
OPINION OF THE PUBLIC ACCESS COUNSELOR

MARY AND JARED FANSLER,
Complainant,

v.

STEUBEN COUNTY BOARD OF ZONING APPEALS,
Respondent.

Formal Complaint No.
17-FC-211

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Stueben County Board of Zoning Appeals (“BZA”) violated the Open Door Law¹ (“ODL”). The BZA responded to the complaint through County Attorney Donald J. Stuckey. In accordance with Indiana Code section 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on September 1, 2017.

¹ Ind. Code §§ 5-14-1.5-1 to -8.

BACKGROUND

Jared and Mary Fansler (“Complainants”) allege that the Steuben County Board of Zoning Appeals violated the Open Door Law (“ODL”) by accepting the vote of a board member outside of a public meeting.

The Fanslers submitted a variance petition to the BZA for the construction of a residential home on property they own in the county. On August 17, 2017, the BZA held a public hearing on the petition. At the hearing, four of the five BZA members were present and voted on the Fanslers’ petition. The vote was split 2-2.

The next day, the BZA accepted a written Member Voting Form from the absentee member denying the Complainant’s petition. The Fanslers argue this is a violation of the Open Door Law.

In its response, the BZA argues that it announced at the hearing on August 17, that the remaining single board member would review the tape recording of BZA hearing in the office of the plan director the next day and that anyone wishing to attend the review could do so.

ANALYSIS

At issue in this complaint is whether an individual BZA member—outside of a public hearing—may take final action under the Open Door Law (“ODL”).

The purpose of the Open Door Law is to ensure that the official action of public agencies be conducted and taken

openly so that the general public may be fully informed. *See* Ind. Code § 5-14-1.5-1. The provisions of the ODL are to be liberally construed in order to give effect to the legislature's intention and carry out its policy. *Id.*

At the heart of the ODL is the requirement that all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. Ind. Code § 5-14-1.5-3(a). The limited exceptions to the general rule of openness are provided in section 6.1 of the ODL.

In this case, there is no dispute that ODL applies to the BZA and the August 17, 2017 public hearing. The parties disagree as to whether the BZA violated the ODL by permitting a single member of the board to take final action—a vote on Fanslers' variance petition—the day after the public hearing in the office of the county plan director.

Under the ODL, a *final action* must be taken at a meeting open to the public. Ind. Code § 5-14-1.5-6.1(c). The ODL defines *final action* as:

A *vote* by the *governing body* on any motion, proposal, resolution, rule, regulation, ordinance or order.

Ind. Code § 5-14-1.5-2(g)(emphasis added). The ODL defines a *governing body* of a public agency as two (2) or more individuals who are:

(1) A public agency that: (A) is a board, a commission, an authority, a council, a committee, a body,

or other entity; and (B) takes official action on public business.

(2) The board, commission, council, or other body of a public agency which takes official action upon public business.

(3) Any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated. An agent or agents appointed by the governing body to conduct collective bargaining on behalf of the governing body does not constitute a governing body for purposes of this chapter.

Ind. Code § 5-14-1.5-2 (b)(emphasis added). Therefore, the five-member BZA is a governing body under the ODL.

In other words, *final action* in this case amounts to a vote by the BZA on the Fanslers' variance petition; and therefore, the vote must occur at a meeting open to the public.

Here, the BZA expressly admits in its response that the fifth member of the board—who was absent from the public hearing the previous day—“voted in the negative and the Fanslers were denied their variance.” Even so, final action is defined as a vote by the *governing body*. Undoubtedly, the BZA is a governing body under the ODL. Yet, an individual member of the BZA is not, and cannot be a governing body. That means, one member of the BZA cannot take final action—i.e., vote on variance petition—because final action can only

be taken by a governing body at a meeting open to the public.

The ODL requires final action be taken at a meeting open to the public. The ODL expressly defines *meeting* as:

A gathering of a majority of the governing body of a public agency for the purpose of taking official action upon public business.

Ind. Code § 5-14-1.5-2(c). The BZA is comprised of five members, so at least three of them must gather with the intent of taking official action on public business to constitute a meeting. Based on the evidence submitted to this office, there is no indication that a majority of the BZA gathered to take official action on public business. Rather, there is only evidence that a single member of the BZA voted on the Fanslers' variance petition the day after the public hearing on the matter.

The BZA argues that it announced at the public hearing on August 17, 2017 that the remaining single BZA member would review the tape recording of the public hearing in the office of the county plan director the next day to make a decision on the matter and advised anyone wishing to attend could do so. This argument is unpersuasive that a meeting open to the public occurred. It matters not if a hearing or meeting is reconvened and open to the public, it must be in a public meeting *as defined* by the ODL. A lone BZA member in the county plan director's office reviewing a recording and voting on an issue is not a meeting open to the public as contemplated by the ODL.

Everything in the Open Door Law contemplates official action being taken as a collective by the public agency's governing body. Action taken individually or in a vacuum is not authorized by law. Since the BZA took final action outside of a public meeting, the vote should not have counted. Toward that end, the BZA should be mindful that judicial remedies are available for a policy, decision, or final action taken by a public agency in violation of the Open Door Law. *See* Ind. Code § 5-14-1.5-7.

The BZA should have either truly reconvened the meeting in accordance with Indiana Code section 5-14-1.5-5 with a majority, or tabled the vote until 48 hours additional notice could have been given.

CONCLUSION

Based on the foregoing, it is the Opinion of the Public Access Counselor the Steuben County Board of Zoning Appeals violated the Open Door Law.

A handwritten signature in black ink, appearing to read 'LH Britt', written in a cursive style.

Luke H. Britt
Public Access Counselor