



MICHAEL R. PENCE, Governor
STATE OF INDIANA

INDIANA DEPARTMENT OF HOMELAND SECURITY
302 West Washington Street
Indianapolis, IN 46204

March 12, 2015
By U.S. Mail and Electronic Mail

Mr. Andrew Velasquez III
Regional Administrator
U.S. Department of Homeland Security
Region V
536 South Clark Street, Floor 6
Chicago, IL 60605

RE: Appeal of FEMA Decision dated February 25, 2015

Mr. Velasquez,

The purpose of this letter is to appeal FEMA's decision to suspend the Hazard Mitigation Grant Program for the entire State of Indiana. This appeal is being initiated pursuant to 44 C.F.R. § 206.440 by the applicant / grantee, Indiana Department of Homeland Security. This appeal is *not* being initiated on behalf of the subgrantee, the City of Kokomo. A list of projects affected by FEMA's decision—totaling \$6,156,015.86—is attached to this letter.

The Indiana Department of Homeland Security agrees with FEMA's determination that certain parcels which are currently part of the Kokomo Municipal Baseball Stadium project are out of compliance with the open space requirements contained within 44 C.F.R. § 206.434. For that and other reasons, IDHS sent a letter to City of Kokomo officials on November 24, 2014, giving the City sixty days to bring the parcels back into compliance. Before that sixty-day period ended and before IDHS had an opportunity to initiate a formal enforcement action against the City of Kokomo, the City filed a lawsuit against IDHS seeking declaratory judgment and injunctive relief. Earlier today, IDHS filed the attached answer and counterclaim against the City seeking to enjoin Kokomo from further construction and requesting that the Court order the City to remove any structures or fill-dirt which currently exists on the deed-restricted parcels in violation of the open space requirements.

Under 44 C.F.R. § 80.19, FEMA has discretion as to if and when it initiates an enforcement action, against whom the action is taken, and which of the enumerated penalties in subsection (e)(1)(ii) are appropriate for imposition based on the circumstances. In this instance, there is no evidence that IDHS has failed to uphold its obligations as grantee. IDHS does not believe the entire State of Indiana should be punished for the noncompliance of the City of Kokomo. 44 C.F.R. § 80.19(e)(1)(ii) provides, in part:

FEMA, its representatives, and assignees *may* enforce the terms of the grant by taking any measures it deems appropriate, including but not limited to 1 or more of the following:



An Equal Opportunity Employer

March 12, 2015

(A) Withholding FEMA mitigation awards or assistance from the State and subgrantee; and current holder of the property interest.

On behalf of the millions of citizens throughout the entire State of Indiana who have the potential to benefit from this grant program, IDHS respectfully requests that FEMA use its discretion under 44 C.F.R. § 80.19 and reinstate the Hazard Mitigation Grant Program for those communities in Indiana which remain compliant with the program. IDHS will continue to aggressively enforce the terms of the grant agreement between the City of Kokomo and the State of Indiana. Thank you.

Sincerely,

A handwritten signature in black ink that reads "David W. Kane". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

David W. Kane
Executive Director
Indiana Department of Homeland Security

Enclosures

cc: Ms. Christine Stack, Region V Mitigation Division Director



FEMA

February 25, 2015

Mr. David Kane, Executive Director
Indiana Department of Homeland Security
Indiana Government Center South
302 West Washington Street
Indianapolis, IN 46204-2767

Re: City of Kokomo Municipal Stadium Project

Dear Director Kane:

The purpose of this letter is to inform you that FEMA is taking enforcement action against the City of Kokomo and the State of Indiana as a result of the City's continuing violation of the open space requirements attached to the parcels of land it acquired with Hazard Mitigation Grant Program (HMGP) funding and on which it is currently constructing the Kokomo Municipal Baseball Stadium (the Stadium).

As you know, the City of Kokomo is required by statute and regulation to maintain the properties acquired under HMGP as open space. This requirement is also recorded in the deeds for the properties at issue. By letter dated November 24, 2014, you notified the City of specific violations and gave the City 60 days to bring the properties into compliance. The City has failed to remedy the violations. As a result, pursuant to its authority under 44 C.F.R. § 80.19(e), FEMA will withhold from the State of Indiana and the City of Kokomo all FEMA mitigation awards or assistance as long as the properties at issue remain in violation of the open space requirements.

In addition, pursuant to 42 U.S.C. § 5170c(b)(2)(B)(iii), 44 C.F.R. § 80.5(a)(6), 44 C.F.R. § 80.19 (a)(4), and 44 C.F.R. § 206.434(e)(1)(iii), and as stated in the deed restrictions, no disaster assistance from any Federal source for any purpose related to the property may be sought or provided. With regard to FEMA, we will not provide any disaster assistance, flood insurance claims payments, or any other FEMA assistance for the Stadium as long as the use of the properties at issue remains in violation of the open space requirements.

