

D R A F T
FOR DISCUSSION ONLY

Public Meetings During Emergencies Act

Uniform Law Commission

April 30, 2021 Video Committee Meeting



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April 19, 2021

Public Meetings During Emergencies Act

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1 **Public Meetings During Emergencies Act**

2 **Section 1. Title**

3 This [act] may be cited as the Public Meetings During Emergencies Act.

4 **Reporter's Note**

5 There are two issues concerning the title of the act. The second issue is whether the
6 “public meetings” in the title should be modified by the term “virtual.” That would give a clearer
7 sense of the purpose of the act, but it would make the title longer and is not in the name of the
8 drafting committee.

9
10 **Section 2. Definitions**

11 In this [act]:

12 (1) “Electronic” means relating to technology having electrical, digital, magnetic,
13 wireless, optical, electromagnetic, or similar capabilities.

14 (2) “Emergency” means an event or condition that is an [emergency, disaster, or public
15 health emergency] [under the appropriate laws of this state or a political subdivision of the state].

16 (3) “Emergency declaration” means a declaration of emergency issued by a person
17 authorized to do so under the laws of the state [or a political subdivision of the state] and that is
18 in effect.

19 (4) “Meeting” shall have the same definition as “meeting” in {the state’s open
20 government law}.

21 (5) “Person” means an individual, estate, business or nonprofit entity, [public
22 corporation, government or governmental subdivision, agency, or instrumentality,] or other legal
23 entity. [The term does not include a public corporation, government or governmental
24 subdivision, agency, or instrumentality.]

25 (6) “Public body” means any [administrative agency of the state] [public entity of the
26 state except the state legislature and state or local courts] that is subject to {insert the relevant

1 state open government law}.

2 (7) “Record” means information that is inscribed on a tangible medium or that is stored in
3 an electronic or other medium and is retrievable in perceivable form.

4 (8) “Virtual meeting” means a meeting of a public body or any part thereof, at which some
5 or all of the members of the public body participate wholly or partly by electronic means.

6 “Virtually” has a corresponding meaning.

7 **Reporter’s Note**

8
9 The Public Meetings During Emergencies Act is intended to build on and fit into existing
10 state laws authorizing the declaration of emergencies and subjecting public meetings to various
11 procedural and public access requirements, particularly open meetings laws. Consequently,
12 rather than define “emergency,” “meeting,” or “public body,” or “public meeting,” the Act cross-
13 references the relevant state laws. An alternative approach would be to define these terms.

14
15 One question is whether the Act applies to *all* public entities of the state subject to the
16 state’s open meetings requirements – which, in many states, will include local governments – or
17 only to *state-level* administrative agencies. There was considerable discussion and disagreement
18 within the drafting committee at the December 17, 2020 meeting as to whether to include local
19 governments in this Act. This draft presents two alternatives. The first – ‘administrative agency’
20 – takes the narrower approach of limiting coverage to just state administrative agencies. That
21 excludes both the state legislature and all local legislatures and local agencies. The second
22 alternative includes all public entities within the state excerpt for the state legislature and state
23 and local courts. In many states, the legislatures have adopted or are currently in the process of
24 adopting their own rules for the conduct of virtual meetings. In some states, the open meetings
25 law applies to the state legislature, so the proposed definition excludes the legislature. So, too, in
26 many states the open meetings law applies to local legislatures and local agencies.

27
28 This draft of the act uses the term “virtual” to refer to a meeting of a public body
29 conducted by electronic means. The executive orders and state laws that have authorized such
30 meetings more commonly use the term “remote” instead of “virtual.” However, as was pointed
31 out at the December 17, 2020 meeting of the drafting committee, “remote” may imply that there
32 is a physical meeting of the public body with some members participating remotely. “Virtual”
33 makes it clearer that there is no central gathering. Subsequent sections of the draft refer to
34 “physical” meetings in contrast to “virtual” meetings. An alternative term would be “in-person”
35 meeting.

36
37 After the February 26, 2021 meeting of the drafting committee the definition of “virtual”
38 was revised to make it clear that it covers “hybrid” meetings in which some members are
39 participating remotely and some are at the public body’s physical location. The language used is
40 similar to that in N.C. Gen. Stat. § 166A.19.24(i)(3).

1 **Section 3. Authorization of Virtual Meetings of Public Bodies During Emergencies**

2 (a) A public body may meet virtually during an emergency that is the subject of an
3 emergency declaration if otherwise permitted by law, or all or part of the jurisdiction of the
4 public body is subject to the emergency declaration, and

5 (1) the emergency declaration prohibits physical meetings, or

6 (2) the person authorized by law or by rule of the public body to act for the public
7 body determines that due to the emergency it would not be practical or prudent for the public
8 body to meet physically, and that person advises the other members of the public body and the
9 members of the public of the basis for the determination.

