

A Public Hearing Practice Paper

Public Hearings

During

COVID-19 Public Health Emergency

Members of the Indiana Municipal Lawyers Association have collaborated to provide this document for your consideration in holding Public Hearings while the COVID-19 Emergency Orders are in effect or as long as we are allowed to have remote meetings and hearings to lower the spread of COVID-19. We would like to thank the Public Access Counselor and Department of Local Government Finance for guidance documents they posted as well as all who shared documents.

Background

Stay at Home

On March 23, 2020, the Governor issued [Executive Order 20-08](#) ordering all individuals living in Indiana are required to stay at home unless leaving home meets a listed exception, and for all non-essential business operations to cease. Since that time the order has been extended in duration and amended to provide more protective measures and clarification of existing provisions, but the fundamental elements remain as of the date of this writing, having been most recently embodied in [Executive Order 20-22](#), issued April 20, 2020.

Other major elements of EO-22 include:

- Gatherings of ten or more people are prohibited in all cases, no exemptions except for certain health care and government employees performing certain functions.
- Travel is limited to only essential activities.

- Social Distancing: Space at least six feet from any other person with the exception for family or household members, cover coughs and sneezes, wash hands, use hand sanitizer

Essential Governmental Functions

While each governmental body is to determine its essential governmental functions and identify essential employees and contractors necessary to the performance of those functions, they should nonetheless fit the definition of Essential Governmental Functions, which is services provided by a government that are

- needed
 - to ensure the continuing operation of government agencies, or
 - to provide for or support the health, safety and welfare of the public

Essential Governmental Functions are included within, and thus subject to the terms and limitations of, “Essential Business Operations”. They are thus one of the permitted reasons for leaving one’s home.

Under normal circumstances, one of the functions of public agencies is generally to conduct meetings of governing bodies whereby decisions are made and actions are taken on public business. However, [Executive Order 20-04](#) states:

Public meetings conducted pursuant to [the Open Door Law] should be **limited to only essential matters critical to the operations** of the governmental agency or entity for the duration of this public health emergency[.]

(Emphasis added, Executive Order 20-04, Sec. 5).

Agencies are challenged to decide not only how to have their public meetings and hearings—before they even reach that question, they should consider whether to have the meeting or hearing.

In considering whether and how to hold a public meeting or a public hearing under the Executive Orders, ask:

1. Will the meeting occur in a physical space with two or more people present?
 - a. If yes, then see no. 2 below.
 - b. If no, and all participants are conferenced in using technology, skip no. 2 because purely electronic meetings need not be limited to essential functions, as they don't require anyone to leave home.
2. Does the agenda contain only essential items?
 - a. If there are none, either postpone the meeting or hold it entirely by virtual participation.
 - b. If there are some essential items, keep only those, and then people (including government workers and members of the public and news media) are allowed to leave their homes to attend, but social distancing must be enforced.

If your governing body will not cease to function without the meeting or hearing, don't have it unless it's completely electronic.

Practice Tip: Build a record on why this public meeting or public hearing is "essential".

Public Meetings

Under Indiana's Open Door Law, 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, and public notice of the meeting must comply with certain requirements, most notably timing the notice no less than 48 hours prior to the scheduled meeting.

The Executive Orders have now allowed public meetings of both state and local governing bodies to occur entirely remotely via telephone or video conferencing or similar means, without the governing body first enacting a rule to allow it. And posting of the 48-hour advance notice of the public meeting may now be accomplished by electronic means. There is no change to the requirements for notification to news media that have requested notice, and the statute already allows that notice to be conveyed via email.

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 including record of how each member voted on each matter.

Public Hearings

Public hearings are a specific type of public meeting, and they frequently are part of a public meeting. Public hearings should comply with both the Open Door Law requirements and the due process (public notice and hearing) requirements set forth in the specific statutes and ordinances governing such hearings. The [Executive Orders issued so far](#) have made no changes to the statutory requirements for holding public hearings.