If you or the City choose to appeal this determination, please follow the procedures outlined in 44 C.F.R. § 206.440. Should you have questions, please have your staff contact Christine Stack, Region V Mitigation Division Director at 312-408-5570 or christine.stack@fema.dhs.gov.

Sincerely,

Andrew Velasquez III
Regional Administrator

Grant Program	Sub grantee	Project Type	Amount
HMGP 4173			\$1,520,347.00
	Tipton Huntingburg Grant Co City of Brazil	Acquisition Safe room Acquisition MHP Acquisition	
PDMC 2014	Bradie Shrum Elementary Salem School corp	Safe room	\$2,214,907.00
PDMC 2014	Ft. Wayne	Acquisition 18 Homes	\$1,150,595.00
PDMC 2014	Marshal County Boone County Grant County Henry County Owen County Ohio County Knox County Orange County Parke County Monroe County Miami County Pike County Ripley County Starke County St. Joseph County	MHMP Update MHMP Update MHMP Update MHMP Update MHMP Update MHMP Update MHMP Update MHMP Update MHMP Update MHMP Update MHMP Update MHMP Update MHMP Update MHMP Update MHMP Update	\$333,333.40
PDMC 2014	IDHS	Management	\$436,833.46
LPDMC	City of Hobart	Mitigation	\$500,000.00

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION ENVIRONMENTAL COURT
CAUSE NO. 49G12-1501-MI-002330

CITY OF KOKOMO,
Plaintiff,

v.

DAVID KANE, in his official capacity as
Executive Director of the Indiana Department
of Homeland Security f/k/a Indiana State
Emergency Management Agency, and
THE INDIANA DEPARTMENT OF
HOMELAND SECURITY,

Defendants.

FILED

(220) MAR 12 2015

Myla A. Eldridge
CLERK OF THE MARION CIRCUIT COURT

**DEFENDANTS' ANSWER
TO THE CITY OF KOKOMO'S
COMPLAINT FOR DECLARATORY JUDGMENT
AND DEFENDANTS'
COUNTERCLAIM FOR PERMANENT INJUNCTIVE RELIEF**

Except as to the specific admissions below, Director David Kane and the Department of Homeland Security DENY the allegations of the complaint. In addition, over a decade ago the City of Kokomo used significant federal funds to acquire and demolish structures on 8 Parcels in the floodplain of Wildcat Creek. Kokomo expressly promised to keep the land as open space, and that no new structures would be built on the 8 Parcels without a determination by FEMA and the Indiana Department of Homeland Security "in writing prior to the commencement of construction" that the proposed construction would be compatible with the open space requirement, as required in Exhibits 1 through 9 of the Complaint.

Without prior approval, Kokomo began construction of its stadium by placing fill dirt and concrete structures on some of the 8 Parcels. Both FEMA and the Department of Homeland

Security have objected to the construction. Moreover, due to Kokomo breaking its promise, as of February 25th FEMA is withholding \$6,156,066 of funding for hazard mitigation projects throughout Indiana, and will continue to withhold any further hazard mitigation awards or assistance throughout Indiana as long as these 8 Parcels remain in violation of the open space requirements. Until Kokomo remedies the violations on the 8 Parcels, millions of dollars of federal assistance are now suspended throughout the State of Indiana. The Department files this Counterclaim to compel the City of Kokomo live up to its promise by removing the fill dirt and structures on any of the 8 Parcels that violate the terms of the Exhibits 1 through 9 of the Complaint.

PARTIES

1. The City is a municipal corporation located in Howard County, Indiana.

ADMIT

2. Defendant David Kane is Executive Director of IDHS. Mr. Kane oversees IDHS programs and activities, including, the funding of grants for purposes of helping municipalities mitigate hazards caused by flooding and enforcement of contracts relating to such grants.

ADMIT, David Kane recently became Executive Director.

3. Defendant IDHS is a department of the State of Indiana.

ADMIT, as per Ind. Code 10-19-2-1.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action because it arises under the Indiana Declaratory Judgment Act, Ind. Code § 34-14-1-1, *et seq.*

ADMIT

5. Venue is proper pursuant to Indiana Trial Rule 75 because the principal office of the entity defendant, IDHS, is located in Marion County.

ADMIT

FACTS APPLICABLE TO ALL CLAIMS

The Stadium Project

6. Wildcat Creek (the "Creek") winds through downtown Kokomo.

ADMIT

7. Historically, the Creek has experienced periods of significant flooding, which have damaged homes and properties in the floodplain adjacent to the Creek.

