factor has changed* to indicate a denial, cancellation, declination to renew or increase in the premium rate." Bull. 123 (emphasis added). The question becomes whether the Commissioner, by interpreting the statute in such a manner, has expanded the scope of the legislation beyond that envisioned by the General Assembly.

The Commissioner's interpretation of the legislative enactment is entitled to great weight because she is charged with the duty of enforcing it. However, the interpretation must be consistent with the statute. *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000). When a law is clear and unambiguous on its face, interpretation is not required and the statute will be held to its clear and plain meaning. *Cotton v. Ellsworth*, 788 N.E.2d 867, 869-70 (Ind. Ct. App. 2003). In adopting Public Law Number 201-2003 the General Assembly clearly mandated insurers who consider credit information in making underwriting decisions to also use other rating factors. Bulletin 123 instructs insurers how the factors are to be used in that one of the rating factors used by an insurer, other than credit information, *must* change to justify denying, canceling, declining to renew or increasing a renewal rate. The General Assembly, however, did not mandate *how* the amalgam of rating factors is to be used and the statute is silent on what action the insurer may take after considering the rating factors. After a review of at least one other rating factor, the insurer may make the business decision it deems appropriate whether the credit score is the only demonstrable change in the calculation or not.

CONCLUSION

Bulletin 123 places restrictions on insurers that were not intended by the General Assembly when it adopted Public Law Number 201-2003.

Sincerely,

Stephen Carter
Attorney General

Gordon White
Deputy Attorney General

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[1] Available at http://www.in.gov/idoi/bulletins/Bulletin123.html.

[2] Brent Kabler, Mo. Statistics Section, Mo. Dep't of Ins., Insurance-Based Credit Scores: Impact on Minority and Low Income Populations in Missouri (2004).

[3] Testimony of the Nat'l Assoc. of Ins. Comm'rs before the Subcomm. on Fin. Inst. and Consumer Credit on the Fair Credit Reporting Act (June 4, 2003) (available at http://www.ins.state.ny.us/acrobat/ty030610.pdf).

[4] NCOIL Clarifies Insurance Scoring "Sole Use" Provisions, NCOILetter (Nat'l Conference of Ins. Legislators, Albany N.Y.) Jan. 2004, at 1.
[5] Me. Bureau of Ins., Implementation of the Act to Ensure Fairness Regarding Use of Consumer Credit Reports in Insurance Underwriting, Bull. 321 (2003) (available at http://www.state.me.us/pfr/ins/bulletin.htm).
[6] Letter from Representative George Keiser, ND, Chair, NCOIL Property-Casualty Insurance Committee to the Co-chairs of the Credit Scoring Working Group of the National Association of Insurance Commissioners (Dec. 22, 2003) (available at http://www.namic.org/pdf/031222NCOILCreditScoring.pdf).

OFFICE OF THE ATTORNEY GENERAL

February 9, 2005
Originally issued August 11, 2003

OFFICIAL OPINION 2004-9

The Honorable Joseph W. Harrison
Majority Floor Leader
P.O. Box 409
Attica, IN 47918-0409

RE: Compensation for Elected City Officer

Dear Senator Harrison:

This letter is in response to your recent request for an advisory opinion on the following question:

Subsequent to a local clerk treasurer resigning his position and an appointment to that vacancy, may the salary for the position be reduced by the council at the request of the mayor under Indiana Code section 36-4-7-2?

BRIEF ANSWER

The salary may not be reduced. It is clear from legislative amendments that the legislature intended to clarify the statutory language at Indiana Code section 36-4-7-2 in order to prohibit such a reduction in compensation. By amendment, the legislature added statutory language to prohibit reducing compensation from a set amount. *See* Pub. L. No. 15-1933, § 3; Acts 1980, Pub. L. No. 212; Acts 1981, Pub. L. No. 17, §21. The compensation of a city officer may not be reduced or increased in the year fixed, nor may it be reduced to less than the salary of the *prior* year, regardless of the timing. Ind. Code§36-4-7-2(c).