10 (b) If a virtual meeting of a public body authorized by subsection (a) of this Section
11 complies with Sections 4, 5, and 6 of this act, any action taken at such a virtual meeting will have
12 the same legal force and effect as an action taken at a physical meeting of the public body. All
13 other laws of the state that would apply to a physical meeting of a public body shall, to the extent
14 practicable and not inconsistent with a virtual meeting, apply to a virtual meeting of the public
15 body.

16 **Reporter's Note**

17 This draft of section 3 authorizes a public body to meet virtually on the declaration of an
18 emergency and for the duration of that emergency. The draft presented at the February 26th
19 meeting of the drafting committee made that authorization automatic. In light of the comments at
20 that meeting, this draft adds the requirement either that a physical meeting would be prohibited
21 by the emergency declaration or that the public body has determined that, due to the emergency,
22 it would not be practical or prudent to meet. That language can be found in 5 Ill. C.S. 120/7c)(2)
23 One question is whether the standard should be higher than “not practical or prudent,” e.g.,
24 something like “necessary.” “Prudent” gives the public body more discretion, and would be less
25 subject to subsequent challenge. A second question is how that determination should be made.
26 The Illinois law grants the authority to the “head of the public body” as defined by the state’s
27 Freedom of Information Act. One alternative would have the public body, acting by majority
28 vote, make that determination. But if the public body cannot meet, it is not clear how that would
29 happen. This draft gives that authority to the person authorized by law or rule of the public body
30 to act for the body when it is unable to meet.

1 There was some discussion at the February 26 meeting of whether there should be a
2 sunset provision for the virtual meetings. The requirement that a physical meeting be either
3 barred by the emergency declaration or determined because of the emergency to be not prudent
4 may address the sunset concern as well.

5 6 **Section 4. Conduct of a Virtual Meeting of a Public Body**

7 (a) Except as provided in subsection (b), during a virtual meeting each member of the
8 public body in attendance must be able contemporaneously to see and hear, and to be seen and
9 heard by, every other member of the public body who is attending the meeting. As long as a
10 member of the public body attending the meeting can see and hear and be seen and heard by the
11 other members of the public body that member shall be considered present for all purposes,
12 including the determination of a quorum and for voting, as if the member were physically present
13 at a physical meeting of the public body.

14 (1) If, due to a technical problem, a member of the public body is unable to obtain
15 both visual and audio access to the meeting but can obtain audio access to the meeting by a
16 means that allows that member to hear and be heard, that member shall be considered present
17 for all purposes, including the determination of a quorum and voting, as if the member were
18 physically present at a physical meeting of the public body.

19 (b) If the public body lacks the technological capacity to provide for simultaneous visual
20 contact for its members, the body may conduct a virtual meeting by electronic means that
21 provides audio access such that each member of the public body in attendance is able
22 contemporaneously to hear and be heard throughout the meeting by the other members of the
23 public body who are attending the meeting. Any member of the public body who can hear and be
24 heard by the other members of the public body shall be considered present for all purposes,
25 including the determination of a quorum and for voting as if the member were physically present
26 at a physical meeting of the body.

1 (c) Any member of the public body who participates in a virtual meeting through
2 electronic means that provide only such audio connection to the meeting shall identify himself or
3 herself before speaking or voting.

4 (d) The notice for a virtual meeting of a public body shall indicate that it will be a virtual
5 meeting, why the public body is meeting virtually, the technology used for the meeting, and the
6 means by which members of the public body may attend the meeting.

7 (e) The minutes of a virtual meeting shall reflect that the meeting was conducted by
8 electronic means, the type of means used, which members were participating by electronic
9 means, when each member joined or left the meeting, a record of any votes taken, and any
10 interruption in or suspension of the meeting due to a technical problem with the electronic means
11 supporting the meeting.

12 (f) A public body may adopt rules to implement the provisions of this Section for the
13 conduct of virtual meetings with the purpose of making the conduct of a virtual meeting of a
14 public body as comparable to the conduct of a physical meeting of that body as feasible given the
15 technology available to the public body. Such rules may address, but are not limited to, all of the
16 following:

17 (1) the means for confirming the identity of a member of the public body
18 attending the virtual meeting by electronic means that provide an audio but not a visual
19 connection to the meeting under Section 4(b); and

20 (2) the effects on the conduct of a virtual meeting of any technical problems that
21 interfere with the electronic means supporting the virtual meeting or the connection of any
22 member of the public body to the meeting;

23 (3) the means by which any document, exhibit, or other record considered at the

1 meeting is made available to all the members of the public body; and,

2 (4) provisions for access to the meeting for a member of the public body with a
3 disability.

