

## PUBLIC MEETINGS DURING EMERGENCIES ACT

### MEMORANDUM

**TO:** UNIFORM LAW COMMISSIONERS

**FROM:** Mark Glaser

Chair, Drafting Committee on Public Meetings During An Emergency

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**RE:** Issues Memorandum for First Reading of the proposed Uniform Law on Drafting Committee on Public Meetings During An Emergency

#### **Introduction:**

The COVID-19 Pandemic has highlighted the need for public bodies to meet when disasters and other emergencies make in-person meetings of public bodies either impossible or inadvisable. The Public Meetings During Emergencies Act is intended to provide a process to ensure that important public meetings can go forward when these events occur. While we would all fervently hope that the Act is never necessary to use, a Uniform Act that ensures that governmental processes can move forward if these emergencies do occur, is not only appropriate, but necessary. The Public Meetings During Emergencies Act builds on existing state laws authorizing the declaration of emergencies and subjecting public meetings to various procedural and public access requirements. This Act is intended to work in harmony with those laws, particularly open meetings and other 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. Some of the executive orders included provisions intended to create public access and participation rights in virtual meetings comparable to those applicable to traditional 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. At the same time, the Act recognizes that unique challenges are presented when substituting technology for in-person meetings.

It has been suggested that with the pandemic winding down and many states relaxing restrictions on public meetings, this act may no longer be necessary. As noted above, while we all hope that to be the case, the onset of the pandemic over a year ago taught us that government must be prepared to carry on its functions, sometimes on extremely short notice. In retrospect, states and local governments adapted to the emergency in various ways. While most found a way to continue necessary public meetings, there was a patchwork with varying degrees of public access and participation. Often, open meetings laws were

suspended. The overarching purpose of this Act is to provide the states with a uniform approach to ensure that public observation and participation in the functioning of public bodies, consistent with each state's unique needs and practices, goes forward, even in times of public emergencies and disasters.

## **STRUCTURE OF THE ACT**

After the definitions, the Act is structured as follows:

- Section 3 provides the authorization for public bodies to conduct their business during an emergency, and requires (i) that an “emergency declaration” has been made and, (ii) that (a) the declaration prohibits a public body from meeting in person, or (b) that the presiding officer or similar authorized person of the public body determines that it is not “practical or prudent” for the public body to meet in person;
- Section 4 of the Act provides for the process to be followed by the public body to conduct the business of the body:
  - In general, the Act expresses a preference for public meetings to be held in such a manner that enables the members of the body who are in attendance to contemporaneously see and hear their fellow members.
  - The Act recognizes, however, that it may not always be possible for all members of the committee to have visual access to the meeting and therefore provides that audio communications between the members of the body may be sufficient under the circumstances set forth in this Act.
- Sections 5 and 6 provide that public bodies subject to the open meetings (or similar law) of the jurisdiction must enable the public to observe the public meeting and, if otherwise authorized by law, participate in the proceedings, to the extent permitted under the law. As with the communications between members of the body, the Act expresses a preference that meetings of public bodies should be broadcast in such a way to provide contemporaneous observation and, if authorized, participation in the meeting. As with the meeting of the members of the body, if only audio participation is available, that is all that is needed to be provided to the public.
- Section 7 relate to due process rights of parties to administrative proceedings at virtual meetings.
- Section 8 relates to notice requirements for virtual meetings.
- Section 9 provides limited rulemaking authority to public bodies to effectuate virtual meetings

## **ISSUES**

### **1. What is the trigger for the Act?**

The Committee seeks the input of the Conference with respect to who has the power to determine that the Acts provisions should become operable. The Committee concluded that an “emergency declaration” from a person authorized to make such a declaration under the law of the state is required for the Act to become operative. The head of the public body is also required to make a determination that an in-person meeting is not permitted or is inadvisable. The Committee seeks the views of the conference on whether this power should be limited to the governor of the state, or whether other state or local officials should have this power;

## **2. What public bodies are covered by the Act?**

- A. The Committee determined that the Act should apply to the executive branch of state government and to all other public bodies that are subject to the state's open meetings law (or equivalent law), except that the Act expressly excludes both the state legislative and judicial branches.
- Is coverage by the state's open meetings law the appropriate trigger?
  - Should legislative and/or judicial bodies, including local legislative and judicial bodies be excluded?
- B. Should local bodies be included?

## **3. Hybrid Meetings?**

Should "hybrid" meetings be covered by the Act? Hybrid meetings are those held where some of the members of the public body are present at a central location, while other members of the body may be remote. The committee elected to cover these meetings, because, during an emergency, some members may be able to attend in person but other members of the body may not be able to attend because of illness, because the disaster may have foreclosed transportation options or other reasons. Allowing hybrid meetings will foster attendance at meetings and allow public bodies to meet quorum requirements.

## **4. Due Process**

Section 7 of the Act relates to meetings of public bodies that may be adjudicating the rights of various parties, such as persons seeking licensure appearing before a public body, neighbors and others who may have a legal right to comment prior to the issuance of a permit or license, and other matters. The Act recognizes that such persons may have a due process right to present evidence, examine evidence submitted at the hearing, cross examine witnesses, etc. The Act further provides that a public body, upon a finding entered into the record, has the power to take action in such a matter, even if a party seeks to have the determination made at a non-virtual meeting.

The Committee considered this matter at length and seeks input from the Conference. The Committee considered deleting this provision, but ultimately decided to keep this in the Act out of concern that for some matters, delay of consideration could, itself deprive a party of its due process rights or harm the public interest. If, a party is seeking approval of a license to operate a venture requiring licensure, for example, a person who purchased a restaurant but requires a liquor license, the delay in granting approval could be financially devastating. Similarly, zoning

issues where a neighbor seeks to object to the issuance of a building permit for a project that would significantly impact the value of the neighbor's property can be time sensitive.

## **5. Rulemaking Authority**

Section 9 authorizes limited rulemaking authority to public bodies to promulgate rules governing procedures at virtual meetings. This section is not intended to require a full rulemaking proceeding consistent with any applicable administrative procedures act. Rather, it is intended to deal with issues such as the ability to shut down "Zoom bombers", provide procedures to deal with presentation of materials at meetings, technological issues during meetings, and to ensure that members of the public with a disability have a means of accessing the meetings. Rules are also authorized to establish procedures for objections to proceedings based on an alleged or perceived denial of due process rights.

The Committee seeks comments from the Conference as to i) whether this section is necessary; or ii) whether this section may inadvertently grant rulemaking authority to bodies that otherwise would not have such powers.