ADMIT

8. The Creek last experienced a significant flood event in 2013.

ADMIT that water in the Creek reached flood level in 2013.

9. The City adopted a strategy of trying to improve flooding conditions along the Creek by (a) buying land within the Creek floodplain when it becomes available, (b) mitigating the risk of future flood hazards on the land by, among other things, demolishing and/or removing buildings, and (c) converting the land into public space that benefits the City and its citizens, including, but not limited to, open space and land used for recreation.

ADMIT that the City has purchased land and has demolished and removed buildings.

The City neglects to mention that on some of the 8 Parcels the City has hauled in fill dirt and begun construction of a stadium without approval by both the State and FEMA.

Approval by both the State and Director of FEMA is required "in writing prior to the commencement of construction" as per Paragraph 1.B of the State Local Agreement

attached as Exhibit 9 to the Complaint. Approval by the Director is required "in writing prior to the commencement of construction" as per Paragraph 1.b.iii of each of the deed restrictions attached as Exhibits 1-8 to the Complaint.

10. The City recently developed a plan to build an open-air, public facility to host baseball games and other sports and community recreation events along the Creek on property consisting almost entirely of parcels of land that the City purchased with its own money in the floodplain.

ADMIT that the City has a plan and is constructing a baseball stadium in the floodplain. The City neglects to mention that on some of the 8 Parcels the City has hauled in fill dirt and begun construction of a stadium without approval by both the State and FEMA. Approval by both the State and Director of FEMA is required "in writing prior to the commencement of construction" as per Paragraph 1.B of the State Local Agreement attached as Exhibit 9 to the Complaint. Approval by the Director is required "in writing prior to the commencement of construction" as per Paragraph 1.b.iii of each of the deed restrictions attached as Exhibits 1-8 to the Complaint.

11. The multi-million dollar project, named the Kokomo Municipal Stadium and Flood Mitigation Project, contemplates the construction of a 4,000 person capacity stadium.

ADMIT.

12. The stadium is the anchor project for additional developments, including, among others:

- a) A \$24 million housing project, which will include 165 residential units, 10,000 sq. ft. of retail space, and 165 space parking garage; and

- b) A \$4 million housing project to rehabilitate a site currently occupied by an asphalt surface parking lot into 16 townhouse units.

DENY as to characterization and for lack of information about these other two projects.

To whatever extent the City is building on the 8 Parcels purchased with state/federal funds, it has done so without approval by FEMA and DHS "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint.

13. These projects in the floodplain will transform downtown Kokomo – which formerly contained substandard housing and vacant or underutilized industrial properties – into a vibrant area complete with new residential, commercial, and recreational opportunities.

DENY as to characterization and for lack of information about these other two projects.

To whatever extent the City is building on the 8 Parcels purchased with state/federal funds, it has done so without approval by FEMA and DHS "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint.

14. The benefits to the community include:

- a) New affordable recreational and entertainment activities for the residents of Kokomo and the surrounding area;
- b) Events that will bring visitors to the community and have a positive economic impact on local restaurants, hotels and other businesses;
- c) New jobs associated with the construction of the stadium and surrounding projects, and new employment opportunities once they are completed; and
- d) Anticipated local tax revenue.

DENY as to characterization and for lack of information about these proclaimed benefits.

To whatever extent the City is building on the 8 Parcels purchased with state/federal funds, it has

done so without approval by FEMA and DHS "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint.

15. The projects also accomplish the City's goal of reducing the floodplain to decrease the risks of future floods and limit the City's need for future disaster assistance.

DENY as to characterization and for lack of information about these proclaimed benefits. To whatever extent the City is building on the 8 Parcels purchased with state/federal funds, it has done so without approval by FEMA and DHS "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint.

16. Flood studies conducted by the City confirm that no adverse floodplain impacts would result from the project. The design for the project includes three detention areas for surface water at the site. Further, the City has created and will create new flood retention areas along the Creek elsewhere in the City to further reduce the impact of future flooding.

DENY as to characterization and for lack of information about these proclaimed benefits. To whatever extent the City is building on the 8 Parcels purchased with state/federal funds, it has done so without approval by FEMA and DHS "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint.

17. The City and affiliated entities have committed funds and signed contracts necessary to design and build the stadium. Local high schools are scheduled to play baseball games in the facility in the spring of 2015.

DENY for lack of information. To whatever extent the City is building on the 8 Parcels purchased with state/federal funds, it has done so without approval by FEMA and DHS "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint.