4 **Reporter's Note.**

5
6 The provisions of this Section derive from some of the gubernatorial executive orders or
7 state laws authorizing remote public meetings, most of which were adopted in 2020. These
8 include: 5 Ill. C.S. 120/7(e), Ind. Code 5-14-1.5-3.7, Ky SB 150, ch. 73, Ls of 2020; Me. Rev.
9 Stat. tit. 1, § 403-A; Michigan Gov. E.O. 2020-154 (July 17, 2020); Mich. Comp. L .Ann. §
10 15.263a; N.J.S.A. § 52:27D-18.11; N.C. Gen. Stat. § 166A-19.24; Va Code Ann. § 2.2-3708.2.
11 Principal changes from the earlier draft include the use of “contemporaneous” instead of
12 “simultaneous,” addressing the situation of an individual member who lacks visual access, and
13 adding a reference to disability access.
14

15 **Section 5. Public Observation of and Public Participation in Virtual Meetings**

16 (a) For any meeting of a public body that would be subject to a law of this state requiring
17 the meeting to be open to the public, a virtual meeting of the public body that conforms to the
18 requirements of this section shall be deemed to be open to the public.

19 (1) If a law of the state provides that members of the public shall be able to
20 observe a meeting of the public body as it occurs, the public body shall enable the public to
21 observe the virtual meeting as it occurs.

22 (2) Any notice of the meeting of a public body required by law shall for a virtual
23 meeting specify the electronic means by which the public can observe the virtual meeting as it
24 occurs. Such notice shall also provide a means for members of the public to alert the public body
25 if there is a technical problem that prevents the public from observing the meeting. The meeting
26 shall be suspended until the technical problem is resolved.

27 (3) If at such a public meeting, members of the public are entitled to observe any
28 documents or exhibits presented to the public body, such documents or exhibits shall, to the
29 extent practicable given the technology being utilized, be made available for public observation.

1 (4) If pursuant to Section 4(b), the virtual meeting is conducted through electronic
2 means that provide only an audio connection, public observation may be limited to an audio
3 connection as well.

4 (5) If under a law of the state providing that a meeting of a public body shall be
5 open to the public that requirement is satisfied by providing the public with a record of the
6 meeting after the meeting has occurred, a record of the virtual meeting shall be made available to
7 the public within the same time period and in the same format as required for a physical meeting
8 of the public body. Any law of the state requiring that a public meeting be recorded and the
9 record made available to the public shall apply to a virtual meeting.

10 (b) If under a law of the state governing the meetings of a public body or the rules of the
11 public body, members of the public may speak or to submit comments, they shall, to the extent
12 practicable, be allowed to speak or submit comments at a virtual meeting, subject to the same
13 conditions as would apply at a physical meeting of the public body. The notice of the meeting
14 shall provide directions for members of the public to access the meeting in order to speak or to
15 submit comments, consistent with the law of the state or the rules of the public body.

16 (c) If, at a virtual meeting, the public body is considering a matter affecting the legally
17 protected right or interest of a person such that under a law of the state or the rules of the public
18 body that person would have a right to address the public body with respect to that matter and
19 participate in the proceeding, including through the presentation of testimony or evidence, or the
20 examination or cross-examination of witnesses, the public body shall enable such person to
21 address the public body and participate in the meeting using the same electronic means as the
22 public body is using to conduct the meeting.

23 (1) The notice of the meeting shall provide directions to such a person concerning

1 how to access the meeting to speak and participate with respect to the matter in which that
2 person has a legally protected right or interest. The public body may also provide appropriate
3 technical assistance to enable such a person to address the public body and participate in the
4 meeting.

5 (2) If a person whose legally protected right or interest in a matter being
6 considered by the public body objects that such person's right or interest cannot receive at a
7 virtual meeting the due process to which the person is entitled, the public body shall consider the
8 objection. It may proceed with the matter only if it determines under the totality of the
9 circumstances that it can provide the objector due process. The circumstances it may consider
10 include but are not limited to the technical capacity of the electronic means it is using to conduct
11 the meeting and make a record of the proceeding, the complexity of the matter under
12 consideration, the nature of the evidence presented, and the consequences of delay until a
13 physical meeting can be held. The public body's decision and the reasons for it shall be a matter
14 of public record.

