
OPINION OF THE PUBLIC ACCESS COUNSELOR

SAMANTHA DEWESTER,
Complainant,

v.

MARION COUNTY METRO. DEV. COMM'N,
Respondent.

Formal Complaint No.
21-FC-154

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Marion County Metropolitan Development Commission violated the Open Door Law.¹ Assistant Corporation Counsel, Thomas Moore, filed an answer on behalf of the commission. 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 September 23, 2021.

¹ Ind. Code § 5-14-1.5-1 to -8.

BACKGROUND

In this case we consider whether a local development commission acted in accordance with the Open Door Law (ODL) when acting on a rezoning proposal.

On August 18, 2021, the Marion County Metropolitan Development Commission (MDC) met and unanimously voted, after receiving testimony, to deny variance and zoning proposals. The MDC denied the petition in question, which involved rezoning a portion of north College Avenue to include an affordable housing development. The MDC forwarded the recommendation to the Indianapolis City-County Council (Council) for ratification, which the Council called down for a vote on September 27, 2021.

Before the ratification vote, in a memo dated September 15, the MDC reversed course and sent a recommendation to the Council to approve the petition. At the September 27 meeting, the City-County Council approved the MDC's revised recommendation.

As a result, Samantha DeWester (Complainant) filed a formal complaint with this office on September 23, 2021. In sum, DeWester claims the entire process violated the Open Door Law.

More specifically, DeWester concludes this was a result of an offline, private conversation between an individual city-county councilor advocating for the project and the MDC.

For its part, the MDC argues it held meetings on September 15, 2021, subsequently changed its recommendation, drafted the memo, and followed procedure to send it to the Council for vote. It maintains that it held no private meetings as a

collective body. Instead, the Administrator of Current Planning for the Department of Metropolitan Development informed the MDC that an individual councilor wanted to MDC to send the Council its reasoning behind its vote on the proposal. One of the MDC's commissioners had the memo already drafted. It was circulated among the Commissioners at the September 15 meetings and was subsequently sent to the Council.

Notably, according to DeWester, the September 15 meeting notice and meetings have not been provided to her.

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).

The City of Indianapolis and Marion County are public agencies for purposes of the ODL; and thus, its governing bodies are subject to the law's requirements. Ind. Code § 5-14-1.5-2. As such, the Metropolitan Development Commission of Marion County (MDC) is a governing body 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 MDC 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).

2. Rezoning hearings

While this office is not a regulatory agency for public hearings required by Indiana Code, the Open Door Law intersects with hearings. While not all meetings are hearings, hearings conducted by governing bodies are meetings.

Indiana Code section 36-7-4-604(a) requires a public hearing to consider rezoning ordinances before sending them to the Council for ratification. Subsequent sections also mandate published notice of such hearings and individualized notice to interested parties with detailed information given in each instance.

Although final action (i.e., a vote) is necessary to certify the recommendation to the Council, the MDC is an advisory

board; and thus, it is not necessarily required to issue findings supporting its decisions.²

Even so, because of the detailed notice and hearing requirements, it stands to reason that all due process rights and transparency obligations for the process would be satisfied at the initial hearing. To consider the matter further at a subsequent regular meeting would be completely dismissive of the legislature's intent of a fully vetted public hearing of a plan commission.

To be sure, once a legislative body receives those recommendations, regardless of content, it only has to "consider" them.³ Councils are not intended to be rubber stamps for the underlying plan commission.

This opinion is not a commentary on the final action by the Council, but rather the way the recommendations of the MDC came before it.

Even if the September 15 MDC meeting and its "pre-meeting" were properly noticed and held openly, those interested parties with due process rights under the planning code had no reasonable notice that overturning the previous vote was on the table. While they could have discussed the matter, arguably a do-over of the public hearing is required before recanting the recommendation.

Moreover, it appears as if the matter was discussed beforehand as a memo backpedaling the decision had already been

² *Hills v. Area Plan Commission of Vermillion County*, 416 N.E.2d 456 (Ind.App.1981).

³ Ind. Code § 36-7-4-605(d).

crafted by an MDC member. The seemingly passive acquiescence by the rest of the board during the September 15 meeting may not be proof positive that they were lobbied behind closed doors, but it raises certain inferences.

In any event, all the activities involving a majority of the MDC taking official action on public business require public notice and minutes under the ODL.

CONCLUSION

While this office cannot make a conclusion as to the procedure and protocol of the hearing and the due process rights

of individual thereby affected, it can make a determination that the meeting portion of the timeline raises significant questions of compliance.

Based on the information provided, the MDC violated the spirit, if not the letter, of the Open Door Law.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor