

Legal Questions about Municipal Procedures during COVID-1 Emergency

1. Public Meetings / Open Door Law

When a public body holds a meeting, whether it be the council, board of works, redevelopment commission, etc., local units of government must adhere to the *Open Door Law*. Indiana Code 5-14-1.5-1 provides that all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. Under normal circumstances, a member of a governing body for a local unit of government can only participate electronically in a meeting for discussion purposes only. The member may not be counted as present for purposes of establishing a quorum and he or she may not vote.

During this time of emergency, however, Governor Holcomb, issued Executive Order 20-04, which allows governing bodies of local units to access IC 5-14-1.5-3.6 which normally is only accessible to state agencies, charter schools and airport authorities. The Executive Order allows local governing bodies to use the electronic meeting provisions in section 3.6 without having to adopt a policy on electronic meetings first. Posting of the notice of the public meeting 48 hours in advance can also be done by electronic means.

Additionally, the Governor issued Executive Order 20-09 on March 23rd which modified further the previous Executive Order 20-04. This order permits a local governing body to hold electronic meetings via teleconference or video conference *without* the requirement of having a public meeting location, as long as the public and media can also access the electronic meeting. All members of the governing body participating electronically may be counted as present for the meeting for purposes of establishing a quorum and may take final action. Roll call votes are required and minutes of the meeting must be kept.

2. Public Hearings

Public hearings are separate from public meetings. Public hearings are specifically called for in certain statutes, when for example, a fee or penalty will be implemented, when certain ordinances are passed, when certain permits are issued (i.e. such as land use permits). The Executive Orders only addressed public meetings, but not public hearings, however, public hearings are held in conjunction with public meetings. While allowing the public to attend a meeting is a matter regarding the Open Door Law, giving the public an opportunity to be heard is a matter of due process.

A public meeting should be properly noticed under the Open Door Law. If a hearing is also to be part of that meeting, the procedures to follow are the ones set out in the particular statute for that matter. The notification requirements for a public hearing required in a statute usually direct that the notice requirements in IC 5-3-1 be followed.

Here are some steps you should consider in order to afford public notice and the opportunity to comment in conjunction with an electronic meeting:

- 1) Follow the public hearing requirements in statute as closely as possible. (i.e. you still need to publish in the newspaper, send notice to the press, etc.)
- 2) Before the crisis, the public would have had the opportunity to show up and make comments in front of the body and hear the discussion, so how can you still make this

happen electronically without requiring the member of the public to show up in person (if you require the person to show up in order to make comment, you are also requiring them to violate the stay at home order). Providing a call-in number to make comments during the meeting is the best option because almost everyone has access to a phone. If possible, you can *also* allow them to watch/hear the meeting live through zoom, Webex, or conference call, etc.

- 3) The call-in number, access to watch info should be published in the newspaper as part of the public notice of the hearing
- 4) In addition, you can allow the public to submit written comments before (and even after the hearing assuming the body does not immediately vote).

3. Cancelling / Rescheduling Public Meetings

During the emergency, the Governor has advised that public meetings (which now can be conducted via teleconference or video conference), should only be held to handle “essential” governmental matters. Defining “essential” is a decision for the local governing body.

There is no requirement to give notice when a meeting cancelled, however, the Indiana Public Access Counselor has advised that it a courtesy to inform the public if a meeting is indeed cancelled and it can be done by electronic means.

Under current statute, meetings (not including executive sessions) can be reconvened if there is an announcement of the date, time, and place of the reconvened meeting made at the original meeting and recorded in the memoranda and minutes thereof, and there is no change in the agenda (see IC 5-14-1.5-5).

4. Following Procedures / Conducting Everyday Business

IC 10-14-3-17(j)(5) allows political subdivisions to waive procedures and formalities otherwise required by law pertaining to: the performance of public work, entering into contracts, incurring of obligations, employment of permanent and temporary workers, use of volunteers, rental of equipment, purchase and distribution of supplies, materials and facilities and appropriation and expenditure of public funds. Indeed, the Governor’s emergency was declared under IC 10-14-3-12 as stated in Executive Order 20-02. While the statute provides broad authority for political subdivisions to act in times of a disaster emergency, we encourage you to discuss the matter with your attorney as to whether it is reasonable to circumvent all procedures and formalities or whether the governing body can continue to comply using certain modifications (such as holding electronic meetings). Keep in mind that we do not yet know what transparency measures the federal government may require in order for a political subdivision to receive federal reimbursements.

5. Depositing Public Funds

IC 5-13-6-1 governs the procedure for deposit of public funds. Executive Order 20-09, however, allows local government units to reduce deposits to no less than twice weekly provided that on intervening days any funds are properly secured and subject to adequate internal controls.

6. Approval of Claims

Indiana Code 5-11-10 governs the claim approval process. The State Board of Accounts, however, has stated in its directive 2020-1 that it will not take audit exception if the governing body chooses to allow one of its members to approve claims for payment in advance of board allowance, as long as the board allows those claims at its first meeting after the public health emergency has ended. As an alternative, for those units of government which have statutory authority to adopt an ordinance for the preapproved payment of claims, the board may provide written approval to the fiscal officer to pay certain claims during the public health emergency. The board must allow those claims at its first meeting after the emergency has ended.

