



Public legislative processes and public meetings during the time of COVID-19

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All states have open meetings laws that provide for transparency in decision-making by deliberative governmental bodies. In light of public health concerns arising from the coronavirus disease 2019 (COVID-19) pandemic, many local governments have postponed meetings of their city councils, committees, boards, and commissions. Public hearings are often a statutory requirement for prerequisite to the adoption of certain ordinances, particularly those ordinances that relate to planning, zoning, and tax increment financing. In the interest of keeping the business of local government moving, many municipalities are now in the process of shifting public meetings, including public hearings, to teleconferencing for virtual or remote formats for future proceedings.

In order to facilitate a shift to remote hearings, many states have exercised emergency authority to modify the requirements of their open meetings laws to meet the challenges imposed by the COVID-19 crisis. For example, in Illinois, Governor J.B. Pritzker issued Executive Order 2020-07 (the "Executive Order") through which the governor exercised emergency powers to suspend portions of the Illinois Open Meetings Act. The Executive Order, in effect, waives a requirement that members of a public body be physically present at the meeting, clearing the way for

public bodies to hold remote or virtual meetings. The Executive Order further encourages public bodies to provide video, audio, or telephonic access to meetings to ensure members of the public may monitor the meeting. Municipalities are encouraged 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.

In these early days of this crisis, municipalities are responding in a variety of ways with regard to carrying out their obligations with respect to advancing public business, public meetings, and public participation despite limitations on group gatherings and “safer at home” orders. Videoconference meetings are becoming the new norm as municipalities adjust to conducting municipal business during the course of the pandemic. While modifications to open meetings laws may allow many public meetings to take place remotely, municipalities and petitioners must also take steps to ensure the legal sufficiency of public participation in remote public hearings.

Best practices and implementation strategies for remote public hearings

As public bodies grapple with making this shift, DLA Piper is monitoring best practices and considerations for implementation of remote public processes during this fluid situation – both in the City of Chicago, as well as urban, suburban, and rural contexts nationwide.

Identifying best practices is not an easy task. Protocols that might work for one public body or agency may not work for another.

Before the COVID-19 pandemic, the City of Lakewood, Colorado was recently recognized with a National Planning Achievement Award from the American Planning Association for its Plan Commission Online Public Hearings.

Using the People Speak Public Hearing Engagement Platform, the city enables citizens to participate in Lakewood Planning Commission hearings two weeks before the live meeting via LakewoodSpeaks.org. Citizens can review presentations and documents, ask questions of staff and project applicants, and comment on proposed actions, all on their own time and at their own pace with the same level of experience and impact as attending the live meetings. Public participation in planning meetings has increased significantly since LakewoodSpeaks.org launched in August 2017, now with both the Planning Commission and City Council using the site. In 2019, use of the platform increased participation by over 800%, including populations left out of the traditional live hearing process.

In light of present circumstances, Lakewood may be viewed as a model for encouraging and providing a mechanism for remote public participation. Municipalities may wish to emulate many of the elements of the Lakewood model.

Selecting a virtual meeting platform

There are a variety of web-based platforms available for use in the context of hosting a public meeting. Zoom, Microsoft Teams, WebEx, Skype, and Facebook Live, among other providers, offer platforms for real time presentation, collaboration, and the two-way exchange of information that are the hallmarks of in-person public meetings.

The Chicago Plan Commission, for example, intends to host a virtual public hearing via WebEx on April 16, 2020. Petitioners and commissioners will participate remotely. Members of the public are encouraged to submit public comment in advance of the meeting via email.

Meanwhile, countless public bodies have elected to host public meetings via Zoom in the wake of the COVID-19 emergency.

Public notice

Public notice of the time and platform for the public hearing should be well advertised online and through published and mailed written notice. Public notices should specify the manner in which members of the public may watch or listen to meetings in real time, and should instruct the public as to how to access the web conference or how to participate by dialing in, as well as opportunities to submit public comment in advance.

Before the public meeting

Municipalities are encouraged to post relevant public hearing materials online to make them available in advance of any meeting.

For example, the County of San Diego is offering pre-recorded presentations of staff and applicant presentations. The presentations are made available online on the Plan Commission's website. Members of the public have the opportunity to provide feedback by submitting written comments prior to the meetings. Members of the public are directed to email staff in advance of the hearing with the agenda item they wish to address, and then may provide testimony over the phone when the item is heard.

Similarly, the Chicago Plan Commission posts application materials and applicant presentations on its website in advance of any public hearing. Written public comments are accepted up to 24 hours before the Plan Commission meeting.

Proceedings

Municipalities should consider adopting "rules of engagement" or ground rules for remote etiquette and participation in public proceedings. The rules should be provided to staff, public officials, petitioners, and members of the public in advance of the hearing. For example, the Village of Arlington, Massachusetts published a memo offering guidance on holding public meetings during the COVID-19 pandemic, along with a Remote Participation Checklist and Remote Participation Script. Similarly, rules and methods for public participation should be provided in advance, and public officials should consider following a script for use during public hearings.

