

D R A F T
FOR DISCUSSION ONLY

Public Meetings During Emergencies Act

Uniform Law Commission

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~~May 28~~ June 30, 2021

Public Meetings During Emergencies Act

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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 **Section 2. Definitions**

5 In this [act]:

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

8 (2) “Emergency” means [an emergency, disaster, or public health emergency]
9 under law of this state or a political subdivision of the state.

10 (3) “Emergency declaration” means a declaration of emergency issued by a
11 person authorized to issue the declaration under other law of this state or a political subdivision
12 of the state.

13 (4) “Meeting” has the same meaning as “meeting” in the open meetings law
14 governing a public body.

15 (5) “Open meetings law” means the law of this state or a political subdivision of
16 the state that governs when and how a meeting of a public body must be open to the public.

17 (6) “Person” means an individual, estate, business or nonprofit entity, or other
18 legal entity. The term does not include a public corporation or government or governmental
19 subdivision, agency, or instrumentality.

20 (7) “Public body” means an entity subject to an open meetings law. The term does
21 not include the [State Legislature and its agencies] or a state [or local] court.

22 (8) “Record” means information:

23 (A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(9) “Virtual meeting” means all or part of a meeting of a public body, at which some or all members of the public body ~~participate~~ attend wholly or partly by electronic means.

Legislative Note: In paragraph (2), the state should insert the words used to describe an “emergency” in state law authorizing the declaration of an emergency.

In paragraph (7), the state should insert the language used in the state to describe its state legislature and legislative agencies. In a state that does not have local courts, the bracketed language at the end of paragraph (7) should be omitted.

Comment

The Public Meetings During Emergencies Act builds on and fits into existing state laws authorizing the declaration of emergencies and subjecting public meetings to various procedural and public access requirements, particularly open meetings laws and laws providing for public comment on and participation in the deliberations of public bodies. During the COVID-19 pandemic, most governors included within their declarations of emergency provisions suspending many state laws concerning the meetings of public bodies, such as those governing the location of meetings and public access and participation, and authorized virtual meetings.⁵² Some of the executive orders included provisions intended to create public access and participation rights in virtual meetings comparable to those applicable to traditional ~~physical in-person~~ meetings. This Act would provide a statutory basis for the authorization of virtual meetings during an emergency conditioned on compliance with requirements intended to assure comparable public access and participation.

The Act uses the term “virtual” to refer to a meeting of a public body conducted by electronic means. The executive orders and state laws that have authorized such meetings more commonly use the term “remote.” However, “remote” may imply that there is ~~a physical an in-person~~ meeting of the public body with only some members participating remotely by electronic means. Indeed, a number of states before the pandemic had adopted laws permitting some members of public bodies to participate remotely in a public meeting that occurred at the public body’s usual physical location. “Virtual” makes it clearer that this act applies to meetings where there is no central gathering. The “some or all” phrase permits the Act to apply in hybrid settings in which some members of the body are at a central location but the meeting involves the use of electronic means to connect them to other members of the body who are participating virtually.

Section 3. Authorization for Virtual Meeting During Emergency

(a) A public body may conduct a virtual meeting during an emergency that is the subject of an emergency declaration that is in effect and applies to all or part of the jurisdiction of the

1 public body if:

2 (1) the declaration has the effect of prohibiting ~~a physical~~ an in-person meeting of
3 the public body; or

4 (2) the presiding officer of the public body or other individual authorized by law
5 or rule of the public body to act for the public body:

6 (A) determines that due to the emergency it would not be practical or
7 prudent for the public body to meet in person; and

8 (B) advises the other members of the public body and the public of the
9 basis for the determination.

10 (b) An action taken at a virtual meeting that complies with Sections 4 through 8 has the
11 same effect as an action taken at an in-person meeting of the public body.

12 (c) Other law that applies to an in-person meeting of a public body applies to a virtual
13 meeting to the extent practicable.

