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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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KEVIN PAUL,  
*Complainant,*

v.

CARMEL BOARD OF ZONING APPEALS,  
*Respondent.*

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Formal Complaint No.  
21-FC-74(expedited)

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Luke H. Britt  
Public Access Counselor

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This advisory opinion is in response to a formal complaint alleging the Carmel Board of Zoning Appeals violated the Open Door Law.<sup>1</sup> Attorney Paul G. Reis filed an answer on behalf of the BZA. 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 June 10, 2021.

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<sup>1</sup> Ind. Code § 5-14-1.5-1-8.

## BACKGROUND

In this case we consider the narrow issue of whether the adoption of written findings of fact by a municipal board of zoning appeals constitutes final action for purposes of the Open Door Law (ODL); and thus, must take place at a public meeting.

On April 26, 2021, the Carmel Board of Zoning Appeals (BZA) held a public hearing to consider a use variance petition and other matters. At the conclusion of the hearing, the BZA voted to deny Tomahawk Holdings LLC's petition for a use variance. On May 4, Tomahawk filed a petition for judicial review. Two weeks later, during a hearing in the case, Tomahawk received written findings of fact from the BZA's attorney explaining the denial of the use variance petition.

As a result, on June 10, 2021, Kevin Paul<sup>2</sup> (Complainant) filed a formal complaint with this office alleging the BZA violated the Open Door Law by taking official action and final action on public business without a public meeting. Paul requested expedited status in accordance with 62 IAC 1-1-3, which this office granted.

Specifically, Paul argues the BZA did not vote to adopt written findings of fact at a public meeting. Paul asserts that the BZA neither adopted written findings at the conclusion of the public hearing on April 26 nor at a subsequent public meeting. Paul asserts that he received the written findings

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<sup>2</sup> Paul is the owner and operator of Tomahawk Holdings LLC, The Greatest of All Taverns, LLC d/b/a The GOAT, and Danny Boy Beer Works, LLC.

of fact concerning his company's petition for judicial review during a hearing on pending motion in the case on May 18, 2021. Paul asserts that the BZA's counsel indicated the board signed the findings of fact on either May 12 or May 14, 2021. Paul argues there is no record of a BZA meeting on those dates or any vote by the BZA on the findings.

On June 17, 2021, the BZA filed an answer to Paul's formal complaint denying any violation of the Open Door Law. The BZA argues that it took final action on the use variance petition at a public meeting in accordance with the ODL.

Additionally, the BZA contends that Paul's complaint is misguided because it is not required to enter its written findings of fact at a public meeting. More specifically, the BZA argues that the approval of the written findings of fact by each member of the board in support of the vote by individual email and communication with the BZA's lawyer does not constitute a public meeting or a vote by the BZA.

## **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 Carmel is a public agency for purposes of the ODL; and thus, is subject to the law's requirements. Ind.

Code § 5-14-1.5-2. Moreover, the Carmel Board of Zoning Appeals (BZA) 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 BZA 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).

It is also worth mentioning another statute applicable to BZAs, which provides that “[a]ction of the board of zoning appeals is not official, unless it is authorized by a majority of the entire membership of the board.” Ind. Code § 36-7-4-911.

## 2. Paul's claims

### 2.1 Open Door Law violation

The crux of the dispute is whether the BZA's adoption of written findings of fact in the underlying use variance petition constitutes final action under the Open Door Law.

Paul argues the Open Door Law requires the BZA to adopt its written findings of fact at a public meeting, which the BZA did not do. Conversely, the BZA argues that neither Indiana law nor its rules of procedure require the adoption of written findings in a public meeting.

As an initial matter, it is important for this office to acknowledge that this opinion is limited to whether the BZA's adoption of written findings of fact constitutes final action for purposes of the Open Door Law.

Based on the information presented and the applicable statutes, this office concludes that the BZA's adoption of written findings of fact constitutes final action for purposes of the ODL; and thus, the adoption of written findings of fact must happen at public meeting.

Indeed, a BZA is required by statute to issue written findings of fact in all cases heard by it. Ind. Code § 36-7-4-915. Additionally, as set forth *supra*, an action of the BZA is not official, unless it is authorized by a majority of the entire membership of the board. *See* Ind. Code § 36-7-4-911.

Since the BZA is required by statute to both adopt written findings of fact and act as a majority for its actions to be official, at least three of the five members must approve the

written findings of fact. The Open Door Law expressly requires final action, (i.e., a vote) to occur at a public meeting. *See* Ind. Code § 5-14-1.5-6.1(c).

### **2.1 Individual email exchanges are not a meeting**

The BZA argues that approving written findings of fact individually by email and communication with its legal counsel does not constitute a meeting or a vote under the Open Door Law.

As a general matter, this office agrees that individual email exchanges between a board member and legal counsel does not constitute a majority gathering that requires a public meeting under the Open Door Law. That analysis changes when the communication exchanged rises to the level of final action in the aggregate.