Where possible, meetings that are held by videoconference should also provide a call-in option. This allows people without computers or Internet to access the meeting.

Members of the public body, presenters from petitioner groups, and public commenters should identify themselves each time they speak so that participants attending telephonically can identify the source of comments, questions, or decisions.

All votes should be taken by roll call. Municipalities that have existing procedural rules relating to proxy votes should examine whether those rules should be modified to allow remote voting.

If feasible, proceedings should be recorded using the web conferencing platform's record function and should be made available to the public as soon as possible after the meeting. The chair should advise participants that the meeting is being recorded. For example, the City of Northampton, Massachusetts conducted its March 19, 2020 council meeting via Zoom. The meeting was also livestreamed and later uploaded to YouTube.

To the extent that court reporters are used to capture the record of the proceedings, a court reporter should participate in the remote hearing. The meeting chair should check in regularly to confirm that the court reporter is able to view, hear, and record the proceedings as they normally would at an in-person hearing.

Public comment

Public comment should be solicited via email or other remote means in advance of the hearing. Members of the public may also be permitted to comment using email or videoconference chat functions.

Importantly, speakers and witnesses may be scheduled in advance to ensure adequate time for all anticipated speakers and that time is allotted for unscheduled testimony.

Commenters should be permitted to electronically submit relevant materials or visual aids in advance of public hearings. For example, in Austin, Texas, commenters must register in advance by noon the day before the

meeting. Once registered, those wishing to make public comment will receive an email or phone call with a telephone number to call in to the public meeting. Speakers must call in 30 minutes prior to the meeting start time and are placed in a queue to speak.

In Arlington, Massachusetts, meeting chairs are directed to ask members of the public to identify their names, addresses, and agenda items for which they wish to speak. Once the chair has a list of all public commentators, the chair calls each name and affords three minutes per speaker for any comments.

In Berkeley Heights Township, New Jersey, meetings held over Zoom will offer a single Public Comment portion of the meeting. Participants may address the Township Council on any matter and are given three minutes to speak.

Even in the current emergency environment, public hearings generally require that the public be provided with adequate opportunity to be informed of the subject matter of the hearing, and to participate. In some jurisdictions, public hearings may require that members of the public are permitted not only to provide their views and comment on a matter of interest, but that they also be afforded the opportunity to cross-examine the petitioner and its witnesses. Municipalities should be cognizant of due process requirements for public hearings in their respective jurisdictions, and prepare to accommodate potential objectors who may have the right to and choose to engage in cross-examination. In this case, municipalities might look to civil courts that already allow remote service delivery technology platforms in the context of adversarial proceedings.

Anticipate technical difficulties

Municipalities are encouraged to plan for technical difficulties. Staff and petitioners should consider engaging in a trial run. Remote public hearings will involve participation by multiple people, including, for example, moderators, presenters, people who manage the web conferencing platform software, people collecting and sorting online questions, and people on standby to address participants' technical issues.

Staff, elected officials, and applicants should consider running through the presentations to make sure that all participants are familiar with the platform including how to log on, call in, access video and microphone, and transition from one presentation to the next. Offering trial runs will help solidify roles and minimize technical issues during the actual remote public hearing. The dry runs could include running through the features of the web conferencing platform and understanding the differences between the audience's view and the moderator's view of the web conferencing platform; and practicing organizing and incorporating public comment that is submitted through an online system.

Encourage the development of a contingency plan for technical difficulties with virtual meeting platforms. When technical difficulties arise, such plan may allow for public hearings to be continued or rescheduled. Recognize that the meeting chair may need to suspend the meeting while attempts to resolve issues are made. Meeting minutes can reflect disconnections and reconnections.

The media has documented and the FBI warns against instances of bad actors taking advantage of videoconferencing methods via so-called "Zoom-bombing" or unanticipated intrusions to presentations at public meetings. Hosts are strongly encouraged to be aware of the features of the platform they are utilizing, and to be cognizant of security and the ability to limit access to presenters and participants to the extent feasible. Public meetings are also encouraged to use a unique ID, and to require registration and a meeting password. If using Zoom, hosts are encouraged create a Zoom Waiting Room. This allows participants to log into the call and view a Waiting Room screen that can be customized so they are not allowed into the call until the host provides them with access. Screen-sharing may be set to a "Host-Only" option so that only hosts can share their screen. This prevents participants from hijacking the screen during a Zoom call.

If you have any questions regarding these new requirements and their implications, please contact any member of the DLA Piper Real Estate group or your DLA Piper relationship attorney.

Please visit our Coronavirus Resource Center and subscribe to our mailing list to receive alerts, webinar invitations and other publications to help you navigate this challenging time.

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