
Coates' Canons Blog: Meetings and Public Hearings Under the Coronavirus State of Emergency

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Article: <https://canons.sog.unc.edu/meetings-and-public-hearings-under-the-coronavirus-state-of-emergency/>

This entry was posted on March 13, 2020 and is filed under Board Member Powers & Authority, Board Structure & Procedures, Featured Posts Related To COVID-19, General Local Government (Miscellaneous), Open Meetings, Public Hearings

[UPDATE: Section 4.31 of Session Law 2020-3 addresses electronic meetings held during a state of emergency declared by the Governor or General Assembly. The new law's provisions aren't reflected in this post, which was written before its enactment. For a discussion of the new law's requirements, please see the blog post here.]

This blog focuses on how local governments can do business and comply with both state law and the state guidance to avoid public gatherings. It also looks at how individual public officials can self-quarantine and practice social distancing, and still carry out their officials duties.

Is there anything in the Governor's Executive Order or anything else that has waived, suspended, or modified the statutory obligations under the open meetings law?

As of this writing, there is none. I've surveyed multiple legal experts and the general conclusion is that the Governor does not have the authority to waive statutory requirements even under a gubernatorial state of emergency declaration. Instead, the guidance from the state is to cancel, postpone, modify, and avoid gatherings of 100 people or more, and NCDHHS has provided additional information for managing gatherings of 100 people or less. Mayors and county board chairs don't have the authority to waive statutory requirements either, even if they've declared a local state of emergency. So the discussion below assumes that local governments must comply with the open meetings law, and provides suggestions for what might be considered reasonable accommodations, if the letter of the law cannot be met.

Can our board meet electronically?

This is an open question of law and the language in the statutes is open to multiple interpretations. The open meetings law requires public bodies to provide notice of and access to "official meetings." "Official meeting" includes "the simultaneous communication by conference telephone or other electronic means." It's possible to interpret the statute's mention of a conference call or other electronic means of gathering as a delegation of authority for electronic participation for all public bodies, including local governments. This interpretation is not universally accepted, however. The statute applies to all types of public bodies, and it clearly implies that at least some types of public bodies that have inherent authority, such as state agencies, may lawfully conduct electronic meetings, and that they have to comply with the procedure for providing access.

But it's not clear that the intent of the law was to authorize the use of electronic meetings for other public bodies that don't have such inherent authority. In the bulletin available here I explained why a court might not interpret the open meeting law's provisions for electronic meetings as authorization for local government boards to meet electronically. Local governments lack inherent authority, and a court might require more evidence of specific authority than the open meetings law definition of an official meeting. To make matters more complicated, the city voting and quorum statutes make reference to members having to be "present" and "physically present."

Here's my recommendation: If it is absolutely necessary for a city council or board of county commission to meet and it is not feasible to cancel the meeting (see below about canceling meetings), and it's impossible or unsafe to meet in person, I think meeting electronically is a reasonable choice. If possible, it would be best to have at least a quorum present in person. I believe the risk of a violation of the open meetings law is low in this situation. Although someone might file a lawsuit, I think a court would consider this to be a reasonable response to the public health and safety needs at this time. Examples of electronic options include conference calls, video options such as Zoom, and Skype or some other streaming platform.

Local government boards of all kinds meeting electronically should follow the procedures for electronic meetings under the statute set out below. I suggest that local governments waive the fee, and if it's impossible to satisfy the statutory notice requirements, I suggest that they use any method of public notice reasonably available, including posting on the unit's website and sending notice to email lists and lists of media who have requested notice.

§ 143-318.13. Electronic meetings; written ballots; acting by reference. Electronic Meetings. – If a public body holds an official meeting by use of conference telephone or other electronic means, [for example Zoom or Skype] it shall provide a location and means whereby members of the public may listen to the meeting and the notice of the meeting required by this Article shall specify that location. A fee of up to twenty-five dollars (\$25.00) may be charged each such listener to defray in part the cost of providing the necessary location and equipment.

Can the board take action if some or all of the members are participating remotely?

Assuming that the local government board has authority to meet electronically and they are all participating that way, I think they can exercise the same powers that they could if its members were meeting in person. They still would need to have a quorum and follow applicable procedures. The default “yes” provision in GS 160A-75 (“...a failure to vote by a member who is physically present in the council chamber, or who has withdrawn without being excused by a majority vote of the remaining members present, shall be recorded as an affirmative vote”) would presumably be inapplicable.

But if only one or some of the members are participating remotely it's a bit more complicated. The quorum statute, GS 160A-74, says, “A majority of the actual membership of the council plus the mayor, excluding vacant seats, shall constitute a quorum. A member who has withdrawn from a meeting without being excused by majority vote of the remaining members present shall be counted as present for purposes of determining whether or not a quorum is present.” I have argued in my bulletin on remote participation that it's possible that a court might construe a person to be present when participating electronically. If the remote participants are considered to be present for quorum purposes, they likely would be able to vote. But based on the language of the city default “yes” voting provision it would not apply to those who are not physically present.

Does the above recommendation apply to all public bodies?

Yes, except that the language about voting and quorum only applies to the city and county governing boards, and not to any other public bodies, such as planning boards, local advisory boards, school boards, or the governing boards of other units of local government. City and county governments have authority to authorize their appointed boards to meet electronically in most situations.

