

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT,
WILL COUNTY, ILLINOIS

BISHOP STEVEN EVANS,)	
MARGIE CEPON,)	
CHARLES WILLIAMS,)	
DENNIS O'CONNOR,)	20-CH-526
)	
Plaintiffs,)	
)	
v.)	
)	
CITY OF JOLIET,)	
)	
Defendant.)	

ORDER

This matter is before the Court on Plaintiffs' Emergency Motion for a Temporary Restraining Order prohibiting the City of Joliet from holding a special City Council meeting regarding the adoption of a pre-annexation agreement. The pre-annexation agreement is related to the proposed NorthPoint development. The Court takes judicial notice (because it is common knowledge in Will County) that NorthPoint is a proposed warehouse, distribution, and manufacturing development that is exceptionally controversial. Public meetings regarding the development have had hundreds, if not thousands, of people in attendance.

According to the Verified Complaint, on April 8, 2020, the City announced the special meeting scheduled for April 13, 2020 (today) at 5:30PM. At 10:54AM today, plaintiffs filed their Verified Complaint and motion for a TRO. At 12:04PM, the Court received it. The Court conducted a hearing by conference call at 2PM, with a court reporter participating in the call. The call ended around 2:30PM.

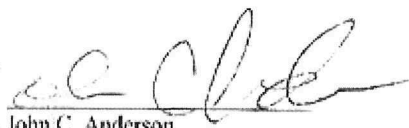
There are two primary arguments raised by Plaintiffs. First, they argue that the meeting is not "necessary" to be held today. During the conference call, plaintiffs' counsel basically acknowledged that, given the COVID-19 crisis and the intense public interest of the matter, it may not be possible to hold an in-person meeting on this issue for many, many months. The City counters that it has discretion to determine what issues justify a "necessity." The Court finds that the City does not have unfettered discretion to determine "necessity" in this context, but it is certainly entitled to reasonable deference. Generally speaking, it would be judicial activism for this Court to tell Joliet what is, and is not, important to Joliet. That is (again, generally speaking) for Joliet's elected officials to decide. Moreover, Plaintiffs argue that the City "has not shown" necessity—but Plaintiff bears the burden here.

Second, Plaintiffs argue that Joliet has not provided the public with a sufficiently meaningful way to participate in the meeting. However, the City announced the meeting five days ago, and is permitting the public to comment by telephone and email. The meeting will be shown live on public access television, on the City's website, and through social media. It will also be recorded and available on the City's website after the meeting. It may be true that persons without access to cable television, telephone, and internet will not have an opportunity to participate. However, that is a relatively small segment of the population, and the law requires only a *reasonable* opportunity to participate. The City has complied with that obligation.

The Court was not born yesterday. Having this meeting in the way the City has decided is shady and does a disservice to the public. But that does not make it illegal. At the end of the day, Plaintiffs have simply not met their burden of justifying the extraordinary remedy of a TRO. Indeed, they have established neither a violation of the Open Meetings Act nor the elements necessary for injunctive relief. The emergency motion for a TRO is denied. A copy of this Order is emailed to all counsel of record. Status is set for July 2, 2020, at 9AM. All other dates are stricken.

ENTERED:

Date: April 13, 2020
Time: 3:35PM


John C. Anderson
Circuit Judge

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**PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

At issue in this motion is whether the Joliet City Council can proceed with a vote today at 5:30 p.m. on a controversial land annexation issue at a meeting that does not comply with the Open Meetings Act. Because the vote is not "necessary" as contemplated by the Governor's Executive Orders on OMA, and because the procedures City of Joliet intends to follow do not result in a meeting that will be "reasonably accessible," the meeting should be enjoined and rescheduled for such time as it can be conducted in the ordinary course, or at least at such time as the vote is truly "necessary" and can be conducted under procedures that ensure reasonable accessibility under the circumstances.

I. THE RELEVANT FACTS

Plaintiffs refer the Court to their Verified Complaint for the relevant facts. In short, however, City of Joliet intends to vote at 5:30 p.m. today on a resolution at a meeting that does not allow for normal attendance by the public, is not "necessary" under the Governor's Executive Orders, and is not "reasonably accessible" under the circumstances.

II. LEGAL STANDARDS

Under the Open Meetings Act, “All meetings of public bodies shall be open to the public unless excepted in subsection (c) and closed in accordance with Section 2a.” 5 ILCS 120/1. Section 2.01 states that “[a]ll meetings required by this Act to be public shall be held at specified times and places which are convenient and open to the public.” 5 ILCS 120/2.01. To be open, meetings must allow for “reasonable accessibility.” *Gerwin v. Livingston Cty. Bd.*, 345 Ill. App. 3d 352, 362 (2003). OMA makes clear that “the provisions for exceptions to the open meeting requirements shall be strictly construed against closed meetings.” 5 ILCS 120/1; *see also Illinois News Broadcasters Ass’n v. City of Springfield*, 22 Ill. App. 3d 226, 228 (1974).