ANALYSIS

Indiana Code section 36-4-7-2 provides guidelines for when the salary of an elected official may be changed, and the parameters for those changes:

> (a) As used in this section, "compensation" means the total of all money paid to an elected city officer for performing duties as a city officer, regardless of the source of funds from which the money is paid.
> (b) The city legislative body shall, by ordinance, fix the annual compensation of all elected city officers. The ordinance must be published under IC 5-3-1, with the first publication at least thirty (30) days before final passage by the legislative body.
> (c) The compensation of an elected city officer may not be changed in the year for which it is fixed, nor may it be reduced below the amount fixed for the previous year.

This Code section has been amended several times, with the most significant, relevant changes taking place in the 1981 amendment. The changes to the statute indicate an intention by the legislature to add clarification to statutory language concerning compensation. The legislature added "nor may it be reduced below the amount fixed for the year 1980." Acts 1980, Pub. L. No. 212; Acts 1981, Pub. L. No. 17, §21. An additional amendment in 1993 changed "year 1980" salary language to "the previous year," thus changing the salary floor to change during each successive year. Ind. Pub. L. No. 15-1933, § 3. That portion of the statute cannot be read as being redundant. The clause now reads in its entirety, "[t]he compensation of an elected city officer may not be changed

in the year for which it is fixed, *nor may it be reduced below the amount fixed for the previous year*." Ind. Code§36-4-7-2(c) (emphasis added). Therefore, the compensation cannot be reduced or increased in the year fixed, and cannot be reduced to less than the salary of the *prior* year, regardless of the timing.

The rules of statutory construction, outlined in Indiana Supreme Court cases, support this interpretation. "[I]t is presumed that the General Assembly did not intend to enact a superfluous statutory provision, and therefore, the Court, when interpreting a statute, will endeavor to give meaning to every word in that statute." *Mynsberge v. Dep't of State Revenue*, 716 N.E.2d 629, 633 (Ind. Tax 1999) (citations omitted).

The 1981 amended version included two significant changes. First, the compensation of an elected official was amended from remaining unchanged "during his term of office" to "in the year for which it is fixed." Acts 1980, Pub. L. No. 212; Acts 1981, Pub. L. No. 17, §21. In addition to that change, the phrase "nor may it be reduced below the amount fixed for the previous year" was added, being offset from the first clause by a comma. Acts 1981, Pub. L. No. 17, §21. This offset and the fact the clause was added, demonstrates an intent by the legislature for this clause to have a distinct importance. When "the Court must read a statute to give effect to every word [and] [t]he Court will avoid an interpretation that renders any part of the statute meaningless or superfluous," the interpretation above is the only possible interpretation. *Enterprise Leasing Co. of Chicago v. Ind. Dept. of State Revenue*, 779 N.E.2d 1284, 1294 (Ind. 2002) (citations omitted). The addition of the second clause was made with the intent to keep the salary from ever dropping below a set amount. "The Court will strive to give words and phrases in a statute their plain, ordinary and usual meaning." *Id.* Any strange or extraordinary interpretation of this statute will thus not be read, as the plain and usual meaning is clear. "[T]he introduction of a new word or words into a statute indicates an intent to cure a defect in and suppress an evil not covered by the former law. It will be presumed in such a case that the Legislature intended to change or add to the existing law." *Sherfey v. City of Brazil*, 13 N.E.2d 568, 570 (Ind. 1938) (citations omitted).

CONCLUSION

In reviewing the statutory language of Indiana Code section 36-4-7-2, in light of its history of legislative amendments, it is my opinion that the salary of the local clerk treasurer may not be reduced. The compensation of a city officer may not be reduced or increased in the year fixed, nor may it ever be reduced to less than the salary of the prior year, regardless of the timing.

Sincerely,

Stephen Carter
Attorney General

Gregory F. Zoeller
Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL

February 9, 2005
Originally issued August 6, 2003

OFFICIAL OPINION 2004-10

The Honorable Tim Berry
Treasurer of State
Indianapolis, Indiana 46204

Re: Distribution of wagering tax under Indiana Code section 4-33-13-5

Dear Treasurer Berry:

This letter responds to your request for an advisory opinion on the appropriate interpretation of Indiana Code section 4-33-13-5 relating to the distribution of riverboat wagering taxes. That statute directs your office to pay certain expenses and gives detailed instructions for the distribution of the money in the state gaming fund. Your offices is also required to certify a "base year revenue"

figure that puts a cap or upper limit on the total amount of wagering taxes annually distributed to a city or county having a riverboat.