14 **Comment**

15
16 Subsection (a) creates a two-part test for authorizing public bodies to meet virtually.
17 First, the individual authorized by state law to declare an emergency has done so with respect to
18 a geographic area that is part of the public body's jurisdiction. That individual is likely to be the
19 governor, but for local emergencies it could be a county executive, mayor or other local official.
20 Second, either the emergency declaration itself must have the effect of prohibiting ~~a physical~~ an
21 in-person meeting – such as by a direct prohibition, a stay-at-home order, or an order limiting the
22 number of people at a gathering – or the presiding officer of the public body or another
23 individual authorized to act for the public body determines that due to the emergency it would be
24 impractical or imprudent for the body to meet. The reason for the second requirement is that
25 sometimes emergency declarations remain in effect long past the most acute phase of an
26 emergency. This may be necessary for the area to continue to receive special emergency
27 assistance or because some emergency measures may still be needed. However, it might be
28 possible for the public body to meet. The second requirement addresses that concern. If the
29 emergency declaration in effect continues to have the effect of prohibiting ~~a physical~~ an in-
30 person meeting, the public body may continue to meet virtually. Alternatively, if the emergency
31 declaration by its terms does not have the effect of prohibiting ~~a physical~~ an in-person meeting, a
32 virtual meeting will be authorized only if the public body's presiding officer or someone else –
33 such as its executive director – determines that it would be impractical or imprudent due to the

1 emergency for the public body to meet and advises the members of the public body and the
2 public of that determination.

3 4 **Section 4. Conduct of Virtual Meeting**

5 (a) Except as provided in subsections (b) and (c), the technology used to conduct a virtual
6 meeting must enable each member of the public body who attends the meeting
7 contemporaneously to see and hear, and to be seen and heard by, every other member of the
8 public body who attends the meeting. If a member of the public body who attends the meeting
9 can see and hear and be seen and heard by the other members of the public body who attend, the
10 member is present for all purposes, including the determination of a quorum and for voting, as if
11 the member were present at an in-person meeting of the public body.

12 (b) If a member of a public body is unable to obtain visual and audio access to the
13 meeting but is able to obtain audio access that allows the member contemporaneously to hear
14 and be heard, the member is present for all purposes, including the determination of a quorum
15 and for voting, as if the member were present at an in-person meeting of the public body.

16 (c) If a public body lacks the capacity to provide contemporaneous visual access to a
17 virtual meeting for its members, the public body may conduct the meeting by electronic means
18 that provides audio access that permits each member of the public body who attends the meeting
19 contemporaneously to hear and be heard throughout the meeting by the other members of the
20 public body who attend. A member of the public body who attends the meeting and can hear and
21 be heard by the other members of the public body who attend is present for all purposes,
22 including the determination of a quorum and for voting, as if the member were present at an in-
23 person meeting of the public body.

24 (d) A member of a public body who attends a virtual meeting through electronic means
25 that provide only audio ~~connection~~ access to the meeting shall state the member's name before

1 speaking or voting.

2 (e) The minutes of a virtual meeting must report that the meeting was conducted by
3 electronic means, identify the technology used and which members attended by electronic
4 means, and report any vote taken.

5 **Comment**

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 The intent is to require technology that permits the members of the public body attending the
12 meeting to see and hear each other throughout the meeting. However, this may not always be
13 possible. Paragraph (a)(1) addresses the situation of a meeting conducted by technology that
14 provides both visual and audio access but where a particular member may not be able to obtain
15 video access. That member will still be treated as attending for purposes of a quorum,
16 participation, and voting, if the member has audio access. Paragraph (a)(2) addresses the
17 situation where the public body as a whole lacks the technical capacity to provide video access.
18 That could be due, for example, to Internet bandwidth limitations in the public body's area. In
19 that case, the virtual meeting may still be conducted using technology that provides only audio
20 access. Subsection (c) provides that the type of technology used, e.g., audio-visual or just audio,
21 shall be reflected in the minutes of the virtual meeting.

22 **Section 5. Application of Open Meetings Law**

24 (a) If the open meetings law provides that the public must be able to observe all or part of
25 a meeting of a public body as it occurs, the public body shall enable the public to observe as it
26 occurs a virtual meeting or that part of the virtual meeting that would be required to be open to
27 the public if part of an in-person meeting.

28 (b) If a document, exhibit or other record is presented to a public body at a virtual
29 meeting that, under the open meetings law, the public is entitled to observe, the document,
30 exhibit or record must be made available for public observation to the extent practicable given
31 the technology used.

32 (c) If under Section 4(c), a virtual meeting is conducted by electronic means that provide

1 only audio connection, public observation is limited to audio connection.