OMA also makes clear that “any person” can bring a suit not only to challenge a prior violation and seek to have actions taken at an improper meeting declared null and void, but also “where there is probable cause to believe that the provisions of this Act will not be complied with.” 5 ILCS 120/3. OMA Section 3(c) states: “The court, having due regard for orderly administration and the public interest, as well as for the interests of the parties, may grant such relief as it deems appropriate, including ... granting an injunction against future violations of this Act.” 5 ILCS 120/3(c). Where, as under OMA, “injunctive relief is expressly authorized by statute,” there is no need to prove irreparable harm or the absence of an adequate remedy at law. *Roxana Cmty. Unit Sch. Dist. No. 1 v. WRB Ref., LP*, 2012 IL App (4th) 120331, ¶¶ 23-26.

To secure a temporary restraining order, the moving party must show (1) a likelihood of success on the merits, (2) a protectible right, (3) irreparable harm, and (4) no adequate remedy at law. *E.g. Bartlow v. Shannon*, 399 Ill. App. 3d 560, 567 (2010).

III. ARGUMENT

The Appellate Court has defined “open” for OMA purposes as “not restricted to a particular group or category of participants.” *Gerwin v. Livingston Cty. Bd.*, 345 Ill. App. 3d 352, 358 (2003). As explained above, City of Joliet residents without internet or cable TV access are unable to watch the April 13 meeting, and because phone access is limited to people who are able to sign up online, that option is similarly unavailable. As a result, the meeting will not be “open” under OMA and should be enjoined.

Obviously, the current pandemic has made it more difficult for public bodies to hold meetings. The Governor’s Executive Order 2020-07 states:

During the duration of the Gubernatorial Disaster Proclamation, the provisions of the Open Meetings Act, 5 ILCS 120, requiring or relating to in-person attendance by members of a public body are suspended. Specifically, (1) the requirement in 5 ILCS 120/2.01 that “members of a public body must be physically present” is suspended; and (2) the conditions in 5 ILCS 120/7 limiting when remote participation is permitted are suspended. Public bodies are encouraged to postpone consideration of public business where possible. When a meeting is necessary, public bodies are encouraged to provide video, audio, and/or telephonic access to meetings to ensure members of the public may monitor the meeting, and to update their websites and social media feeds to keep the public fully apprised of any modifications to their meeting schedules or the format of their meetings due to COVID-19, as well their activities relating to COVID-19.

Exhibit A. Executive Order 2020-18 states the same. Exhibit B.

For the purposes of this Motion, Plaintiffs assume *arguendo* that the Governor has the authority to modify statutory requirements, though they do not concede this point and, if the meeting proceeds as planned, Plaintiffs reserve the right to argue in support of declaring the vote null and void, *see* 5 ILCS 120/3(c), that executive orders do not have such authority. But setting that to the side for now, the Orders do not even purport to suspend the openness requirement or permit final action to be taken in sessions that do not comply with the requirement, but suspend only the requirement that members of the public body meet in person except under the limited

circumstances otherwise allowed under OMA. And further, when “a meeting is necessary,” the Orders contemplate that public bodies will “provide video, audio, and/or telephonic access to meetings to ensure members of the public may monitor the meeting.”

The first question, then, is whether this meeting is “necessary,” such that City of Joliet can even rely on the Orders at all. City of Joliet has made no such showing thus far. This vote has nothing to do with the response to the pandemic, and there is no indication that City of Joliet residents will somehow be harmed if a vote on this controversial land deal is postponed until such time as a truly open meeting can be held and all voices can be heard.

But even if this meeting was “necessary,” the Orders contemplate video, audio, and/or telephonic access, and more importantly, the OMA statute *requires* that the meeting be “reasonably accessible” and “not restricted to a particular group or category of participants.” *Gerwin v. Livingston Cty. Bd.*, 345 Ill. App. 3d 352, 358 (2003). City of Joliet has made no effort to make the meeting accessible to people lacking cable TV or internet access because the only way to attend the meeting by phone (if that even means that people can listen to the meeting, as opposed to the phone call being used solely for providing comment) is to pre-register online and wait for a callback. And as discussed above, the Media Release, Agenda, and Online Instructions are confusing and inconsistent, which is particularly problematic given that over 15% of City of Joliet residents lack a high-school degree and nearly 28% of households speak a language other than English at home. U.S. Census Bureau Website, *available at* <https://www.census.gov/quickfacts/jolietcityillinois>.