The City's Right To Build The Stadium

18. The stadium, as designed, sits on approximately seventy (70) parcels of land in the floodplain. The vast majority of the parcels for the project were purchased using only the City's funds. However, eight (8) of the parcels, scattered among the larger project area, were purchased with grant money obtained through agreements between IDHS and the City (the "Parcels").

ADMIT that 8 of the parcels, scattered among the larger project area, were purchased with grant money obtained through agreements between IDHS and the City. To whatever extent the City is building on the 8 Parcels purchased with state/federal funds, it has done so without approval by FEMA and DHS "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint.

19. The grant agreements, as consideration for IDHS granting funds to the City, include specific terms relating to how the City can use the land acquired with the funds. Those terms are memorialized in restrictive covenants recorded on the Parcels.

ADMIT. The restrictions on the use of the 8 Parcels are contained in both (1) the State Local Agreement attached as Exhibit 9 to the Complaint, and reiterated in (2) the deed restrictions attached as Exhibits 1-8 of the Complaint.

20. Specifically, the City and IDHS agreed to the following terms in the restrictive covenants:

- a. Compatible uses. The land shall be used only for purposes compatible with open space, recreational or wetlands management practices; in general, such uses include parks for outdoor recreational activities, nature

reserves, unimproved pervious parking lots and other uses described in 44 C.F.R. § 206.434 as it reads now or may be amended in the future.

b. Structures. No new structures or improvements shall be erected on the property other than:

i. A public facility that is open on all sides and functionally related to the open space use;

ii. A public restroom; or

iii. A structure that is compatible with the uses described in paragraph 1(a), above, and approved by the Director in writing prior to the commencement of construction of the structure.

Any structures built on the property according to this paragraph shall be floodproofed or elevated to the Base Flood Elevation plus one foot of freeboard.

These covenants are hereinafter referred to as the Agreed Terms.

ADMIT. The restrictions on the use of the 8 Parcels are contained in both (1) the State Local Agreement attached as Exhibit 9 to the Complaint, and reiterated in (2) the deed restrictions attached as Exhibits 1-8 of the Complaint.

21. The Agreed Terms appear in the deeds for each of the eight parcels (attached as Exhibits 1-8) and the 2003 grant agreement (attached as Exhibit 9).¹

ADMIT.

22. Locations of the 8 Parcels are designated on the map attached as Exhibit 10.

ADMIT to the extent that Exhibit 10 depicts the general area where the City is building the stadium. To whatever extent the City is building on the 8 Parcels purchased with state/federal funds, it has done so without approval by FEMA and DHS "in writing prior

¹ Neither the City nor IDHS has located a copy of an additional grant agreement from 2000.

to the commencement of construction,” as required by Exhibits 1 through 9 of the Complaint.

23. The City, in its original design of the stadium, sought to comply with the Agreed Terms by designing the parts of the stadium that sit on the eight Parcels to be used exclusively for purposes compatible with open space or recreational purposes.

DENY. In the redesigns dated December 29, 2014, and January 7, 2015, the City states:

“All of the parcels in question contain similar ERCs that limit the uses. These limits were not known during design. Therefore, design changes are being proposed to meet these limits. . . .

Complaint, Exhibits 11, pg. 1; and Exhibit 12, pg. 1. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or IDHS beforehand “in writing prior to the commencement of construction,” as required by Exhibits 1 through 9 of the Complaint.

24. In July 2014, IDHS contacted a representative of the City and indicated that IDHS may have concerns about the original design.

ADMIT.

25. The City, in response on July 17, 2014, sent a letter to IDHS requesting that IDHS explain its position and requesting a meeting to discuss any concerns prior to planned construction.

ADMIT that such a letter was sent and eventually received by IDHS, but deny as to the characterization of the letter. To whatever extent the City began construction on the 8 Parcels purchased with state/federal funds, it has done so without approval by FEMA and

DHS "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint.

26. Months later in October 2014, IDHS informed the City that there was a dispute between the parties. Upon notice from IDHS of a dispute, the City took measures to ensure no construction would occur on the eight Parcels at issue while discussions with IDHS continued.

ADMIT that IDHS advised the City of the dispute. To whatever extent the City began construction on the 8 Parcels purchased with state/federal funds, it has done so without approval by FEMA and DHS "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint.

27. The City, over the following months, participated in meetings and teleconferences with IDHS and the Federal Emergency Management Agency ("FEMA") to better understand the concerns about the project and to determine how the City and IDHS could resolve the dispute.

ADMIT that IDHS participated in meetings and teleconferences about the concerns about the project and to attempt to resolve the dispute.