Like other public meetings, public hearings may now be conducted by virtual means. **The difference is that the public has a right to participate, not just observe and record.** This most typically involves petitioners for, and remonstrators against, such actions as permits, variances, rezoning, and similar matters where notice is given pursuant to IC 5-3-1 by advance publication of legal advertisements in a newspaper, as well as by other means as required by statute or the governing bodies depending on the circumstance,

rather than the very limited and comparatively short notice required under the Open Door Law.

When a statute requires a public hearing prior to a governing body taking action, especially where findings of fact must be prepared to explain the action as in a Board of Zoning Appeals hearing, the body should provide for some method for the public to provide comment remotely.

The public hearing notice should explain that the hearing will be conducted electronically as permitted under [Executive Order 20-09](#) and include instructions for how to access the electronic meeting, such as via phone or internet and how such comments will be made. This includes verbal comments using WebEx, Zoom, or other means and perhaps written comments by mail or email including the time period for those comments.

These matters may be governed by statute or ordinance, and provisions for holding a virtual meeting electronically should hew as closely as possible to those requirements. Sometimes the statutes require different types of participation depending on the specific board or commission. For example, in the case of rezoning petitions, written objections must be filed with the secretary of the APC prior to the hearing in order to be considered¹; conversely, whereas with a variance, objections or other information intended to influence the decision of the BZA must not be communicated to the BZA by anyone other than the staff prior to the hearing².

¹ See IC § 36-7-4-604(b)(6)

² See IC § 36-7-4-920(g).

Providing Due Process While Maintaining Orderly Electronic Public Hearings

Before the public health crisis, the public would have had the opportunity to show up and say what they wanted to in front of the body, and hear the discussion of the members. The challenge during the public health emergency is how to make this happen electronically without requiring the member of the public to show up in person (if you require the person to show up to make comment, you are forcing them to violate the stay at home order and opening the door for the person to get sick) but also without losing control of the meeting.

There are certainly meeting software applications out there for purchase. Bloomington, we understand uses Zoom. Greenwood and Indianapolis/Marion County use WebEx. There are others. (The Aim website has an [article video conferencing software](#).) You must know how these systems work. You must train those staff and the members of the governing body involved in the public meeting and public hearing as to how it will work, especially if it is a due process public hearing, and definitely if it is a quasi-judicial public hearing.

But beyond the features of the technology that may allow for some degree of control of the meeting, Rules of Procedure specific to virtual meetings should be developed and disseminated as discussed below. If something goes awry, this will help establish some degree of informed consent, and in case extraordinary action must be taken that might impair someone's right to speak (or continue speaking more), it is important to comment on the record that the rules are being violated in a particular way, preferably with progressive measures.

Practice Tips:

- Remember that not all members of the public have a computer. Most will have access to a phone, so providing alternative access via phone is important and should be described in the meeting notice.
- Any and all members of a governing body may participate remotely in a public hearing, even via phone calls or computer apps such as Zoom, Webex or others.

- Know the limitations of the system you are using so you know what to do if someone joins your meeting without a valid purpose of the meeting or in violation of the rules.
- Public hearings should be livestreamed or broadcast on the local government's website or social media page, but remember to archive the recordings, which must be kept as public records.
- The staff of the governing body should be allowed to accept public comments submitted via email or text message, *before or during* the hearing, consistent with the statutes, rules, and ordinances governing the regular live meetings. Whether to accept written comments or materials after the hearing is perhaps more problematic but may be useful.
- Members of the governing body should duly consider comments submitted remotely in accordance with procedural rules, the meeting minutes should reflect that comments were received from remote participants, and record should be kept of the comments received.

If you choose to conduct the meeting in a physical space, with or without concurrent virtual participation:

- All "public gatherings" – which would include a public hearing or meeting – must still be limited to no more than 10 persons, meaning no more than 10 people in a physical space, including agency staff, members of the governing body, and even facility support personnel if present; all must be counted, not just the petitioners, remonstrators, speakers, members of the public or news media.
- Prioritize news media when limiting the number of persons present in the room.
- All persons who are physically present in the hearing room should observe social distancing.