While simply postponing the meeting is clearly the most appropriate remedy, at the very least, City of Joliet should provide the public with a conference call number and clear instructions on how to use it to listen to the meeting, and should adequately publicize this to ensure that

residents without internet access are reasonably likely to learn how they can attend. A phone number should be made available for answering questions and assisting residents, and at least a full week should be allowed between the release of instructions and the meeting to allow word to spread among residents and for technical issues to be addressed. Access to the internet should not be a prerequisite for accessing any of this information, making public comment, or observing the meeting. And if it is safe enough for members of the City Council to attend the meeting in person, arrangements should also be made for in-person attendance and comment by the public in a manner that allows for appropriate social distancing, while still providing remote access options for residents under quarantine, with vulnerable conditions, etc. *See also* Public Access Counselor, Guidance to Public Bodies on the Open Meetings Act and the Freedom of Information Act during the COVID-19 Pandemic (April 9, 2020) (attached as Exhibit C) (offering a number of suggestions for “necessary” meetings during the pandemic, including using larger rooms that allow for social distancing and “offer[ing] multiple ways for the public to access a public meeting, such as offering both a telephone number and a weblink, so that individuals who do not have internet services have an option to access the meeting”). But, again, none of this is appropriate unless the meeting is “necessary” under the Executive Orders anyway, and City of Joliet has not shown that to be the case.

That leaves the issue of remedies. In the immediate term, the court should enter a temporary restraining order prohibiting City of Joliet from voting on the resolution or discussing it at a public meeting until a hearing on Plaintiffs’ request for a preliminary injunction can be held. *See* 735 ILCS 5/11-101. While Plaintiffs have not located any case law on whether irreparable harm or inadequate remedy at law must be shown to obtain a TRO in an OMA case, case law discussed above establishes that no such showing for a preliminary injunction is required, and

there would seem to be no reason for anything different for a TRO. See *Roxana Cmty. Unit Sch. Dist. No. 1 v. WRB Ref., LP*, 2012 IL App (4th) 120331, ¶¶ 23-26.

But even if those things must be shown, it will be more complicated to unwind a vote through the null-and-void remedy once a vote has been taken than to simply delay the meeting and vote until the Court can determine whether it will violate OMA, and declaring a vote null and void requires the Court to take “due regard for orderly administration and the public interest, as well as for the interests of the parties,” 5 ILCS 120/3(c), which may substantively impact Plaintiffs’ rights if the vote has already been taken and reliance on the vote by third parties has occurred, though Plaintiffs do not concede, of course, that such a remedy would be inappropriate; the point is that it might prejudice Plaintiffs by making that analysis more complicated than it would be if the Court simply delay the meeting. Therefore, a TRO is appropriate and should be entered and preliminary injunction motion should be set for the earliest convenient date.

IV. CONCLUSION

Sadly, there have been, and will continue to be, people who take advantage of the pandemic, and sadly too, history teaches that public officials do not always operate by the letter or spirit of transparency laws. See *Better Gov’t Ass’n v. Blagojevich*, 386 Ill. App. 3d 808, 818 (2008) (“We are not surprised that governmental entities . . . generally prefer not to reveal their activities to the public. If this were not a truism, no FOIA would be needed. Our legislature enacted the FOIA in recognition that (1) blanket government secrecy does not serve the public interest and (2) transparency should be the norm, except in rare, specified circumstances. The legislature has concluded that the sunshine of public scrutiny is the best antidote to public corruption, and Illinois courts are duty-bound to enforce that policy.”). It is vitally important that the Court ensure that the provisions of the Open Meetings Act be vigorously enforced during these difficult times, and the statute and Executive Orders adequately provide for “necessary” meetings with appropriate

adjustments. Unfortunately, City of Joliet has neither shown that this meeting is "necessary" nor done all of the things it must do to ensure that this meeting, if truly "necessary," is reasonably open to the public under the circumstances.

RESPECTFULLY SUBMITTED,

/s/ Matthew V. Topic

Attorneys for Plaintiffs,
BISHOP STEVEN EVANS,
MARGIE CEPON,
CHARLES WILLIAMS,
DENNIS O'CONNOR.

Matthew Topic, ARDC # 6290922
Joshua Burday
Merrick Wayne
LOEVY & LOEVY
311 North Aberdeen, 3rd Floor
Chicago, IL 60607
312-243-5900
foia@loevy.com