28. The City, as a result of this dialogue, redesigned the parts of the facility that sit on the Parcels to ensure strict compliance with the Agreed Terms (the "Redesign").

ADMIT the City changed the design, DENY that the changed design complies with the restrictive covenants on the 8 Parcels.

29. An initial redesign was submitted to IDHS on December 29, 2014. A true and accurate copy of the December 29, 2014 redesign is attached as Exhibit 11.

ADMIT that a redesign was submitted on December 29, 2014, and that Exhibit 11 is a true and accurate copy of the redesign.

30. After discussions with IDHS on December 30, 2014, the City made further revisions to the design for the project and submitted the final Redesign on January 7, 2015. A true and accurate copy of the final Redesign is attached as Exhibit 12.

ADMIT that a redesign was submitted on January 7, 2015, and that Exhibit 12 is a true and accurate copy of the redesign.

31. In the Redesign, identified as Exhibit 12, each of the eight Parcels will continue to be used for open space or recreation in satisfaction of the Agreed Terms. Half the Parcels will not include any structures. Where the Parcels do include partial structures, the City redesigned them to honor the Agreed Terms by (i) raising the structures on pillars to ensure they are open on all sides at ground level and functionally related to the open space use, (ii) building public restrooms on the Parcels; or (iii) both.

ADMIT the City changed the design, DENY that the changed design complies with the restrictive covenants on the 8 Parcels.

32. The Redesign complies with the Agreed Terms as follows:²

Parcel No.	Proposed Redesign
1	Parcel No. 1 is outside the project area and no development is planned. No structures or improvements will be erected on Parcel No. 1.
2	Parcel No. 2 is outside the project area and no development is planned. No structures or improvements will be erected on Parcel No. 2.
3	Parcel No. 3 is positioned in the field of play of the baseball stadium. It is open space and is purposed for recreational use. No structures will be erected on Parcel No. 3.
4	Parcel No. 4 is positioned in the field of play of the baseball stadium. It is open space and is purposed for recreational use. No structures will be erected on Parcel No. 4.

² Parcel Nos. 1-8 are identified and described in the map at Exhibit 10 and the Redesign at Exhibit 12 using the same numbering conventions.

5-6	Adjacent Parcels No. 5 and 6 will be primarily open space for public use. A small portion of public restrooms associated with the baseball park overlap with the northern most part of the parcels. Therefore, these parcels are open space and are purposed for recreational use. To the extent any structures are constructed on Parcels No. 5 and 6, they will be raised high on pillars to ensure they are open on all sides of the parcel and functionally related to the open space use. The structures will be floodproofed or elevated to the Base Flood Elevation plus one foot of freeboard. ³
7	Parcel No. 7 includes a public restroom and a portion of a picnic area outside the stadium. It is purposed for recreational use. The structures on Parcel No. 7 will be raised high on pillars to ensure they are open on all sides of the parcel and functionally related to the open space use at the parcel. The structures will be floodproofed or elevated to the Base Flood Elevation plus one foot of freeboard.
8	Parcel No. 8 includes a sidewalk, a ramp, a portion of a concession stand, public restroom, stair, and maintenance space. The structures on Parcel No. 8 are purposed for recreational use. They will be raised high on pillars to ensure they are open on all sides of the parcels at ground level and functionally related to the open space use. The structures will be floodproofed or elevated to the Base Flood Elevation plus one foot of freeboard.

DENY. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint.

33. IDHS has refused to honor the terms of its grant agreements with the City.

DENY. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or

³ The same deed addresses the Agreed Terms for Parcels Nos. 5 and 6.

IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint.

34. On January 23, 2015, IDHS indicated to counsel for the City that the City's redesign is not in compliance with the Agreed Terms and that the City is not permitted to build anything on the Parcels. That same day, IDHS representatives were quoted in the Kokomo newspapers threatening to bring legal action against the City.

ADMIT that the IDHS communicated that the City's redesign was not in compliance with the Agreed Terms and that the City is not permitted to build anything on the Parcels without approval from FEMA and/or IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint.

35. IDHS has no right to impose the Agreed Terms to limit construction in areas outside the Parcels.

ADMIT that the Agreed Terms are limited to the 8 Parcels purchased with state/federal funds.

36. IDHS has no right to prevent the proposed construction on the Parcels that comply with the Agreed Terms.

DENY. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint.

37. The Agreed Terms, which IDHS and the City agreed to govern the future use of the Parcels, allow the City to build on the Parcels pursuant to and consistent with the Redesign.

DENY. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint.

38. The City will suffer irreparable harm for which they have no adequate remedy at law if IDHS's ability to apply its misinterpretation is not immediately enjoined.

