
Coates' Canons Blog: Remote Participation in Quasi-Judicial Evidentiary Hearings

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Quasi-judicial evidentiary hearings are subject to formal procedural limits. Such hearings must adhere to the core elements of a fair trial and protect the due process rights of the parties. These issues heighten the concerns (and challenge) of holding a meeting of a quasi-judicial board remotely. As such, it is best to hold evidentiary hearings in person. If a live meeting is impractical due to a pandemic, a major weather event, or otherwise, it is best to postpone the evidentiary hearing. In certain limited circumstances there may be flexibility to allow remote participation in a quasi-judicial evidentiary hearing if absolutely necessary. This blog highlights the concerns and outlines some practical considerations.

Remote Meetings and Evidentiary Hearings

My colleague Frayda Bluestein provided a great bulletin on Remote Participation in Local Government Board Meetings, and she added clarification for the COVID-19 concerns in a blog post on Meetings and Public Hearings Under the Coronavirus State of Emergency. As she explains, the authority for a local government board to meet electronically is an open question of law, but there is a reasonable argument to allow it, especially under emergency circumstances. My colleague Trey Allen outlined related concerns in a blog on Failures to Vote by Board Members Participating Remotely.

North Carolina law defines “official meetings” to include “the simultaneous communication by conference telephone or other electronic means of a majority of the members of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business.” G.S. 143-318.10. “Public body,” in turn, is defined to include a board authorized to exercise a quasi-judicial function. There is ambiguity in the statutes as to how we interpret this authority in relation to other statutes that seem to require physical presence (statutes on quorums and voting, for example). Even so, if a board must meet and meeting in person is impossible or unsafe, then meeting electronically may be reasonable. If a board meets electronically, they still must follow the procedures outlined in state law and in Frayda Bluestein’s written guidance.

This would apply to *meetings* of a public body such as the governing board, the planning board, the board of adjustment, and other local government boards. But what about a quasi-judicial decision by that governing board, planning board, or board of adjustment? Can the board hold a quasi-judicial evidentiary hearing remotely?

Quasi-judicial decisions, such as variances and special use permits, are like court trials: The board must hold an evidentiary hearing and apply legal standards. North Carolina courts have long demanded that the due process elements of a fair trial apply to a quasi-judicial decision. A party with legal standing in a quasi-judicial decision has a right to be heard, to present evidence, and to cross-examine opposing witnesses. Witnesses must be sworn in or affirmed. Board members must be impartial and must base their decision on evidence in the record. *Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974). Given those legal requirements, quasi-judicial evidentiary hearings raise additional questions and concerns regarding remote participation.

Research has not revealed a case addressing the topic of remote participation in quasi-judicial hearings directly, neither from North Carolina nor other state courts. A Maryland court addressed participation by phone by one member of a board of zoning appeals in *Tuzeer v. Yim, LLC*, 201 Md. App. 443, 29 A.3d 1019 (2011). In allowing that participation, though, the court focused on the state open meetings laws, not the due process rights of the parties in the appeal.

Remote Participation by Members

The ability of a board member to see and hear a witness directly, ask them questions, assess witness credibility and how much weight to give their testimony, ask questions of staff, and the like is a key part of the work of the board. The

opportunity to deliberate candidly with fellow board members in real time is likewise important. Body language, facial expressions, and other nonverbal communication that goes along with live participation is important for members to see.

That said, North Carolina courts have allowed that a board member may deliberate and vote on a case even if they were not present at the hearing, as long as the member has access to the minutes of the hearing and the full record. *Brannock v. Zoning Bd. of Adjustment*, 260 N.C. 426, 132 S.E.2d 758 (1963); *Dellinger v. Lincoln Cty.*, 248 N.C. App. 317, 789 S.E.2d 21 (2016). If that is permissible, then remote participation by a member may also be permissible. It is unclear, however, if that line of reasoning would extend to remote participation by the entire board.