We have also received correspondence from a number of legislators representing districts in which riverboats are located suggesting that the legislative intent was that base year revenue be calculated before making deductions for the Commission's expenses, and that the statute is ambiguous in this regard.

It is our opinion that the statute is not ambiguous, and that base year revenue is calculated after deducting from the state gaming fund the amount necessary to cover the Gaming Commission's expenses of administering riverboat gambling.

ANALYSIS

Money from riverboat gambling authorized by Indiana Code, title 4, article 33 flows to the state, its agencies, or its local units of government from two sources: the riverboat admissions tax and the riverboat wagering taxes.

The riverboat admissions tax, authorized and described at Indiana Code section 4-33-12-6, is distributed primarily to the local units of government where the riverboat is located, with additional allocations also made to the State Fair Commission, to the Division of Mental Health and Addiction, and to the Horse Racing Commission. This guarantees the designated entities an annual, stable, recurring amount of revenue generated by admissions taxes. If the amount of admissions taxes available for distribution falls below the base amount, the entity receives a supplemental distribution pursuant to Indiana Code section 4-33-13-5(g).

The tax on adjusted gross receipts from riverboat gambling (the "wagering tax") is authorized by Indiana Code section 4-33-13-1. Indiana Code section 4-33-13-2 establishes the state gaming fund, and Indiana Code section 4-33-13-3 requires the department of revenue "to deposit tax revenue collected under this chapter in the state gaming fund." It is from this fund that the State's costs of administering riverboat gambling are paid:

> Sufficient funds are annually appropriated to the [Indiana gaming] commission from the state gaming fund to administer this article [Indiana Code article 4-33, Riverboat Gambling].

Ind. Code § 4-33-13-4.

The General Assembly has enacted a very detailed statute covering how these wagering taxes are to be distributed. For purposes of our analysis the relevant sections of Indiana Code section 4-33-13-5, as amended by Public Law Number 192-2003, provides (emphasis added):[1]

> (a) This subsection does not apply to tax revenue remitted by an operating agent operating a riverboat in a historic hotel district. After funds are appropriated under section 4 of this chapter, each month the treasurer of state shall distribute the tax revenue deposited in the state gaming fund under this chapter to the following:
>
> (1) The first thirty-three million dollars ($33,000,000) of tax revenues collected under this chapter shall be set aside for revenue sharing under subsection (e).
>
> (2) Subject to subsection (c), twenty-five percent (25%) of the remaining tax revenue remitted by each licensed owner shall be paid:
>
> (A) to the city that is designated as the home dock of the riverboat from which the tax revenue was collected, in the case of:
>
> (i) a city described in IC 4-33-12-6(b)(1)(A) [Michigan City]; or
>
> (ii) a city located in a county having a population of more than four hundred thousand (400,000) but less than seven hundred thousand (700,000) [Lake County]; or
>
> (B) to the county that is designated as the home dock of the riverboat from which the tax revenue was collected, in the case of a riverboat whose home dock is not in a city described in clause (A) [counties adjoining the Ohio River].
>
> (3) Subject to subsection (d), the remainder of the tax revenue remitted by each licensed owner shall be paid to the property tax replacement fund.
>
> (b) This subsection applies only to tax revenue remitted by an operating agent operating a riverboat in a historic hotel district [West Baden Springs]...
>
> (c) For each city and county receiving money under subsection (a)(2)(A) or (a)(2)(C), the treasurer of state shall determine the total amount of money paid by the treasurer of state to the city or county during the state fiscal year 2002. The amount determined is the base year revenue for the city or county. The treasurer of state shall certify the base year revenue determined under this subsection to the city or county. The total amount of money distributed to a city or county under this section during a state fiscal year may not exceed the entity's base year revenue. For each state fiscal year beginning after June 30, 2002, the

treasurer of state shall pay that part of the riverboat wagering taxes that:
(1) exceeds a particular city or county's base year revenue; and
(2) would otherwise be due to the city or county under this section;
to the property tax replacement fund instead of to the city or county.

