
OPINION OF THE PUBLIC ACCESS COUNSELOR

DEREK S. COLLINS,
Complainant,

v.

POSEY COUNTY BOARD OF ZONING APPEALS,
Respondent.

Formal Complaint No.
22-FC-45

Luke H. Britt
Public Access Counselor

This advisory opinion is in response a formal complaint alleging that the Posey County Board of Zoning Appeals violated the Open Door Law.¹ Attorney Beth McFadin Higgins 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 March 28, 2022.

¹ Ind. Code § 5-14-1.5-1-8.

BACKGROUND

In this case we consider whether a county board of zoning appeals complied with the Open Door Law (ODL) when the board decided to appeal the final judgment of a trial court without a public meeting.

On January 25, 2022, the Posey Superior Court ordered the Posey County Board of Zoning Appeals (BZA) to grant a variance to Derek Collins (Complainant) regarding a residential architectural issue.

At some point after the court's ruling, the BZA made the decision to appeal the judgment. Collins argues that no public meeting took place between the court's decision on January 25, 2022, and the BZA's filing of the appeal on February 22, 2022. As a result, on March 21, 2022, Collins filed a formal complaint with this office alleging the BZA violated the Open Door Law.

The BZA disputes Collins' claim. The board argues that it held an executive session to discuss litigation strategy on February 10, 2022. The BZA contends that it provided proper public notice for executive session by February 1. Although the notice of appeal was filed on February 22, 2022, the BZA asserts that it ratified the filing at its regularly scheduled meeting on March 10.

Moreover, the BZA contends the filing of the appeal did not require final action, for purposes of the Open Door Law, before filing and no final action was taken at the executive session on February 10, 2022.

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).

Posey County is a public agency for purposes of the ODL; and thus, is subject to the law's requirements. Ind. Code § 5-14-1.5-2. Moreover, the Posey County Board of Zoning Appeals (BZA) is a governing body of the agency; and thus, subject to 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 ODL definitions

Under the ODL, "meeting" means "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). Notably, 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). The ODL also mandates a governing body to take all final action at public meeting. *See* Ind. Code § 5-14-1.5-6.1(c). Additionally, “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).

Under the ODL, the term “executive session” means “a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose.” Ind. Code § 5-14-1.5-2(f).

There exists a heightened requirement for executive session notice and for good reason. While the law allows some latitude to a governing body to meet behind closed doors, the public in turn is entitled to specific notice as to why.

The ODL requires public notice of executive sessions to state the subject matter by specific reference to the enumerated instance or instances for which executive sessions may be held under subsection (b). Ind. Code § 5-14-1.5-6.1(d). Subsection (b), of course, lists the specific subject matters that are authorized for an executive session.

Notably, final action cannot be taken at even a properly noticed executive session and must be taken at a meeting open to the public. *See* Ind. Code § 5-14-6.1(c).

2. Final action

The crux of this dispute is whether final action (i.e., a vote by the board) is necessary for the BZA to appeal the final judgment of a trial court or whether that decision can be made in executive session.

It is true that the ODL authorizes a governing body to hold an executive session for discussion of litigation strategy.² Within those strategy discussions, it seems practical that a governing body can make some decisions regarding the direction of a lawsuit. Neither the ODL nor this office is interested in micromanaging or interfering with litigation proceedings.

It is also true that “final action” is somewhat ambiguously defined as “a vote by the governing body on any motion, proposal, resolution, rule, regulation, ordinance, or order.”³ The law does not, however, enumerate every subject matter requiring one of these actions as a condition precedent to legitimacy.

Even so, the legislature intends to adopt meaningful statutes and not nullities.⁴ Therefore, its intention to affirmatively reserve final action for public meetings must mean *something*.

Here, not every pleading, trial motion, or discovery request requires final action (i.e., a vote by the board) in public. That would surely be impractical and overly burdensome. But to initiate or extend litigation past some sort of objective inflection point is a different matter altogether.

When the Posey Superior Court issued the judgment in favor of Collins, it finalized that phase of proceedings. Appealing and extending the litigation, however, would subject the taxpayers to additional litigation costs mutually exclusive from the trial court proceedings. This is true even if

² Ind. Code § 5-14-1.5-6.1(b)(2)(B).

³ Ind. Code § 5-14-1.5-2(g).

⁴ *Anton v. Davis*, 656 N.E.2d 1180 (Ind. Ct. App. 1995)

county-appropriated money remained within the BZA's budget and an attorney was hired to see the litigation through to its conclusion. Still, nothing in the information provided—which includes the attorney's letter of engagement—appears to give the attorney absolute independent decision-making authority during the course of litigation, far less the authority to appeal a trial court judgment.

If we are to give meaning and weight to “final action,” it should be applied for those decisions that warrant public scrutiny. A BZA's decision to continue litigation into the appellate courts is one of those decisions.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Posey County Board of Zoning Appeals violated the Open Door Law by taking final action outside of a public meeting.



Luke H. Britt
Public Access Counselor

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