Remote Participation by Parties v. Remote Participation by the Public

In quasi-judicial decisions, there are notable differences in how individuals may participate. In thinking about remote participation, the considerations are different for an individual with legal standing as a party as compared to an individual who is merely a member of the general public. I outline additional details for those distinctions in this blog on Standing and Quasi-judicial Hearings.

A party with legal standing has due process rights in the case. That individual has rights to present evidence, to review all evidence, to challenge the impartiality of board members, to cross-examine witnesses, and to rebut evidence from opposing parties. It is practically difficult to respect all due process rights through a remote meeting.

The general public, in contrast, does not have rights to participate in a hearing. Open meetings laws give an opportunity to observe, not a right to participate. Quasi-judicial boards can, and often do, allow members of the general public to provide factual testimony and evidence relating to quasi-judicial decisions, but that is at the discretion of the board or specified in local policy.

Complicating this analysis is the fact that parties are not necessarily identified prior to a quasi-judicial hearing. In contrast to a court case or judicial appeal where the litigants are specifically named in advance, in a quasi-judicial case before a local board, a neighbor may not claim standing and participate until the first hearing. This fact makes it hard to properly address remote participation of the parties in advance.

Note that any witness—whether a party or a member of the general public—must be sworn in or affirmed in order to provide testimony and evidence in the evidentiary hearing.

Limited Flexibility for Rules of Evidence

In quasi-judicial evidentiary hearings, the judicial rules of evidence apply—to an extent. North Carolina courts and state law give some flexibility. Evidence that would not be admissible under the strict rules of evidence may be admissible for a quasi-judicial evidentiary hearing if “the evidence was admitted without objection or (ii) the evidence appears to be sufficiently trustworthy and was admitted under such circumstances that it was reasonable for the decision-making board to rely upon it.” G.S. 160A-393(k)(3).

North Carolina courts, for example, have allowed boards to admit and consider a special class of hearsay evidence without the author being present: technical reports from experts and analyses by government officials. For example, in *Whiteco Outdoor Advert. v. Johnston Cty. Bd. of Adjustment*, 132 N.C. App. 465, 513 S.E.2d 70 (1999), the court allowed the board to rely on analysis from an engineer with the NC Department of Transportation who was not present for the hearing when the opposing party did not timely object to the evidence. (Notably, a recent amendment to the statutes limits this flexibility for lay opinions on technical matters. Such evidence is inadmissible even without objection.)

Practical Considerations

It is best to hold a quasi-judicial evidentiary hearing in person. If circumstances such as mandated social distancing or a major weather event make an in-person hearing impractical, it is best to cancel the hearing and postpone it to a future date. That may require additional notice, but it will be the most prudent path.

If it is absolutely necessary to proceed with a case, there may be some flexibility in the law. In such cases, the local government should weigh these practical considerations.

- Use video conference. Video conference (such as Skype or Zoom) is closer to live engagement and is preferable to a phone conference call with audio only.
- Consider the case. If there are no contested facts and the evidence is stipulated, there is less of a necessity for members being able to personally interact with a witness. If the legal issues are clear and there is broad consensus among the board, the deliberation is simpler and it is easier to justify the adequacy of remote engagement. In contrast, if a case involves multiple witnesses, conflicting evidence, and close calls on the application of the standards, remote participation will be more challenging.
- Establish ground rules. Set a detailed agenda and outline procedures for how the meeting is organized to ensure due process rights are protected. What is the order of testimony? How is evidence entered into the record? How is cross-examination handled?
- Get agreement from the parties. If remote participation is allowed, obtain written consent for the record from all parties that they agree to use of that process. If any of the parties objects, it may be prudent to honor that objection and to continue the hearing until you have a quorum present.

Links

- www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/lglb133.pdf
- www.ncleg.net/enactedlegislation/statutes/html/bysection/chapter_143/gs_143-318.10.html
- www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_160A/GS_160A-393.pdf