Although it is long and exceptionally detailed, we find no ambiguity in the distribution instructions of the foregoing statute, which we summarize as follows:

1. All revenues from the wagering tax are deposited in the State Gaming Fund. Ind. Code § 4-33-13-3.

2. Sufficient funds are annually appropriated from the Fund to the Commission to administer the whole of Title 4, Article 33. Ind. Code § 4-33-13-4.

3. After funds are appropriated under section 4-33-13-4, the Treasurer is required by Indiana Code section 4-33-13-5(a)(1) to distribute $33,000,000 to non-riverboat cities and counties.

4. After funds are appropriated under section 4-33-13-4, and subject to subsection 4-33-13-5(c), the Treasurer is required by Indiana Code section 4-33-13-5(a)(2)(A) and (B) to distribute "25% of the remaining tax revenue remitted" to the city or county that "is designated as the home dock of the riverboat from which the tax revenue was collected."

5. Indiana Code section 4-33-13-5(c) explicitly states that for each city and county receiving money under subsection (a)(2)(A) or (a)(2)(C)2, the treasurer shall determine the total amount of money paid by the treasurer to the city or county, and that amount "is the base year revenue for the city or county."

Courts will construe and interpret a statute only if it is unclear and ambiguous, *Enterprise Leasing Company of Chicago v. Indiana Department of Revenue*, 779 N.E.2d 1284, 1293 (Ind. Tax Ct. 2003), but a statute whose language is clear and unambiguous is not subject to judicial interpretation. *Romine v. Gagle*, 782 N.E.2d 369, 379 (Ind. App. 2003). "If a statute is unambiguous, that is, susceptible to but one meaning, [the court] must give the statute its clear and plain meaning." *Bolin v. Wingert*, 764 N.E.2d 201, 204 (Ind. 2002). When construing a statute, the court's function is to give effect to the intent of the legislature in enacting the statutory provision, and generally the best evidence of that intent is found in the language of the statute itself. *Enterprise Leasing*, 779 N.E.2d at 1294 (*citing Mynseberge v. Ind. Dep't of Revenue*, 716 N.E.2d 629, 632 (Ind. Tax Ct. 1999)).

It is our opinion that Indiana Code section 4-33-13-5(c) is clear and unambiguous. The initial distribution of the wagering tax is to be made after the funds necessary to cover administrative costs are appropriated. The base year revenue is determined by the amount paid by the treasurer. While Indiana Code section 4-33-12-6 relating to the admissions tax specifically provides for a supplement if an entity will receive a lower distribution than the base year revenue under that section, there is no language contemplating such a supplement for a lower distribution under the wagering tax.

The General Assembly can, of course, amend Indiana Code section 4-33-13-5 to provide that base year revenue is determined by adding the amount paid to the city or county plus that entity's pro-rata share of the funds appropriated under section 4-33-13-4. Perhaps this was what was intended. But the statute, as it was passed and signed into law, can only be interpreted one way, and that is that base year revenue is determined by the total amount of money paid.

CONCLUSION

It is our opinion that Indiana Code section 4-33-13-5 is not ambiguous, and that base year revenue is calculated after deducting from the state gaming fund the amount necessary to cover the Gaming Commission's expenses of administering riverboat gambling.

Sincerely,

Stephen Carter
Attorney General

Gregory F. Zoeller
Deputy Attorney General

cc: Representative Becker
Representative Duncan

Representative Lytle
Representative Pelath
Senator Nugent
Senator Server

[1] The full text of the statute is contained in the Appendix to this letter.
[2] Public Law Number 92-2003 amended Indiana Code section 4-33-13-5 by deleting clause (a)(2)(B) relating to Patoka Lake; clause (a)(2)(C) [which authorizes distributions to certain riverboat counties] was then re-numbered (a)(2)(B). However, the corresponding change was not made in Indiana Code section 4-33-13-5(c). We view this as a purely technical error, and clause (a)(2)(C) no longer exists, but was renumbered as (a)(2)(B).

