

On April 20, 2021, Governor Eric Holcomb signed Public Law 88-2021 (House Enrolled Act 1437), which became effective upon signature. In short, these additions and amendments to the Open Door Law clarified the procedures for virtual meetings and remote participation for members of governing bodies. Moreover, the governor rescinded the executive orders assisting governing bodies in navigating the pandemic on May 11, 2021,¹ in light of the passage of these laws.

This compendium is intended to supplement the law and provide interpretive guidance by the public access counselor (PAC) on the effects of the new law. It bears mentioning that all materials provided by the PAC seeks to liberally construe the access laws to meet the intent of the legislature of an open government and an informed public. Furthermore, the new law does not grant license to any governing body to hold entirely electronic meetings without a statutorily declared emergency.

1. Virtual meetings by local government

Under the prior version of the Open Door Law, members of governing bodies of local government units could participate in discussions of meetings remotely, but could not be counted present or take part in final action. The revised version amends Indiana Code section 5-14-1.5-3.5 to afford local board members the ability to participate in a manner aligned more closely with their state counterparts pursuant to Indiana Code section 5-14-1.5-3.6. There are some key differences between those statutes, however, which will be referenced herein.

Local governing body members can now utilize electronic means of communication to be considered present and participate in final actions pursuant to Indiana Code section 5-14-1.5-3.5(a) without the declaration of a public health emergency subject to the following requirements:

- The lynchpin to electronic participation by local governing body members is the physical presence of at least 50% of *sitting* board members, i.e. total membership of the board at the time of the meeting. Ind. Code §5-14-1.5-3.5(g). If less than 50% cannot attend in-person, the meeting must be canceled or postponed. This is an important fail-safe to ensure transparency.
- Another key consideration for remote participation is the requirement that the off-site participant can be seen and heard by the public in order to vote. Ind. Code § 5-14-1.5-3.5(a). While “seen and heard” is not defined by the statute, it stands to reason that the ability of the public to meaningfully observe the remote member is not compromised. A reasonably-sized monitor or screen should be set up at the meeting location visually depicting the off-site individual (this does not necessarily mean the public has access to the virtual platform used – only observation thereof). Likewise, the remote member should be amplified to a reasonable degree consistent with other present board members. If a board or member lacks the technological

¹ Executive Order 21-13.

wherewithal to accomplish this, remote voting is prohibited and participation is limited to discussion only.

- Should the remote board member not have access to technology allowing them to be seen, they can still participate in discussion but cannot be considered to be present or participate in any final action.
- Similarly, the statute contemplates technological failures. In these cases, the meeting does not have to adjourn, but can continue with the members physically present. Ind. Code § 5-14-1.5-3.5(c). Nonetheless, agencies should strive for reasonable technical fidelity. *Intentional or blatantly negligent technological failures - whether expressly or circumstantially inferred – may be ripe for a complaint to the PAC and, by extension, a civil action in the local circuit or superior court.*
- The ratification of a policy setting parameters around virtual meetings is mandatory for electronic participation. Ind. Code § 5-14-1.5-3.5(d). This policy *may* include all or any the following at the discretion of the governing body:
 - Limitations on the number of members participating remotely (*remember that at least 50% on-site attendance is always required*).
 - Limiting the number of meetings in a calendar year held by electronic means.
 - Requiring a member to notify the presiding officer of remote participation within a specified time.
- Additional memoranda are required to satisfy minutes requirements. Ind. Code § 5-14-1.5-3.5(e):
 - Noting each member physically present, each absent, and each participating remotely.
 - Identifying the method/platform by which the remote member participated (FaceTime; Zoom; etc.)
 - Identifying the method/platform by which the public observed the meeting (broadcast on social media, the Internet or television; Zoom; etc.). The public's observation must be in real-time simultaneous with the meeting itself. Meetings do not have to be recorded.
- All votes must be taken by roll call. Ind. Code § 5-14-1.5-3.5(f).
- An individual member cannot participate remotely by electronic means in more than half of the governing body's meetings annually unless the member's physical absence is due to the reasons enumerated in Indiana Code section 5-14-1.5-3.5(h). *This should largely be self-policed at the local level by the presiding officer of the governing body although the PAC will field complaints for any abuses of this provision.*

- There are important limitations in the type of votes that can be cast remotely. The following final actions must only be taken in person:
 - o (1) adopt a budget; (2) make a reduction in personnel; (3) initiate a referendum; (4) establish or increase a fee; (5) establish or increase a penalty; (6) use the governing body's eminent domain authority; or (7) establish, raise, or renew a tax.

- While a member is limited to participating electronically in two consecutive meetings only, they may extend consecutive meetings if their physical presence is precluded by military service, illness or medical conditions, death of a relative, or an emergency threatening life or limb. Ind. Code § 5-14-1.5-3.5(j). *Again, these provisions should be monitored locally although the PAC will provide guidance on an as-needed basis.*

2. Virtual meetings for State governing bodies

State governing bodies have previously enjoyed the statutory benefit of remote meetings pursuant to Indiana Code section 5-14-1.5-3.6. The only amendment affecting these state boards is the exclusion of the 50% physical presence requirements for those boards whose membership is statutorily comprised of a majority of persons with disabilities. *See* Ind. Code § 5-14-1.5-3.6(d).

3. Virtual meetings during a public health emergency

An entirely new section 3.7 was added to the Open Door Law, which is triggered by the declaration by the governor or an authorized local official of a disaster emergency such as a public health crisis. At the time of this writing, the statewide public health emergency remained in place.

In these rare instances, Indiana Code section 5-14-1.5-3.7 usurps section 3.5 and 3.6 and the entirety of a governing body may participate remotely with the following requirements:

- The public must simultaneously observe the meetings. All of the practical requirements noted above remain in place as to reasonable technological fidelity.
- Memoranda must identify the platforms used and the members who participated electronically.
- All votes are to be taken by roll call.
- Based on local and state health orders and caps on gathering size, whether to allow a physical audience is at the discretion of the governing body. As with any meeting, the public must be notified of the date, time, and location of the meeting 48 hours in advance. *If the meeting is electronic for the public, the location requirement should include either a link to the meeting or information as to how to acquire that link. This process should be consistent and conspicuous.*

Miscellaneous tips:

These provisions do not apply to executive sessions. Because final actions cannot be conducted at executive sessions 50% of membership is required to be physically present anyway, remote participation by the remainder is appropriate.

While practicality and public safety are paramount, governing bodies should continue to be mindful of any practice that might substantively hinder the public's access to meetings.