DENY. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint. Any harm suffered by the City is the result of the City's decision to build the stadium without prior approval, as required by the Agreed Terms. Due to FEMA's February 25th suspension of any further hazard mitigation awards throughout Indian, the harm to the State of Indiana is greater than any purported harm asserted by the City.

39. If IDHS is permitted to stop construction of the project, it will cripple or eliminate planned development in downtown Kokomo and drain the resources of the City. The City would suffer irreparable harm from delay of the proposed stadium and its surrounding projects. The City would lose significant amounts of money, as well as potential and realized economic development, jobs, and tax revenue, without any legal recourse against IDHS or anyone else.

DENY. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint. Any harm suffered by the City is the result of the City's decision to build the stadium without prior approval, as required by the Agreed Terms. Due to FEMA's February 25th suspension of any further hazard mitigation awards throughout Indian, the harm to the public interest throughout the State of Indiana is greater than any purported harm to the public interest asserted by the City.

40. The City has no recourse but to file this suit to protect its rights.

DENY. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint. Any harm suffered by the City is the result of the City's decision to build the stadium without prior approval, as required by the Agreed Terms. The City has always had the option of seeking approval in writing in advance of construction.

COUNT I – DECLARATORY JUDGMENT

41. The City incorporates by reference the allegations set forth in paragraphs 1 through 40 of the Complaint as if fully stated herein.

42. The parties dispute the meaning and effect of the Agreed Terms.

ADMIT.

43. This Court can and should declare that IDHS has no right to obstruct the City's immediate, continued construction of the stadium as described in the Redesign because:

- a) Each of the Parcels will be used for purposes "compatible with open space" or "recreational" purposes;
- b) Half of the Parcels at issue will have no structures;
- c) On each Parcel on which a structure or improvement will be erected, the structures will be "public facilit[ies] that [are] open on all sides and functionally related to the open space use" or "public restrooms"; and
- d) On each Parcel on which a structure or improvement will be erected, the structures will be floodproofed or elevated to the Base Flood Elevation plus one foot of freeboard.

DENY. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint.

44. In the alternative, to the extent a question exists about whether one or more of the Parcels complies with the Agreed Terms and cannot be resolved by the above considerations, this Court can and should declare that IDHS has no right to prevent the City's immediate, continued construction of the project on any of the Parcels as set forth in the Redesign because:

- a) The City is immune from penalty for any violation of the Agreed Terms under 42 U.S.C. § 5205(c) because (i) all IDHS grant payments made to the City were authorized by approved and executed contracts which specified costs associated with the grants, (ii) the specified costs were reasonable, and (iii) the purpose of the grant was accomplished;
- b) On each Parcel on which a structure or improvement will be erected, the structures are “compatible with the uses described in paragraph 1(a)” of the Agreed Terms;
- c) The Agreed Terms either contain unlawfully vague approval requirements at paragraph b(iii) that are unenforceable as a matter of law or approval of the Redesign was wrongfully withheld in breach of the Agreed Terms;⁴ and
- d) Even if IDHS could prove the City breached the Agreed Terms (which the City did not do), IDHS would be made whole by legal damages and therefore is not entitled to specific performance.

DENY. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or IDHS beforehand “in writing prior to the commencement of construction,” as required by Exhibits 1 through 9 of the Complaint. The Agreed Terms are not ambiguous. Due to

⁴ The Agreed Terms are ambiguous with regard to identity of the person(s) who may approve a structure that does not meet the requirements of b(i) or b(ii). Paragraph b(iii) of each of the deeds refers to approval of the “Director.” *E.g.*, Ex. 1 at p. 3. Paragraph b(iii) of the grant agreement refers to approval of “the State and the Director of FEMA.” Ex. 9 at 4 of 20.

FEMA's February 25th suspension of any further hazard mitigation awards throughout Indiana, the State of Indiana cannot be made whole by money damages.

45. This is an actual, justiciable controversy which is clearly defined and which affects the legal rights of the parties, who have adverse legal interests.

ADMIT.

46. The City has a substantial present interest in the relief sought, and a question has arisen affecting its rights which ought to be decided to safeguard such rights.

ADMIT. Due to FEMA's February 25th suspension of any further hazard mitigation awards throughout Indiana, the question affects the citizens throughout the State of Indiana.

COUNT II – REQUEST FOR INJUNCTIVE RELIEF

47. The City incorporates by reference the allegations set forth in paragraphs 1 through 46 of the Complaint as if fully stated herein.

48. IDHS has indicated that the City is violating the Agreed Terms by contemplating performance of the proposed construction on the Parcels.

ADMIT. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint. Any harm suffered by the City is the result of the City's decision to build the stadium without prior approval, as required by the Agreed Terms.