Appendix A
Full Text of IC 4-33-13-5.

(a) This subsection does not apply to tax revenue remitted by an operating agent operating a riverboat in a historic hotel district. After funds are appropriated under section 4 of this chapter, each month the treasurer of state shall distribute the tax revenue deposited in the state gaming fund under this chapter to the following:

(1) The first thirty-three million dollars ($33,000,000) of tax revenues collected under this chapter shall be set aside for revenue sharing under subsection (e).

(2) Subject to subsection (c), twenty-five percent (25%) of the remaining tax revenue remitted by each licensed owner shall be paid:

(A) to the city that is designated as the home dock of the riverboat from which the tax revenue was collected, in the case of:

(i) a city described in IC 4-33-12-6(b)(1)(A); or

(ii) a city located in a county having a population of more than four hundred thousand (400,000) but less than seven hundred thousand (700,000); or

(B) to the county that is designated as the home dock of the riverboat from which the tax revenue was collected, in the case of a riverboat whose home dock is not in a city described in clause (A).

(3) Subject to subsection (d), the remainder of the tax revenue remitted by each licensed owner shall be paid to the property tax replacement fund.

(b) This subsection applies only to tax revenue remitted by an operating agent operating a riverboat in a historic hotel district. After funds are appropriated under section 4 of this chapter, each month the treasurer of state shall distribute the tax revenue deposited in the state gaming fund under this chapter as follows:

(1) Thirty-seven and one half percent (37.5%) shall be paid to the property tax replacement fund established under IC 6-1.1-21.

(2) Thirty-seven and one half percent (37.5%) shall be paid to the West Baden Springs historic hotel preservation and maintenance fund established by IC 36-7-11.5-11(b). However, at any time the balance in that fund exceeds twenty million dollars ($20,000,000), the amount described in this subdivision shall be paid to the property tax replacement fund established under IC 6-1.1-21.

(3) Five percent (5%) shall be paid to the historic hotel preservation commission established under IC 36-7-11.5.

(4) Ten percent (10%) shall be paid in equal amounts to each town that:

(A) is located in the county in which the riverboat docks; and

(B) contains a historic hotel.

The town council shall appropriate a part of the money received by the town under this subdivision to the budget of the town's tourism commission.

(5) Ten percent (10%) shall be paid to the county treasurer of the county in which the riverboat is docked. The county treasurer shall distribute the money received under this subdivision as follows:

(A) Twenty percent (20%) shall be quarterly distributed to the county treasurer of a county having a population of more than thirty-nine thousand six hundred (39,600) but less than forty thousand (40,000) for appropriation by the county fiscal body after receiving a recommendation from the county executive. The county fiscal body for the receiving county shall provide for the distribution of the money received under this clause to one (1) or more taxing units (as defined in IC 6-1.1-1-21) in the county under a formula established by the county fiscal body after receiving a recommendation from the county executive.

(B) Twenty percent (20%) shall be quarterly distributed to the county treasurer of a county having a population of more than ten thousand seven hundred (10,700) but less than twelve thousand (12,000) for appropriation by the county fiscal body after receiving a recommendation from the county executive. The county fiscal body for the receiving county shall provide for the distribution of the money received under this clause to one (1) or more taxing units (as defined in IC 6-1.1-

1-21) in the county under a formula established by the county fiscal body after receiving a recommendation from the county executive.

(C) Sixty percent (60%) shall be retained by the county where the riverboat is docked for appropriation by the county fiscal body after receiving a recommendation from the county executive. The county fiscal body shall provide for the distribution of part or all of the money received under this clause to the following under a formula established by the county fiscal body:

(i) A town having a population of more than two thousand two hundred (2,200) but less than three thousand five hundred (3,500) located in a county having a population of more than nineteen thousand three hundred (19,300) but less than twenty thousand (20,000).

(ii) A town having a population of more than three thousand five hundred (3,500) located in a county having a population of more than nineteen thousand three hundred (19,300) but less than twenty thousand (20,000).