Can we cancel meetings in order avoid public gatherings and for the safety of our board members and staff? And if so, what is the process for doing this?

There are no statutory provisions that address cancelling meetings. The assumption is that public bodies have authority to cancel. There is no specific procedure for doing this, but if possible, it should be done by vote of the board, unless the mayor or chair makes that decision under a local state of emergency (discussed below). There is no requirement for providing notice of cancelled meetings, but I think the best practice is to provide notice as widely as possible. See my blog post about cancelling meetings for more on this topic: <https://canons.sog.unc.edu/cancelling-and-rescheduling-meetings/>

What about the requirements for city and county governing boards to hold at least one regular meeting a month?

Cities that adopt a schedule of regular meetings are not required to have a regular meeting each month. See GS 160A-71(a). Counties do have such a requirement. See GS 153A-40(a). If cancellations would create a violation of this requirement there are a few options. If it's possible to gather a quorum, whether in person or electronically, the board can convene the meeting and indicate that there is no agenda and adjourn. Or, if a quorum can be met, the mayor or county board chair can recess the meeting to another date and time. An argument could be made that the recess of the meeting doesn't meet the intent of the monthly meeting requirement if the recessed meeting doesn't take place within the month. In the event that this requirement simply can't be met, it's not clear whether there would be any serious legal consequence.

What about cancelling hearings?

Again, there are no specific statutory provisions that addresses this. The assumption is that the board has this authority. Statutorily mandated public hearings often have their own specific notice requirements, so when rescheduling meetings and hearings those notice provisions must be complied with. For example, if the board goes forward with the meeting but cancels the hearing, the board will have to satisfy the hearing notice requirements a second time. What if a public hearing doesn't happen because the meeting was cancelled? Under state law if a public hearing doesn't happen because a quorum is not present, "the board *shall* continue the hearing without further advertisement until its next regular meeting." GS 153A-52; G.S. 160A-81. It may be that this provision would be triggered in this situation, in which case the board may not be required to provide any additional notice. This provision does not apply to appointed boards, however, so if they need to cancel hearings, they should satisfy the specific notice requirements as applicable. As with meetings, there is no requirement to give notice of the cancellation of a hearing, but the best practice is to provide notice as widely as possible. For more on this see my blog post here:

<https://canons.sog.unc.edu/canceling-meetings-and-hearings-because-of-inclement-weather/>

We are concerned about having a meeting because of the need to avoid large public gatherings. Can we have a meeting and prohibit people from attending in person?

This may seem to be the safest thing to do, even if you're not dealing with large groups, but I'm not sure that it's within a unit's general authority. I think this should carefully considered. The guidance from the state is to cancel gatherings of 100 people or more. The open meetings law gives the public a right to attend meetings. Although it could be said that a person could be considered to be attending if they are listening or watching it remotely, but I think it's a stretch.

Here are some options I would recommend:

- 1) Contact your local public health officials and ask them whether it is possible to manage social distancing and other practices in a way that is acceptable and safe. This will be a function of how many people you expect to attend and how conducive your facilities are, and this will vary from unit to unit.
- 2) If your local government has declared a state of emergency, the mayor or county board chair has the power to control "The movements of people in public places, including any of the following: The operation of offices, business establishments, and other places to or from which people may travel or at which they may congregate," and also "Other activities or conditions the control of which may be reasonably necessary to maintain order and protect lives or property during the state of emergency." (GS 166A-19.31). (For more about who has what authority over local COVID-19 issues see Norma Houston's blog post here.) Under this provision I think the city or county could prohibit people to be in the building for meetings, and perhaps establish rules that people can only be in the public building for specific necessary purposes. Again, I think it might be good to consult with the public health folks to ascertain whether this is a necessary action.
- 3) Although the public has the right to attend meetings, North Carolina case law has held that the board does not have to accommodate everyone who wants to attend. Boards could limit the number of attendees in order to maintain social distancing. I think that would reasonable for the purposes of accommodating the open meetings laws and the health and safety considerations.
- 4) It's possible that you could prohibit the public from attending in person and provide access remotely with a streaming option. There is a risk that this would not comply with the statute. Even so, it seems a reasonable approach if no other option is feasible.

If we have prohibited the general public from attending the meeting, can we allow specific individuals to attend if they are necessary for the matters to be taken up at the meeting?

Yes.

If we have an electronic meeting, or we have prohibited the public from attending the meeting, do we have to provide a public comment period?

A public comment period is required at least once a month at a regular meeting. One option is to postpone the period to a



meeting later in the month. The purpose of this requirement is to allow members of the public to make comments to the board. There is no requirement for the board to respond. If public comments can't be made in person, perhaps a reasonable accommodation would be to provide a sign up for people to provide their comment by phone call or video, or provide an email option for the public to provide written comments.

What about public use of other buildings? Do we have authority to prohibit gatherings in those spaces not related to meetings of public bodies?

The board has authority over its property and the public doesn't have a general right to use those spaces at all times. There is a distinction between the public's ability to be in public buildings to engage in public business as allowed by the board, and the public's statutory right to attend an official meeting.

Links

- www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S704v6.pdf
- files.nc.gov/ncdhhs/Interim%20Guidance%20for%20Organizations%20that%20Gather%20100%20or%20More%20Peopler_031220.pdf
- www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/lglb133.pdf
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