
OPINION OF THE PUBLIC ACCESS COUNSELOR

LISA G. FLETTER,
Complainant,

v.

LAGRANGE COUNTY BD. OF ZONING APPEALS,
Respondent.

Formal Complaint No.
20-FC-109

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the LaGrange County Board of Zoning Appeals violated the Open Door Law.¹ Attorney Dustin Glick filed an answer on behalf of the board. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on August 10, 2020.

¹ Ind. Code § 5-14-1.5-1-8.

BACKGROUND

This case involves a dispute alleging the LaGrange County Board of Zoning Appeals (BZA) violated the Open Door Law (ODL) by improperly restricting access to a public meeting.

On July 21, 2020, the BZA met in regular session, which included several public hearings to consider different land use variance petitions including one to operate a commercial dog breeding facility. The BZA convened the meeting in the commissioners' room at the county office building.

Although the meeting room can reportedly hold 150 people, the BZA limited the number of people in the room as a result of the COVID-19 health emergency and the resulting guidance from the CDC, the governor's office, and other health officials.

On August 10, 2020, Lisa G. Fletter (Complainant) filed a formal complaint alleging the BZA's violated the ODL.

Specifically, Fletter contends that deputies from the LaGrange County Sheriff's Department inappropriately prevented her and several other people from accessing the meeting. Fletter says she asked to be allowed into the meeting but law enforcement told her that she would not be allowed to enter in order to comply with the CDC guidance related to COVID-19.

Even though the BZA allowed representatives for both the petitioners as well as opponents into the meeting, Fletter argues the BZA allowed more supporters of the variance into the meeting while forcing opponents of the dog breed-

ing facility to stay outside. Fletter says she spoke with members of the BZA about possibly rotating people in and out of the meeting room so that more people could safely attend, but that did not happen.

Moreover, Fletter contends she was told that she would be welcomed, time permitting, to speak during the meeting, but that also did not happen. She also alleges that the people who did speak during the meeting never signed the provided attendance sheet; and thus, there is no written record of the speakers.

Furthermore, Fletter argues that the matter discussed during the meeting should not be considered essential business critical to the operation of the governmental agency, which is the standard let by the Governor Holcomb's Executive Order 20-09.

On September 15, 2020, the BZA filed a response to the complaint. In sum, the BZA argues that all of the actions taken before and during the July 21, 2020 meeting, including reducing the number of attendees physically present in the meeting room, were in accordance with state and local guidance related to large gatherings.

The BZA contends that the restrictions were put in place out of an abundance of caution to ensure the safety of everyone attending the meeting due to the COVID-19 pandemic. Additionally, the BZA asserts that when deciding who was allowed to be present in the meeting room, it gave first priority to any petitioners on the agenda, their legal representatives, any adjacent or surrounding landowners that would be most affected by any of the scheduled variance hearings, and any media outlets on hand to report on the meeting.

The BZA asserts that once all essential individuals were present in the meeting room, there was little room left for other members of the public if social distancing measures were to be met. The board says this is why so many people were not allowed to attend the meeting in person.

As for the sign-in sheet, the BZA acknowledges that even though it provided a sign-in sheet for those speaking at the meeting, none of the speakers signed the sheet. The board attributes this oversight to the chaos of the evening.

The BZA also disputes Fletter's assertion that its decision to hear the variance was inappropriate. The BZA argues that the variance in question had already been postponed due to COVID-19, and that the work of the board, including hearing land use variance petitions, is essential for the county and allows for the continued growth and development of the community and surrounding industries.

The BZA contends that its actions during the July 21, 2020 meeting, were all precautionary measures deemed necessary to protect the health and well-being of all those attending the meeting due to the COVID-19 virus.

ANALYSIS

1. The Open Door Law

The Open Door Law (ODL) requires public agencies to conduct and take official action openly, unless otherwise expressly provided by statute, so the people may be fully informed. Ind. Code § 5-14-1.5-1. As a result, the ODL requires all meetings of the governing bodies of public agencies to be open at all times to allow members of the public to

observe and record the proceedings. *See* Ind. Code § 5-14-1.5-3(a).

LaGrange County is a public agency for purposes of the ODL; and thus, subject to the law's requirements. Ind. Code § 5-14-1.5-2. The LaGrange County Board of Zoning Appeals (BZA) is a governing body of the county for purposes of the ODL. *See* Ind. Code § 5-14-1.5-2(b). As a result, unless an exception applies, all meetings of the BZA must be open at all times to allow members of the public to observe and record.