49. IDHS has directed the City not to build the project on the Parcels based on its belief that the City is violating the Agreed Terms as described above.

ADMIT. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint. Any harm suffered by the City is the result of the City's decision to build the stadium without prior approval, as required by the Agreed Terms.

50. IDHS's position is wrong as a matter of law.

DENY. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint. Any harm suffered by the City is the result of the City's decision to build the stadium without prior approval, as required by the Agreed Terms.

51. The City has not violated and will not violate the Agreed Terms by constructing the facility pursuant to and consistent with the Redesign submitted to IDHS.

DENY. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or

IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint. Any harm suffered by the City is the result of the City's decision to build the stadium without prior approval, as required by the Agreed Terms.

52. The City's available remedies at law are inadequate to protect the City's interests. The City will suffer irreparable harm pending resolution of the action as described above.

DENY. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint. Any harm suffered by the City is the result of the City's decision to build the stadium without prior approval, as required by the Agreed Terms. Due to FEMA's February 25th suspension of any further hazard mitigation awards throughout Indiana, the harm to the State of Indiana is greater than any harm to the City. The State of Indiana cannot be made whole by money damages, and accordingly seeks injunctive relief to compel the City to comply with the Agreed Terms.

53. The City is reasonably likely to prevail on the merits of its claims. The Agreed Terms allow the construction proposed in the Redesign. Of the eight (8) Parcels that are the subject of this contract dispute, two (2) of the Parcels will be untouched by any construction, two (2) will be open space in the outfield of a ball field, and four (4) have structures that are raised up on pillars to be open on all sides of the parcels or are public restrooms or both. Further, on each

Parcel on which a structure or improvement will be erected the structures will be floodproofed or elevated to the Base Flood Elevation plus one foot of freeboard.

DENY. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint. Any harm suffered by the City is the result of the City's decision to build the stadium without prior approval, as required by the Agreed Terms.

54. The threatened injury to the City if an injunction is denied is extreme, substantial and imminent. If an injunction is not entered, the City would lose the baseball stadium or suffer delays in building the stadium that would irreparably harm the development of downtown Kokomo and its citizens. The City stands to lose other planned and pending development in its downtown area, depriving the City of future jobs and future tax base, again, without any available recourse at law or equity. The City also could default on contracts and bonds and be forced to pay significant funds without any recourse against IDHS. The threatened injuries to the City outweigh the prospective harm, if any, to IDHS if the injunction is granted.

DENY. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint. Any harm suffered by the City is the result of the

City's decision to build the stadium without prior approval, as required by the Agreed Terms. Due to FEMA's February 25th suspension of any further hazard mitigation awards throughout Indiana, the harm to the State of Indiana is greater than any harm to the City.

55. As described above, the project serves the public interest for the citizens of Kokomo. If the City is wrongfully not allowed to proceed with construction, the public interest will be disserved without recourse unless injunctive relief is granted.

DENY. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint. Any harm suffered by the City is the result of the City's decision to build the stadium without prior approval, as required by the Agreed Terms. Due to FEMA's February 25th suspension of any further hazard mitigation awards throughout Indian, the public interest within the State of Indiana is greater than any purported public interest asserted by the City.

56. This Court can and should enjoin IDHS from:

- (i) Preventing the City from constructing the portions of the stadium that rest on the Parcels pursuant to and consistent with Redesign;
- (ii) Preventing the City from constructing the portions of the stadium that rest on the parcels of land that were not subject to the grant agreements; and

- (iii) Imposing penalties or sanctions of any kind against the City for its efforts to construct the stadium pursuant to and consistent with the Redesign.

DENY. The City has dumped and compacted fill dirt on some of the parcels and begun construction in violation of the Agreed Terms. These City actions and others are not compatible with the Agreed Terms, and the City did not get approval from FEMA and/or IDHS beforehand "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint. Any harm suffered by the City is the result of the City's decision to build the stadium without prior approval, as required by the Agreed Terms.

**Defendants' Counter Claim for
Breach of Contract, Declaratory and Injunctive Relief**

57. The City of Kokomo's construction of the stadium on some or all of the 8 Parcels and without approval from FEMA and/or IDHS "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint, is a breach of and in violation of the State Local Agreement and the deed restrictions attached as Exhibits 1 through 9 to the Complaint.