At the same time, this office has consistently cautioned governing bodies against using group email exchanges, messaging applications, or other means of gathering simultaneously for addressing public business to avoid running into potential ODL violations. This is especially true with the advent of platforms that allow virtual meetings.

Although this is not an exact standard, the more simultaneous the interaction is between the majority of members of a governing body, the more likely the gathering is a meeting for purposes of the ODL and must be open to the public.

Here, the BZA argues that it approved the written findings of fact by email and individual communication with its legal counsel; and thus, it was not a meeting under the ODL.

If the BZA establishes that fact, the exchanges likely do not amount to a majority gathering under the Open Door Law. Even so, the inquiry does not end there.

### **2.3 Voting by email is final action under the ODL**

The Open Door Law expressly requires final action, (i.e., a vote) to occur at a public meeting. *See* Ind. Code § 5-14-1.5-6.1(c). The parties disagree about whether the BZA's adoption of written findings of fact amount to final action for purposes of the Open Door Law.

The BZA's argues that its adoption of written findings of fact by email or individual communication with its legal counsel is not a vote for purposes of the Open Door Law.

This office cannot agree.

As set forth above, the relevant zoning code requires a BZA, for its actions to be official, to act as a majority. In other words, the zoning code both requires written findings of fact and authorization by a majority of the entire membership of the BZA, and the ODL requires a final action by a majority to happen at public meeting.

The BZA relies, in part, on *Town of Darmstadt v. CWK Invs.-Hillsdale,<sup>3</sup> LLC* to support its argument that the entry of written findings of fact does not constitute official action under the ODL.

This office cannot agree because that case did not involve the Open Door Law. Instead, in *Town of Darmstadt*, the

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<sup>3</sup> 114 N.E.3d 11 (Ind. Ct. App. 2018).

court examined, among other things, the procedural requirements and timeline for filing a petition for judicial review of a zoning decision.

It is true that the *Town of Darmstadt* court observed that “[t]he findings of fact, while essential to judicial review, are not a separate, appealable decision of the board.” *Id.* at 17.

Although the *Town of Darmstadt* holding recognizes that a BZA’s entry of written findings of fact is not a separate decision for purposes of triggering a petitioner’s right to initiate judicial review of a zoning decision, the case does not address the Open Door Law.

Here, it is undisputed that the BZA did not adopt written findings of fact at the conclusion of the hearing where it denied the use variance petition. The parties also do not dispute that the BZA did not adopt its written findings at a subsequent public meeting. Essentially, the BZA argues the law does not require it to do so.

This office concludes that the Open Door Law does require the BZA to adopt its written findings at a public meeting.<sup>4</sup>

Indeed, our courts recognize that a BZA is not required to adopt written findings of fact contemporaneously with the zoning decision. *McBride v. Bd. of Zoning Appeals of Evansville-Vanderburgh Area Plan Comm’n*, 579 N.E.2d 1312, 1316

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<sup>4</sup> Incidentally, this approach is also recommended by the Indiana Chapter of the American Planning Association. See Citizens Planner Guide, Chapter 2, Pg. 33. <http://indianaplanning.org/wp-content/uploads/2012/12/FINAL-CitizenPlannersGuide-3.20.17-Ch.2-BZABasics.pdf>



(Ind. Ct. App. 1991); *Habig v. Harker* 447 N.E.2d 1114, 1117 (Ind. Ct. App. 1983).

Even though the BZA is not required to adopt written findings of fact at the hearing when it makes the zoning decision, the Open Door Law requires adoption of the findings at a public meeting because it constitutes final action for purposes of the ODL.

Here, the parties do not dispute that Paul received the BZA's written findings of fact during a hearing on a motion related to his company's petition for judicial review of the zoning decision. Paul contends that counsel for the BZA indicated the board adopted the written findings sometime between May 12 and May 14.

The BZA did not hold a public meeting on or between those dates, which bolsters Paul's argument that the BZA—acting as a majority—adopted the findings without a public meeting.

The best practice going forward, from a public access perspective, is for the BZA to adopt its written findings of fact at a public meeting either at the time of the zoning decision—which is not required by law—or at a later public meeting. This approach avoids any potential tension with the Open Door Law while still adhering to the zoning code and the BZA's rules of procedure.

This office is convinced that a Board of Zoning Appeals can, and must, comply with all applicable provisions of the law. Final action for purposes of the Open Door Law is distin-

guishable from a final zoning decision for purposes of initiating judicial review because the application and meaning are broader.

Stated differently, a BZA is capable of taking final action under the Open Door Law without making a final appealable zoning decision that is eligible for judicial review. The Open Door Law requires final action to take place at a public meeting.

In this case, the BZA's adoption of written findings of fact is an illustrative example because the zoning code requires both the written findings and approval by a majority of the BZA. At the same time, the Open Door Law requires a public meeting when the majority of a governing body takes final action on public business.

### **CONCLUSION**

Based on the foregoing, it is the opinion of this office that the Carmel Board of Zoning Appeals violated the Open Door Law by taking final action for purposes of the ODL without a public meeting.



Luke H. Britt  
Public Access Counselor