2 **Comment**

3 This section confirms that the state's open meetings law applies to a virtual meeting to the
4 same extent as it would to a comparable ~~physical~~ in-person meeting. If a meeting, or a portion of
5 meeting, would not be open to the public under the state's open meetings law, that meeting or
6 portion, would not be open when conducted virtually. The form of public observation will
7 inevitably be affected by the nature of the technology used. For a meeting conducted by audio-
8 only technology because, under section 4, the public body lacks the capacity for an audio-visual
9 meeting, public observation of any documents or exhibits considered by members of the public
10 body may be provided by making those documents or exhibits available for inspection separately
11 from the meeting, such as by posting them to the public body's website.

13 **Section 6. Public Participation**

14 If a public body is subject to a law of this state or a political subdivision of the state, or
15 the public body has adopted a rule, that permits members of the public to speak or submit
16 comments at a meeting of the public body, the public body to the extent practicable shall allow
17 members of the public to speak or submit comments at a virtual meeting, subject to the
18 conditions that apply at an in-person meeting of the public body.

19 **Comment**

20
21 This section addresses the situation in which members of the public have a right to
22 provide comments at the meeting of a public body, either orally or in writing. This right to
23 participate typically derives not from an open meetings law but from some other law, such as an
24 administrative procedure act, another law dealing with the operations of state and local public
25 bodies, or the organic law governing the specific public body. Compliance with public comment
26 requirements may require flexible arrangements. For example, the public body could provide for
27 the submission of written comments by e-mail or text message in advance of, or within a limited
28 time after, the virtual meeting.

30 **Section 7. Due Process Rights**

31 (a) If a public body at a virtual meeting considers a matter affecting the right or interest
32 of a person entitled as a matter of due process to address the public body and participate in the
33 meeting, including through the presentation of testimony or evidence and the examination or
34 cross-examination of witnesses, the public body shall enable the person to address the public

body and participate in the meeting using the same electronic means that the public body uses to conduct the meeting.

(b) If a person entitled under subsection (a) to address the public body and participate in the meeting objects that the person cannot receive due process at a virtual meeting, the public body may proceed with the matter only if the public body considers the objection and determines under the totality of the circumstances that it can provide the person due process. The objection, the public body's decision and the reason for the decision, are matters of public record.

Comment

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

Section 8. Notice

(a) Notice of a virtual meeting must specify that the meeting will be virtual, the reason the meeting will be virtual, the electronic means used for the meeting, and how members of the

public body may attend the meeting.

(b) Notice of a virtual meeting subject to an open meetings law under Section 5 must specify how members of the public may observe the meeting as it occurs.

(c) Notice of a virtual meeting subject to public participation requirements under Sections 6 and 7 must specify how members of the public may participate in the meeting.

(d) Notice under subsections (b) and (c) must specify how a member of the public may alert the public body if there is a technical problem that prevents the member from observing or participating in the meeting.

Section 9. Rulemaking Authority

A public body may adopt rules for the conduct of a virtual meeting as comparable as possible to the conduct of an in-person meeting of the public body that may include:

(1) the effect of a technical problem that interferes with the meeting or the connection of a member of the public body or the public to the meeting;

(2) the means by which a document, exhibit, or other record considered at the meeting is made available to the public body or the public if required by the open meetings law;

(3) the means for access to the meeting by an individual with a disability; ~~and~~ and

(4) the process by which a person entitled under Section 7 to address the body and participate in a meeting may object to the conduct of the meeting on the ground that the process does not protect the person's due process rights.

Section 10. Uniformity of Application and Construction

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

Section 11. Relation to Electronic Signatures in Global and National Commerce Act

This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

Legislative Note: *It is the intent of this act to incorporate future amendments to the cited federal law. A state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law should omit the phrase “, as amended”. A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law also should omit the phrase.*

Section 12. Saving Provision

This [act] applies only during an emergency and does not limit or supersede other law authorizing a public body to permit a member of the public body or the public to observe or participate in a meeting of the body by remote means.

Comment

A number of states have laws authorizing remote participation in public meetings by individual members of a public body and some forms of remote observation or participation by members of the public. These laws assume that the meeting of the public body will be in a physical location, and may specify that members of the public body also be at a publicly accessible physical location, such as at a state office building. The [act] does not supersede those laws but supplements them with an authorization for an entirely or primarily virtual meeting during an emergency.

[Section 13. Severability

If a provision of this [act] or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.]

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

[Section 14. Repeals; Conforming Amendments

(a) . . .

1 (b) . . .]

2 ***Legislative Note:*** *The state should examine its statutes to determine whether conforming*
3 *revisions are required by provisions of this act relating to meetings of public bodies and open*
4 *meetings requirements.*

5

6 **Section 15. Effective Date**

7 This [act] takes effect