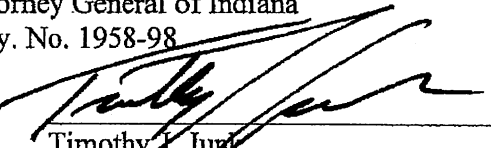
58. As per the attached letter dated February 25, 2015, the Federal Emergency Management Agency has declared Kokomo's stadium project to be a violation of the FEMA State Agreement, the State Local Agreement and deed restrictions, and is withholding \$6,156,066 of Hazard Mitigation Grants for projects throughout Indiana pending Kokomo's compliance with the State Local Agreement and the deed restrictions. See Ex. A.

59. The City of Kokomo's construction on some or all of the 8 Parcels without approval from FEMA and/or IDHS "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint, has caused the State to lose the immediate benefits of more than \$6,156,066 of FEMA's Hazard Mitigation Grants throughout Indiana, and the loss of future FEMA hazard mitigation grants as well.

Wherefore, the Director and the Indiana Department of Homeland Security request that this Court deny Kokomo's requests for relief and instead (1) declare that Kokomo's construction of a stadium on some or all of the 8 Parcels without approval from FEMA and/or IDHS "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint, is a breach of contract and violation of the Agreed Terms, (2) enjoin Kokomo from any further construction on the 8 Parcels without approval from FEMA and/or IDHS "in writing prior to the commencement of construction," as required by Exhibits 1 through 9 of the Complaint, (3) order Kokomo to remove any construction and fill dirt placed on the 8 Parcels in violation of the Agreed Terms, and (4) for all other appropriate relief.

Respectfully submitted,

GREGORY F. ZOELLER
Attorney General of Indiana
Atty. No. 1958-98

By: 

Timothy J. Jurek
Deputy Attorney General
Atty. No. 5587-02

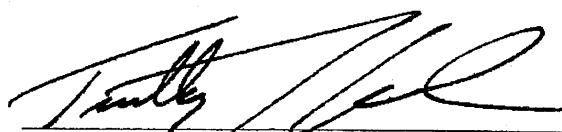
Office of the Attorney General
Indiana Government Center South -- 5th Floor
302 West Washington Street
Indianapolis, Indiana 46204
Telephone: (317) 232-6247
Facsimile: (317) 232-7979

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served upon counsels of record by United States Mail, first-class, postage pre-paid this 12th day of March, 2015 at the following address:

Matthew B. Barr
Timothy A. Haley
Barnes & Thornburgh, LLP
11 South Meridian Street
Indianapolis, IN 46204

Beth A. Garrison
Corporation Counsel
City of Kokomo
100 South Union Street
Kokomo, IN 46901



Timothy J. Junk, Deputy Attorney General



FEMA

February 25, 2015

Mr. David Kane, Executive Director
Indiana Department of Homeland Security
Indiana Government Center South
302 West Washington Street
Indianapolis, IN 46204-2767

Re: City of Kokomo Municipal Stadium Project

Dear Director Kane:

The purpose of this letter is to inform you that FEMA is taking enforcement action against the City of Kokomo and the State of Indiana as a result of the City's continuing violation of the open space requirements attached to the parcels of land it acquired with Hazard Mitigation Grant Program (HMGP) funding and on which it is currently constructing the Kokomo Municipal Baseball Stadium (the Stadium).

As you know, the City of Kokomo is required by statute and regulation to maintain the properties acquired under HMGP as open space. This requirement is also recorded in the deeds for the properties at issue. By letter dated November 24, 2014, you notified the City of specific violations and gave the City 60 days to bring the properties into compliance. The City has failed to remedy the violations. As a result, pursuant to its authority under 44 C.F.R. § 80.19(e), FEMA will withhold from the State of Indiana and the City of Kokomo all FEMA mitigation awards or assistance as long as the properties at issue remain in violation of the open space requirements.

In addition, pursuant to 42 U.S.C. § 5170c(b)(2)(B)(iii), 44 C.F.R. § 80.5(a)(6), 44 C.F.R. § 80.19 (a)(4), and 44 C.F.R. § 206.434(e)(1)(iii), and as stated in the deed restrictions, no disaster assistance from any Federal source for any purpose related to the property may be sought or provided. With regard to FEMA, we will not provide any disaster assistance, flood insurance claims payments, or any other FEMA assistance for the Stadium as long as the use of the properties at issue remains in violation of the open space requirements.

If you or the City choose to appeal this determination, please follow the procedures outlined in 44 C.F.R. § 206.440. Should you have questions, please have your staff contact Christine Stack, Region V Mitigation Division Director at 312-408-5570 or christine.stack@fema.dhs.gov.

Sincerely,

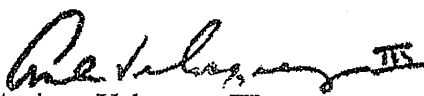

Andrew Velasquez III
Regional Administrator

EXHIBIT
www.fema.gov

A