- Members of the public should be informed at the beginning of the hearing that they can observe the proceedings on their phones or computers and transmit their comments via phone or computer.
- Make accommodations for a staging area outside the room but preferably within earshot or even with a view of the proceedings, and rotate people in and out when they are speaking and when they are finished, if possible. Just remember even that staging area cannot accommodate more than 10 people at a time.
- When all spaces are at capacity, turn away anyone else who arrives at the venue in person and inform them about how to instead participate remotely in the hearing.
- ADA compliance is not waived under the Emergency Orders

Rules of Procedure

Develop a set of procedural rules as to how the public meeting or public hearing (or both) will be conducted, so as to provide meaningful participation but reasonably orderly proceedings. These rules should be available to the public in advance.

Rules on Presentation Materials:

The notices the petitioners send to interested parties as well as the legal ad published in the newspaper should include reference to a separate notice on the agency's website home page setting forth procedures and a deadline for submitting documents, photos or other exhibits to display during presentations or comments. The separate notice on the website should provide that all materials to be displayed must be timely submitted, and will be under the control of a staff member at the hearing.

If you will accept written comments after the public hearing, the hearing notice (or the separate notice on the website) should indicate a deadline for submission, and the governing body should have time to consider those before taking final action at a public hearing.

In practice:

- The meeting Host would grant "Presenter" status to the staff member who is running the display for materials such as photos, PowerPoint presentations, etc.
- A deadline of close of business the day before the hearing may allow staff enough time to view the proposed materials and have them ready to display on the screen while the person is speaking. But this should be evaluated based on staff schedules and availability, the number of petitions, the nature or complexity of individual petitions, etc.
- While some platforms allow participants to "show desktop", i.e., to take over the video display and show whatever they want (which may be legitimate or may be inappropriate such as pornography), and the host can also designate anyone as a "presenter", allowing the person to do the same, it is recommended that all materials to be displayed at the hearing be submitted in advance as described above, and either the host or the designated "presenter" (presumably a staff person) will be responsible for displaying the material on the screen.
- It is also important to ensure, both when scheduling the meeting and when conducting it, that the appropriate settings are selected as to permissions given or denied depending on the status of the participant (host, presenter, or participant).

Rules on Speaking During the Hearing:

Inform the participants that their audio will be muted upon entering the virtual hearing space, and that they should remain muted and not attempt to "unmute" their audio lines. Inform them of a mechanism to request to be heard, such as by activating the "chat" or "raise hand" features if available.

Urge all persons permitted to speak that they should avoid simply repeating concerns others have expressed.

In practice:

- Only the host should unmute people, preferably one at a time.
- The exception would be the board members, whom the Host would unmute and ask that they control their own microphones like they already do in meetings, where they turn them on to comment or ask questions and then turn them back off when finished. Board members can be advised of this prior to the meeting.
- It would be helpful to encourage Board members to observe decorum and ask the chair for permission before commenting or asking questions so as to avoid people talking over each other, which impairs the record of the hearing and creates confusion.
- When a matter is called up, the Host should unmute the staff member's mic to read the staff field report and any other information, then "recognize" and unmute the petitioner's mic to make a presentation and take questions from the board.
- Once the petitioner is finished, the Host would mute the petitioner's mic, and have remonstrators identify themselves using either the "raise hand" feature or the chat feature or both. The Host will then "recognize" and individually open each remonstrator's mic one at a time and close it when they are finished.

Rules on Enforcing Order / Avoiding Chaos Generally:

Provide for the possibility that those participating using electronic means may violate the rules, so a provision such as this would be appropriate:

Discourteous, disorderly or contemptuous conduct shall be regarded as a breach of the privileges of the Board and shall be dealt with as the Board directs.

In practice:

- Be aware that even if the Host mutes everyone, all participants—including those with no host or presenter status—are able to unmute

themselves. Just re-mute them, but be ready to admonish repeat offenders. WebEx does provide the option for the host to “expel” someone from a meeting, but this option should be used most judiciously, if at all, and only after making a record of the reasons.

Samples

Examples of virtual hearing notices and other related documents have been gathered for your consideration and will be located on the Aim website along with this Public Hearing Practice Paper.

Disclaimer: The above Paper and related documents on the website are not intended as legal advice and are not a substitute for obtaining individualized legal advice. Users are advised that all materials must be updated and adapted to local needs and circumstances. Use of these materials is at the sole risk of the user.