(c) For each city and county receiving money under subsection (a)(2)(A) or (a)(2)(C), the treasurer of state shall determine the total amount of money paid by the treasurer of state to the city or county during the state fiscal year 2002. The amount determined is the base year revenue for the city or county. The treasurer of state shall certify the base year revenue determined under this subsection to the city or county. The total amount of money distributed to a city or county under this section during a state fiscal year may not exceed the entity's base year revenue. For each state fiscal year beginning after June 30, 2002, the treasurer of state shall pay that part of the riverboat wagering taxes that:

(1) exceeds a particular city or county's base year revenue; and

(2) would otherwise be due to the city or county under this section;

to the property tax replacement fund instead of to the city or county.

(d) Each state fiscal year the treasurer of state shall transfer from the tax revenue remitted to the property tax replacement fund under subsection (a)(3) to the build Indiana fund an amount that when added to the following may not exceed two hundred fifty million dollars ($250,000,000):

(1) Surplus lottery revenues under IC 4-30-17-3.

(2) Surplus revenue from the charity gaming enforcement fund under IC 4-32-10-6.

(3) Tax revenue from pari-mutuel wagering under IC 4-31-9-3.

The treasurer of state shall make transfers on a monthly basis as needed to meet the obligations of the build Indiana fund. If in any state fiscal year insufficient money is transferred to the property tax replacement fund under subsection (a)(3) to comply with this subsection, the treasurer of state shall reduce the amount transferred to the build Indiana fund to the amount available in the property tax replacement fund from the transfers under subsection (a)(3) for the state fiscal year.

(e) Before August 15 of 2003 and each year thereafter, the treasurer of state shall distribute the wagering taxes set aside for revenue sharing under subsection (a)(1) to the county treasurer of each county that does not have a riverboat according to the ratio that the county's population bears to the total population of the counties that do not have a riverboat. The county treasurer shall distribute the money received by the county under this subsection as follows:

(1) To each city located in the county according to the ratio the city's population bears to the total population of the county.

(2) To each town located in the county according to the ratio the town's population bears to the total population of the county.

(3) After the distributions required in subdivisions (1) and (2) are made, the remainder shall be retained by the county.

(f) Money received by a city, town, or county under subsection (e) may be used only:

(1) to reduce the property tax levy of the city, town, or county for a particular year (a property tax reduction under this subdivision does not reduce the maximum levy of the city, town, or county under IC 6-1.1-18.5);

(2) for deposit in a special fund or allocation fund created under IC 8-22-3.5, IC 36-7-14, IC 36-7-14.5, IC 36-7-15.1, and IC 36-7-30 to provide funding for additional credits for property tax replacement in property tax increment allocation areas;

(3) to fund sewer and water projects, including storm water management projects; or

(4) for police and fire pensions.

However, not more than twenty percent (20%) of the money received under subsection (e) may be used for the purpose described in subdivision (4).

(g) This subsection does not apply to an entity receiving money under IC 4-33-12-6(c). Before September 15 of 2003 and each year thereafter, the treasurer of state shall determine the total amount of money distributed to an entity under IC 4-33-12-6 during the preceding state fiscal year. If the treasurer of state determines that the total amount of money distributed to an entity under IC 4-33-12-6 during the preceding state fiscal year was less than the entity's base year revenue (as determined under IC 4-33-12-6), the treasurer of state shall make a supplemental distribution to the entity from taxes collected under this chapter and deposited into the property tax replacement fund. The amount of the supplemental distribution is equal to the difference between the entity's base year revenue (as determined under IC 4-33-12-6) and the total amount of money distributed to the entity during the preceding state fiscal year under IC 4-33-12-6.

(h) This subsection applies only to a county containing a consolidated city. The county auditor shall distribute the money

received by the county under subsection (d) as follows:

(1) To each city, other than a consolidated city, located in the county according to the ratio that the city's population bears to the total population of the county.

(2) To each town located in the county according to the ratio that the town's population bears to the total population of the county.

(3) After the distributions required in subdivisions (1) and (2) are made, the remainder shall be paid in equal amounts to the consolidated city and the county.