1.1 Meeting

Under the ODL, a meeting is “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). “Official action” means to: (1) receive information; (2) deliberate; (3) make recommendations; (4) establish policy; (5) make decisions; or (6) take final action. Ind. Code § 5-14-1.5-2(d).

Moreover, “public business” means “any function upon which the public agency is empowered or authorized to take official action.” Ind. Code § 5-14-1.5-2(e).

1.2 Public hearings and essential government functions

Notably, procedures of public hearings fall statutorily outside of the scope of this office. While meetings are under its purview, the public access counselor's enabling statute does not expressly grant jurisdiction over hearings. That stated, by definition, most hearings are also meetings, but not all meetings are hearings.

In any case, this office is often asked by various governmental units (including municipalities, counties and state regulatory agencies) to make determinations as to hearing procedures because they are so closely related to meeting functions and the Open Door Law.

And so it is in this case. This office was tasked, early during the COVID-19 crisis, to be the point agency for providing guidance as to government gatherings. It continues to serve in that role. This office issued guidance on the agency's website on March 23, 2020, which served to answer frequently asked questions, give governance advice, and attempt to provide tips on navigating public meetings during a pandemic.

One of the first items for consideration was the "essential business" limitation found in Governor Holcomb's Executive Order 20-08, commonly referred to as the "Stay-at-Home" order. While that order limited essential business to services "needed to ensure the continuing operation of government agencies" or to support public health, it also provided some discretion to local authorities to decide essentiality.

If this office had been asked in April or May whether a county BZA's consideration of a land use variance for a dog breeding operation qualified as essential, it likely would have answered no. Here, it appears the county agreed because the BZA postponed the hearing for a number of months.

In any case, once the stay-at-home orders were lifted and public meetings began to resume, so too did the easing of

the strict definition of essential government operations. By July, it would have been appropriate to address the issue.

1.3 Safety measures for public meetings and hearings

What does continue at the time of this writing are the health and safety measures addressed in those early executive orders and those cited in prior PAC guidance.

Social distancing, masks, and limited crowd size are all considerations to be taken seriously when hosting and attending public meetings. It became apparent that, in some cases, public attendees would be turned away at public meetings for capacity purposes when government units began resuming in-person meetings.

A solution proposed by this office was a hybrid approach of virtual real-time broadcast of the meeting coupled with the physical observation of those members of the public safely allowed in the meeting room. It is unclear if that was the case here, however, the meeting was at least recorded and available at a later date.

In any event, what should be implicit in these considerations in terms of access is that the room with a smaller capacity cannot be purposefully stacked with proponents or opponents of a particular measure. Admission should be nondiscriminatory. For that matter, crowd size should not be packed with government officials either.

Fletter alludes to more proponents of the variance being allowed in, however, this office cannot confirm that. The BZA denies the allegation.

All of these considerations apply equally to hearings and meetings.

An additional nuance to hearings, however, is the requirement that the public often has a right to appear and provide comment in support or opposition to a measure. This is not the case for regular meetings. This poses a logistical challenge to boards who need to balance public safety with due process rights of those who are entitled to weigh-in on an action. For example, if the hearing was held under Indiana Code section 36-7-4-920, multiple parties could have standing to provide argument in support or favor of a land use variance.

To the extent that affected parties were unable to attend and participate, it could possibly be construed as a defect in the hearing proceedings.

1.4 Meeting location

To remedy some of these issues, often the solution is to find the largest meeting venue available so that as many members of the public can safely attend.

An example often cited by this office is the city of Carmel's consideration of an Islamic life center development within city limits. That issue generated a considerable amount of public interest. Toward that end, the city moved the hearing from the usual location to the local center for performing arts and its 1600 seat Palladium concert hall. It accommodated some 1200 hearing attendees, who were all provided a short time to speak during a public comment period. They turned a potential disastrous situation into a meeting that

allowed the greatest amount of access under the circumstances.

Since LaGrange County is a more rural county in northern Indiana, it may not have a venue of that size available on short notice. But it most likely does have a high school gymnasium, outdoor amphitheater, or other location to accommodate more than just a handful of people safely.

This is not to say the BZA did not consider these solutions or rule them out for practicality's sake, but extraordinary times do call for commensurate measures. This office's recommendation, in lieu of live broadcast, would be to move to a larger location.

In the end, nothing in the materials provided, or information gathered by this office, indicates any malintent on the part of the BZA. This pandemic has presented a steep learning curve and everyone still has lessons to learn.

Whether any deficiencies in the hearing process or procedure were so injurious to the public is a matter best left to judicial review. However, based on the allegations presented, without more, the Open Door Law was not violated.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the LaGrange County Board of Zoning Appeals did not violate 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