Coates' Canons Blog: Can We Really Ban In-Person Attendance at Board Meetings During the Coronavirus Emergency?

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[Update 11/18/2020: Section 5.2(a) of the Governor's Executive Order 169 (extended by Executive Order 176) generally exempts "government operations" from the order's prohibitions on mass gatherings. The NC Department of Public Safety interprets "government operations" to include local government board meetings. Section 5.2(a) expressly does NOT exempt government operations from the capacity limits imposed by Sections 3.2 and 6 of EO 169. Section 3.2 covers bars, night spots, and arenas, while Section 6 concerns very large outdoor facilities. For purposes of Section 6, a "very large outdoor facility" has a seating capacity of at least 10,000.]

[UPDATE 5/22/2020: The Governor's Executive Order 141 includes mass gathering restrictions that supersede those previously imposed by Executive Orders 138 and 121. As interpreted by the Governor's legal counsel, the mass gathering restrictions in EO141 do not apply to local government board meetings.]

[UPDATE 5/6/2020: The Governor's Executive Order 138 imposes a 10-person limit on mass gatherings that appears to supersede the limitation in Executive Order 121. Unlike EO121, EO138 doesn't expressly exempt "Essential Governmental Operations" from its mass gatherings provision. Local governments should consult with their attorneys regarding the impact of EO138 on their board meetings.]

[UPDATE 4/23/2020: The Governor's Executive Order 135 extends the provisions of Executive Order 121, including its 10-person limit on mass gatherings, until 5:00 p.m. on May 8, 2020.]

[UPDATE 3/27/2020: The Governor's latest executive order limits mass gatherings to 10 people, though that limitation doesn't apply to "Essential Governmental Operations" as defined in the order. Local governments may want to seek guidance from their attorneys on the order's implications for public attendance at their board meetings.]

Under the open meetings law, the general rule is that "any person is entitled to attend" an official meeting of a public body. G.S. 143-318.10(a). In response to the COVID-19 crisis, some local governments have begun prohibiting members of the public from attending board meetings in person. This blog post considers the lawfulness of those exclusions.

My colleague Frayda Bluestein has addressed this and related issues in her excellent blog post *Meetings and Public Hearings Under the Coronavirus State of Emergency*. Here I aim to supplement her comments on in-person attendance bans by looking at the relevant caselaw in light of events of the past few days. Spoiler: I conclude that it may be possible to justify such bans in the present extraordinary context, if reasonable alternative means are available for observing the meeting.

The Right to Attend

In *Garlock v. Wake County Board of Education*, 211 N.C. App. 200 (2011), the North Carolina Court of Appeals provided the most detailed judicial treatment yet of what local governments must do to satisfy the open meetings law's public access requirement. Frayda has analyzed the case thoroughly elsewhere, so I'll focus on aspects of the case pertinent to this blog post.

The plaintiffs in *Garlock* essentially argued "that the exclusion of even one person from a meeting may be a violation [of the open meetings law], even if the meeting room is filled to its legally permitted capacity by other members of the public." 211 N.C. App. at 217-18. The court of appeals rejected that literal interpretation of the law's public access requirements. It

explained that “the open meetings law is satisfied as long as the public body takes ‘reasonable measures’ to accommodate members of the public, even if some of them are not actually able to attend.” Frayda S. Bluestein & David M. Lawrence, *Open Meetings and Local Governments in North Carolina: Some Questions and Answers* 87 (8th ed. 2017) (quoting *Garlock*, 211 N.C. App. at 225). What’s reasonable depends on the circumstances. Under *Garlock*, then, a public body’s obligation to accommodate an individual’s desire to attend a meeting in person can vary depending on the specific facts of a given situation. *See also Hildebran Heritage & Develop. Ass’n v. Town of Hildebran*, 252 N.C. App. 286, 295 (2017) (no violation of the open meetings law where the public filled the council’s meeting room and between 20 and 25 people had to stand outside the meeting room with no way to see or hear the meeting).

The *Garlock* plaintiffs alleged a litany of open meetings law violations. Some allegations concerned the defendant school board’s total exclusion of the public from the room during a meeting of the board’s “Committee of the Whole” (“COW”). At least initially, board members and school district staff occupied all the chairs in the room. The COW didn’t switch rooms, even though a larger room was immediately available in the same building. The board did provide a separate room where the public could observe live audiovisual feed of the COW meeting. It also broadcast the COW meeting live over the internet.

Like the trial court, the court of appeals ruled that the total exclusion of the public from the COW’s meeting room violated the open meetings law. It would be a mistake, though, to read *Garlock* as holding that a violation of the open meetings law occurs anytime a local government completely excludes the public from the meeting room. The court was careful not to make such a blanket pronouncement. It ruled that the exclusion of the public from the COW meeting was unreasonable *under the circumstances*.

It’s also worth noting that the legal consequences of the school board’s violations were relatively minor. The only remedy that the trial court granted the plaintiffs was a declaration that the school board had indeed violated the open meetings law. It refused to invalidate any of the board’s actions or to award any other affirmative relief. The court of appeals upheld the trial court’s decision because the violations “did not affect the substance of the Board’s actions, . . . they were not committed in bad faith, and the Board had in the past made and was continuing to make reasonable efforts to comply with the Open Meetings Law.” 211 N.C. App. at 232.

In sum, *Garlock* leaves open the possibility that situations could arise in which it’s reasonable for a local government to prohibit in-person attendance at board meetings. The case also establishes that, even if the prohibition is found to have violated the law, the court may decline to grant any remedies other than a declaratory judgment if the board acted without bad faith and has made and continues to make reasonable efforts to satisfy its obligations under the open meetings law.

