
OPINION OF THE PUBLIC ACCESS COUNSELOR

JIM BRUGH,
Complainant,

v.

CASS CNTY. COUNCIL & CASS CNTY. REDEV.
COMM'N,
Respondent.

Formal Complaint No.
20-FC-48

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Cass County Council (“Council”) and the Cass County Redevelopment Commission violated the Open Door Law.¹ County attorney Jeffrey D. Stanton filed an answer on behalf of the county. 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 April 13, 2020.

¹ Ind. Code § 5-14-1.5-1-8.

BACKGROUND

This case involves a dispute about a meeting allegedly held to address nonessential items during the COVID-19 pandemic.²

Attorney Jim Brugh (Complainant) notes that in March 2020, and in response to the COVID-19 outbreak, Governor Holcomb signed a series of executive orders to help prevent spread of the disease. Executive order 20-04 mandated that all public business considered by local government be limited to essential matters critical to the operations of government. This office released guidance suggesting all meetings addressing nonessential matters be postponed or cancelled.

On March 20, 2020, however, the Cass County Council adopted Resolution 20-02, which issued up to \$52,000,000 in revenue bonds.

Brugh also correctly notes that on March 23, 2020, Governor Holcomb clarified the term “essential government functions” in Executive order 20-08. It defines the term as:

all services provided by the State of Indiana or any municipality, township, county, political subdivision, board, commission or agency of government and needed to ensure the continuing operation of government agencies or to provide for or support the health, safety and welfare of

² This opinion considers temporary executive orders in effect in March 2020, which have not been codified. Any analysis and holding is strictly between these parties and regarding these specific facts.

the public, and including contractors performing Essential Governmental Functions.

While Brugh objected to the March 20 meeting as nonessential, the Cass County Redevelopment Commission published notice on April 3, 2020, for an April 15 meeting to consider a TIF district designation for a controversial zinc reclamation plant.

As a result, Brugh filed his complaint on April 7, 2020.

The Cass County Council responded on May 15, 2020, addressing the March 20 meeting in particular. It argues first that the adoption of the Resolution did not require a public meeting. Additionally, it contends that economic development is an essential government function and the resolution was time-sensitive. Furthermore, the resolution does not approve the actual bonding for a particular project, it merely opens the door to the possibility.

The council also notes that the April 15, 2020 meeting was ultimately cancelled.

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).

Cass 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 Cass County Council (Council) and the Cass County Redevelopment Commission (RDC) are governing bodies of the Cass 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 Council and RDC 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 Brugh’s complaint & the March 20 meeting

Brugh takes exception to both the March 20 meeting as non-essential and the April 15 meeting, which was still pending at the time of the filing of the complaint.³

While the governor’s executive orders are binding and have the force of law, they give some latitude to local government as to how to handle their business.

One of the most frequent questions posed to this office during the pandemic is the determination of what is critical and essential and what is not. The answer always hinged on a case-by-case analysis of the facts. While essentiality is defined in the executive orders, there is room for subjective interpretation. This office, like all other statutes, considers statutory interpretation of the access laws – and any other related authority - consistent with Indiana Code section 5-14-3-1: liberally in favor of transparency.

With that in mind, this office has also interpreted essential government functions in a manner that limits those activities to public health and safety during the pandemic. Toward that end, a significant amount of relaxation of statutory deadlines, administrative rules, and agency-imposed regulations were extended by the State.

³ The complaint references the public’s inability to comment, but has not provided any authority as to either governing body’s statutory obligation to allow comment.

For example, the Open Door Law was temporarily amended to allow local government units to utilize technology to hold meetings. While in some cases this led to increased access – tech-savvy constituents could observe public business safely and conveniently – it also led to some growing pains and a learning curve for all involved.

One of the downsides to virtual meetings is that it allows government to conduct its business physically removed from the public. There is simply no substitute for looking a person in the eye when raising their taxes, spending their money, or imposing a regulation. Hence the restriction to essential business only.

These were the arguments made by those, including the complainant, who contacted us seeking assistance in enforcing the executive orders consistent with the ODL.

Even so, at the time of the March 20, 2020 meeting, Executive Order 20-08 – which defines essential government functions explicitly – had not been released. While Cass County would eventually become a hotspot, it had not yet been identified as such.

Thus, we do not take particular umbrage to the March 20 meeting and its subsequent passed resolution. The matter had a significant amount of momentum already – this office had been aware of its progress for some time (including constituent consternation). While approval of the TIF district was not inevitable, the preliminary groundwork, such as Resolution 20-02 were more so a foregone conclusion. It was old business at that point.

1.3 The April 15, 2020 meeting

By April 3, however, the consideration of moving forward should have been postponed. Undoubtedly, to some, economic development is an essential government function during a pandemic. The Council argues it was advised by its attorneys accordingly. Even though some discretion and deference was given to local government, this office cannot fully embrace the position that economic development – particularly the awarding of subsidies to a zinc recycling plant - was critical to address in April 2020 while people were stuck in their homes fearing death and plague.

What was clear, however, was the frustration on the part of the community who felt blindsided by the meeting announcement.

While sheltering-in-place, they felt silenced by the circumstances and that their local officials were taking advantage of the pandemic in an opportunistic way by shepherding through a controversial project while the public was distracted by a public health emergency.

Even if this was not the intention of the RDC, perception is often reality in the eyes of the public. A barrage of complaints flooded this office and we took action by contacting local counsel. To their considerable credit, they were accepting of the recommendation to postpone the meeting and remove it from the calendar.

1.4 Final thoughts

As restrictions ease, so too does the stance of this office on interpreting what is essential. As the phases of Governor Holcomb’s Back on Track plan progress, more and more can be added to the items of what local government can appropriately address. This is especially so in those regions where people can safely leave their homes to attend meetings or have figured out a way to conveniently observe remotely.

Nevertheless, we do note a problematic statement in the Council’s response. It posits that a resolution does not require a public meeting.

This office cannot agree.

The Open Door Law expressly requires final action on public business to happen at a meeting open to the public. Ind. Code § 5-14-1.5-6.1(c). “Final action” means 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).

A public meeting was held and rightfully so, but we caution the council on this point.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the Cass County Council and Redevelopment Commission did not violate the Open Door Law.

A handwritten signature in black ink, appearing to read 'LHB', is positioned to the right of the conclusion text.

Luke H. Britt
Public Access Counselor