7. Employee Telework Policy / Ghost Employment

The CDC's Guidance for Preparing Workplaces for Covid-19, <https://www.osha.gov/Publications/OSHA3990.pdf>, urges employers to minimize contact between workers, clients and customers by replacing face-to-face meetings with virtual communications and implementing telework, if feasible. Of course, not all types of employees can work from home, but for those who can, the CDC recommends it. Development of a work-from-home policy including work expectations (such as hours or availability) and documentation should be clearly communicated to employees who are permitted to work from home.

8. Safety Precautions for Essential Workers

For those workers who must continue to be present at the workplace, the CDC encourages that employers take several safety precautions. Implement engineering controls, such as increasing air flow in the workplace, changing air filters and making use of drive-through windows. Implement administrative controls such as requiring sick workers to stay home, reworking shifts to minimize the number of workers present at one time, discontinuing non-essential travel, developing communications plans and training. As for safe work practices, the CDC recommends providing resources that promote personal hygiene, such as making available tissues, hand sanitizer, and no-touch trash cans. Require regular handwashing and post handwashing signs. Also, provide personal protective equipment (gloves, masks, etc.) to those employees based on the hazard to the worker. For more information, see the CDC's Guidance for Preparing Workplaces for Covid-19, <https://www.osha.gov/Publications/OSHA3990.pdf>.

9. Authority to Close Food/Drink Establishments

No local authority is required to close restaurants, bars and nightclubs. This has already been done by state mandate under the Governor's Executive Order 20-04. Under the Order, restaurant, bars and nightclubs and other establishments that provide in-person dining services are required to close to in-person patrons through March 31, 2020. The establishments are still permitted to provide drive-thru, take-out and delivery services. Additionally, Executive Order 20-11 allows for carryout consumption of alcohol.

10. Enforcement of Emergency Provisions

Under IC 10-14-3-24, the law enforcement authorities of the state and of the political subdivisions are required to enforce the orders, rules and regulations made under the chapter. In addition, Executive Order 20-09 provides that the Indiana Alcohol Tobacco Commission (ATC) has the

authority to take all available administrative and enforcement actions, including suspension or revocation of an alcoholic beverage permit if an establishment refuses to abide by the in-person dining prohibition.

11. Declaration of a Local Disaster Emergency

The principal executive officer of a political subdivision may declare a local disaster emergency for seven days. The declared emergency may continue beyond seven days with the consent of the governing board of the political subdivision. The order declaring an emergency shall be given prompt and general publicity and shall be filed promptly in the office of the clerk of the political subdivision. The effect of a declaration of a disaster emergency is to activate the response and recovery aspects of all applicable local or interjurisdictional disaster emergency plans and authorize the furnishing of aid and assistance under the plans. Utility workers, rail workers maintaining a safe rail system or public emergency individuals may not be restricted from traveling on public highways within the political subdivision. (See IC 10-14-3-29).

12. Local Travel Advisories

Under IC 10-14-3-29.5, the principal executive officer of a political subdivision may issue one of three levels of travel advisories. The lowest level, "Advisory," means routine travel or activities may be restricted in certain areas. The mid-level, "Watch," means only essential travel is recommended. The highest level, "Warning," can only be implemented in conjunction with the declaration of a local disaster emergency under section 29 and means that travel may be restricted to emergency management workers only.

13. Shelter in Place

On March 23rd, the Governor issued Executive Order 20-08 calling for "Shelter in Place." All individuals living in Indiana are required to stay home unless leaving home meets a listed exception. All non-essential business operations must cease. Gatherings of ten or more people are prohibited. Travel is limited to only essential activities. If you must leave home for essential activities, essential governmental functions or essential business operations, you are to maintain a distance of at least six feet from any other person with the exception for family or household members.

Essential Activities include matters of health and safety, to obtain necessary supplies and services, to engage in outdoor activity such as walking, hiking, running or biking, to take care of others, or to seek medical care. Individuals may leave their homes to work for or seek services from human services providers such as long-term care facilities, day care centers, day care homes, and places that care for individuals with physical, intellectual or developmental disabilities or the needy. Individuals may leave home in order to provide services or perform work for essential infrastructure, such as food production/distribution, construction, building management, airport operation, maintenance of utilities and telecommunications. Any governmental worker who supports essential business operations is also excepted such as law enforcement, emergency personnel, legislators, court personnel, and child protection personnel. **Each governmental body shall determine its essential governmental functions and the identify employees and/or contractors necessary to the performance of those functions.** Essential business that may continue include stores that sell groceries and medicine, laundry services, restaurants for consumption off-premises (alcohol may now be carried out), suppliers of items needed to work

from home, manufacturers and suppliers of essential products, transportation providers, home based care providers, residential facility employees, and those providing professional services (legal, accounting, insurance and real estate), hotel workers, and funeral service providers.

14. Family First Coronavirus Medical Leave Act

On March 18, President Trump signed into law, the Families First Coronavirus Response Act (FFCRA). The Act applies to cities and towns as employers and provides employees with paid leave entitlements. The provisions of the Act will apply from April 1, 2020 through December 31, 2020. As part of the requirements of the Act, you must post an *Employee Rights* poster. (It would also be a good idea to send out a link to the poster via email to employees as well). Below is further information that we hope you find helpful:

- Link to Employee Rights poster: https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf
- Q&A about how/where to display the poster: <https://www.dol.gov/agencies/whd/pandemic/ffcra-poster-questions>
- Q&A about the FFCRA: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- Link to the Act: <https://www.congress.gov/116/bills/hr6201/BILLS-116hr6201enr.pdf>