15 (d) A public body may adopt rules to implement the provisions of this Section for the
16 provision of public observation of and public participation in virtual meetings with the purpose
17 of making public observation and participation at a virtual meeting of the public body
18 comparable to public observation of or participation in a physical meeting of that body. .

19 (e) The requirements of this Section are subject to enforcement by the rules and
20 procedures of the other laws of this state providing for public observation of or public
21 participation in the meetings of public bodies.

22 **Reporter's Note**

23
24 The focus of section 5 is to adapt the pre-existing law of the state with respect to public
25 access to or public participation in meetings of public bodies to virtual meetings. It does not

1 create any new rights of access or participation but seeks only to require the provision of
2 electronic means to secure the rights of access or participation already provided by state law. It
3 tracks some of the same executive orders or state legislation referred to in the Reporter's Note to
4 section 4.

5
6 Subsections (a), (b), and (c) address public access at three steadily increasing levels of
7 public involvement. Subsection (a) addresses the situation in which the public's only right under
8 law is to observe the public meeting. This is most commonly the result of a state's open meeting,
9 open government, sunshine, or open door. Such observation could be provided by livestreaming
10 the meeting on the public body's website, broadcast online, or giving the public access to the
11 electronic means used to conduct the meeting. Subsection (b) addresses the situation in which
12 members of the public have the right to provide comments either orally at the meeting or in
13 writing. This right typically derives not from an open meetings law but from an administrative
14 procedure act or other law dealing with the operations of state and local bodies, either generally
15 or with respect to specific bodies.

16
17 Subsection (c) addresses the situation in which the action of the public body will so affect
18 the rights or interests of specific members of the public that they have a due process right to be
19 heard at the meeting. These are commonly referred to as quasi-adjudicative proceedings, and
20 typically involve such land use matters as variances, special use permits, and site-specific
21 rezonings, but may also include the grant (or revocation) of licenses, franchises, permits, or
22 benefits. Recently adopted laws in Georgia and North Carolina would bar quasi-adjudicative
23 action at a virtual proceeding unless all persons whose interests are affected agree. The North
24 Carolina law also requires that the right to a hearing and emergency occur during the emergency.
25 This draft follows the approach of New Jersey's virtual meeting law, which does not require the
26 consent of the parties or that a decision must be provided during the emergency. However, it
27 incorporates in the proposed statute language derived from an administrative rule adopted by the
28 state's Division of Local Government concerning whether a land use board can conduct a public
29 hearing on a development application virtually. The rule requires the public body to undertake a
30 "totality of the circumstances" examination of the application to determine whether a remote
31 meeting could provide due process to all affected parties: "Before holding a public hearing on an
32 application for development during a remote public meeting, a land use board shall determine
33 whether electronic communication technology can sufficiently facilitate due process of the
34 applicant and any interested party, including the ability to examine exhibits, transcribe testimony
35 and cross-examine witnesses, as well as the ability of the public to comment upon the
36 application. Factors in making this determination shall include, at minimum, the scale of the
37 project, the number of approvals requested, the degree of public interest, and the number of
38 potential objectors." N.J.A.C. 5:39-1.7(a).

39 40 **Section 6. Savings Clause**

41 This [act] applies only during emergencies and does not supersede any other state law
42 authorizing a public body to permit members of the body or members of the public to participate
43 in its meetings by remote means.

1 **Reporter's Note**

2
3 A number of states have laws authorizing remote participation in public meetings of
4 individual members of a public body and some forms of remote participation by members of the
5 public. These laws assume that the meeting of the public body will be in a physical location. The
6 [act] is not intended to supersede those laws but only to supplement them with an authorization
7 for an entirely virtual meeting during an emergency.
8

9 **Section 7. Transitional Provision**

10 This [act] applies to a proceeding commenced on or after [the effective date of this [act]].

11 **[Section 8. Severability**

12 If any provision of this [act] or its application to any person or circumstance is held
13 invalid, the invalidity does not affect other provisions or applications of this [act] which can be
14 given effect without the invalid provision or application, and to this end the provisions of this
15 [act] are severable.]

16 ***Legislative Note:** Include this section only if this state lacks a general severability statute or a*
17 *decision by the highest court of this state stating a general rule of severability.*
18

19 **Section 9. Repeals; Conforming Amendments**

20 (a)

21 (b)

22 (c)

23 ***Legislative Note:** The state should examine its statutes regarding {the meetings of public bodies*
24 *and open meetings requirements} to determine whether conforming revisions are*
25

26 **Section 10. Effective Date**

27 This [act] takes effect