Reasonable Access in the Coronavirus Context

Local governments aren’t imposing attendance restrictions in a vacuum. They’re acting to protect their board members, employees, and residents from the highly contagious and seriously dangerous Coronavirus. Nonbinding Coronavirus guidelines issued by the President of the United States recommend against social gatherings of more than 10 people. The Governor has declared a state of emergency, and his most recent executive order bans gatherings of 50 or more people in most settings, including local government board meetings. An earlier order urges people to practice “social distancing” by staying at least six feet away from each other.

In my view, the above facts plainly support limiting in-person attendance at local government board meetings. Indeed, the Governor’s latest executive order requires local governments to cap meeting attendance at 50 persons. Would a court deem the facts sufficient to sustain a complete ban on in-person attendance? I can’t offer a definitive response, but I suspect the court would have questions. Instead of completely excluding the public, the court might ask, why not limit in-person attendance as necessary to comply with state restrictions on mass gatherings and abide by social distancing guidelines? A local government that imposes a total ban should be prepared to answer that and related questions. I can think of additional facts that some local governments might cite as evidence of the reasonableness of their prohibitions. For instance, a city or county might point out that it has a relatively high number of Coronavirus cases or a disproportionately large percentage of elderly or other residents especially vulnerable to the Coronavirus. It might also highlight the limited capacity or lack of a local hospital.

Over the past several days scores of cities and counties have declared local states of emergency. Some have further restricted public gatherings, and a few – Mecklenburg County is one – have gone so far as to order their residents to

"shelter in place." Cities and counties cannot suspend the open meetings law through local emergency declarations, but the legal position of a local government that prohibits in-person meeting attendance is probably stronger if the unit acts pursuant to such a declaration. A court might wonder whether the situation is truly dire enough to justify the attendance ban if the relevant city or county hasn't declared a state of emergency. Moreover, as lucidly explained by my colleague Norma Houston here, here, and here, the express statutory powers that cities and counties may exercise under local emergency declarations include the power to restrict or prohibit "the movement of persons" within emergency areas, as well as the "operation of offices, business establishments, and other places to or from which people may travel or at which they may congregate." G.S. 166A-19.31(b). Although the open meetings law remains in effect, local emergency restrictions and prohibitions on movement and public gatherings can operate to prevent in-person attendance at board meetings. Those restrictions and prohibitions are themselves subject to a reasonableness test, however, as Norma discusses here and here. Thus, even when a city or county exercises its emergency powers to ban in-person attendance at board meetings, it should be prepared to defend the reasonableness of the prohibition.

Any local government that bans in-person attendance must still take reasonable steps to make its board meetings accessible to the public. The failure to do so would certainly constitute an open meetings law violation. Livestreaming meetings online is a good start. Local governments might also consider providing conference call numbers so that residents without internet access can listen to meetings. By demonstrating a sincere commitment to openness and transparency, a local government improves its chances of avoiding major legal consequences should a court later find that its total ban on in-person attendance was unreasonable.

Reasonable Access to Electronic Meetings

So far this post has assumed that some board members are actually in a meeting room from which the public is being excluded. If the members are instead conducting their meeting remotely by electronic means, G.S. 143-318.13 comes into play. Under that statute, when a public body conducts a meeting by conference call or other electronic means, it must "provide a location and means whereby members of the public may listen to the meeting[.]"

Does the term "location" in G.S. 143-318.13 signify a physical space? I think so, at least in normal situations. Otherwise, rather than specifying a "location and means," the General Assembly could've simply mandated that public bodies furnish a "means" of listening to the meeting. On the other hand, I believe that, if confronted with a claim that a local government failed to satisfy the requirements of G.S. 143-318.13, a court would apply a reasonableness standard. The same circumstances that would justify excluding the public from the board's meeting room would also support a decision to provide the public with a virtual – as opposed to an actual – room where they could listen to an electronic meeting.

Reasonable Access to Public Comment Periods and Public Hearings

City councils and boards of county commissioners have express statutory authority to adopt reasonable regulations for the conduct of public comment periods and public hearings. G.S. 153A-52 (county public hearings); 153A-52.1 (county public comment periods; 160A-81 (city public hearings); 160A-81.1 (city public comment periods). In my view, consistent with *Garlock*, a court would employ a reasonableness standard to a city council's or county board's decision to hold public comment periods or public hearings solely by electronic means.

Reasonable Access to Quasi-Judicial Hearings?

Remote participation in quasi-judicial hearings raises due process and other legal issues. My colleague Adam Lovelady has just written a blog post on the topic.

Links

- files.nc.gov/governor/documents/files/EO169-Phase-3.pdf
- files.nc.gov/governor/documents/files/EO176-Phase-3-ext.pdf
- files.nc.gov/governor/documents/files/EO141-Phase-2.pdf
- files.nc.gov/governor/documents/files/EO138-Phase-1.pdf
- files.nc.gov/governor/documents/files/EO135-Extensions.pdf
- files.nc.gov/governor/documents/files/EO121-Stay-at-Home-Order-3.pdf

- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-318.10.html
- www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf
- files.nc.gov/governor/documents/files/EO120.pdf
- files.nc.gov/governor/documents/files/EO117-COVID-19-Prohibiting-Mass-Gathering-and-K12-School-Closure.pdf
- www.mecknc.gov/news/Documents/Mecklenburg%20County%20Stay%20at%20Home%20Orders.pdf
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_166a/GS_166a-19.31.html
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-318.13.html
- www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_153A/GS_153A-52.pdf
- www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_153A/GS_153A-52.1.pdf
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_160a/GS_160a-81.html
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_160a/GS_160a-81.1.html