Coates' Canons Blog: Remote Zoning Hearings during Declared Emergencies

By Adam Lovelady

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COVID-19 and related shutdowns have forced local governments to dramatically alter meetings. With some questions swirling around the authority and procedures for remote public meetings, the General Assembly stepped in to provide clarity. As outlined in this blog, new legislation clearly outlines procedures for remote public meetings during declared emergencies, authorizes remote public hearings with one important caveat, and authorizes remote quasi-judicial evidentiary hearings with several limiting conditions.

The new legislative clarity is especially important for planning and zoning decisions that commonly require public hearings and/or quasi-judicial evidentiary hearings, and this blog focuses on those decisions.

Remote Public Meetings

Session Law 2020-3 (Senate Bill 704), Section 4.31(a), enacts G.S. 166A-19.24, which provides authority and procedures for remote meetings by simultaneous communication during declarations of emergency by the Governor or General Assembly. This authority is limited to only the area of the declared emergency and only for the duration of the declared emergency. Note that these new rules and procedures apply to a remote meeting, which is defined as an official meeting "with between one and all of the members of the public body participating by simultaneous communication." If all members of the board are together in person for a meeting, it is not a remote meeting subject to these limits and procedures. The rules apply to remote *public meetings*, generally; as discussed below, additional limitations are placed on the *public hearings* and *quasi-judicial evidentiary hearings* that may occur during the remote public meeting.

Frayda Bluestein's blog on the New Rules for Meetings provides a careful analysis of the provisions. Here is a brief summary. For a remote public meeting during a declared emergency, the local government must provide proper notice, including information about how the public can access the meeting. The method of remote meeting must allow members to hear, and be heard by, members of the board and the public. Simultaneous communication is defined broadly to include conference telephone, conference video, and other electronic means. The remote meeting must be simultaneously streamed live online or otherwise available for the public. Minutes must reflect that the meeting was remote, how board members accessed the meeting, and when board members joined or left the meeting. All chats by instant message, text message, or other written communication by the board members regarding the transaction of public business are deemed public records.

If a member of the board is not visible, he or she must identify himself or herself for roll call, deliberations and motions, and voting. All documents must be provided to the board members. All discussions, deliberations, and actions must be clear to the listening public; board members must not refer to a matter merely by letter, number, or other designation. All votes are by roll call.

With regard to quorum, a board member only counts as present during the period when he or she maintains communication; if the connection is dropped, the member is no longer present for quorum. Similarly, votes by board members are counted as if the member were physically present only while the simultaneous communication is maintained.

Remote Zoning Public Hearings

The new law includes a provision to allow public hearings to be held during an authorized remote meeting, but there is an added requirement for written public comment. A local board may conduct any public hearing required or authorized by law during a remote meeting, but the board must allow written comments on the subject of the public hearing to be submitted between publication of notice and 24 hours after the public hearing.

In normal times it is common for a local government board to hold a public hearing on a zoning matter and then, at the same meeting, turn immediately to deliberate and vote on the zoning matter. It seems that such immediate action is not possible under the new provision for remote public hearings. The new legislation, it appears, effectively extends the public hearing for an additional 24 hours for written comments. It would be improper for the governing board to vote on the matter while the public is still invited to comment.

So, for example, if the board holds a remote public hearing on a rezoning on Tuesday night and closes the hearing at 8:00 pm, the board must accept written comments from the public from the time of published notice (10-25 days prior to the hearing as required by statute) until 8:00 pm on Wednesday. The board could take up the rezoning matter for deliberation and vote after 8:00 pm Wednesday—by recessing (continuing) the matter to the next regularly scheduled meeting or at a properly noticed special meeting. There would be no need for additional notice for a *public hearing*, but the subsequent *public meeting* would need to be properly noticed.

Remote Quasi-Judicial Evidentiary Hearings

Under Section 4.31 of Session Law 2020-3 (Senate Bill 704), the new G.S. 166A-19.24 authorizes local governments to hold quasi-judicial evidentiary hearings by remote meeting during a declared emergency subject to notable limitations. With those limitations and the legal and practical challenges of ensuring due process, quasi-judicial evidentiary hearings remain difficult, but not impossible, to manage remotely.

One note to start. The provision for remote quasi-judicial evidentiary hearings is permissive: “A public body *may* conduct a quasi-judicial proceeding as a remote meeting” when certain conditions are met. There is not a requirement to hold remote evidentiary hearings. But, if a property owner is dependent upon the issuance of a particular approval or if a shot-clock is expiring for an application, there may be circumstances when a remote evidentiary hearing is necessary.

Under the new law a local board may conduct a quasi-judicial evidentiary hearing remotely only if three conditions are met: (1) the right to a hearing and decision occurs during the emergency, (2) all individuals with standing consent to the remote hearing, and (3) all due process rights are preserved. Consider each in turn.

The right of an individual to a hearing and decision occur during the emergency.

The phrasing here is not clear and the meaning has some ambiguity. That said, it is reasonable to interpret this provision as allowing a quasi-judicial evidentiary hearing to continue remotely if, under normal circumstances, that hearing would have occurred during the time of the declared emergency. The intent of the Session Law is to provide relief from the crisis and continuity of government. The title of the Session Law is “An Act to Provide Aid to North Carolinians in Response to the Coronavirus Disease 2019 (COVID-19) Crisis,” and Part VI, which includes these rules on quasi-judicial hearings, is titled “Continuity of State Government/Regulatory Relief.” With that in mind, it is reasonable to interpret this particular provision as allowing more, not fewer hearings to be remote. Plus, the additional conditions (discussed below) will prevent many hearings from going remote.

An alternate interpretation of the provision is that remote evidentiary hearings are permitted only for those matters where a decision shot-clock will expire during the declared emergency (the "right . . . to a hearing and decision occur during the emergency"). A preservation commission, for example, must decide a request for a certificate of appropriateness within 180 days. There is statutory obligation to hear the case within a specified time. In contrast, variances typically get a hearing and decision in a reasonable time—there is not a right to a variance hearing and decision by a date certain. A narrow interpretation of the new law would say that certificates of appropriateness and other approvals with shot-clocks may be handled remotely, but not other quasi-judicial decisions. This narrow interpretation, though, carves out a broad range of quasi-judicial development decisions and seems to go against the legislative intent.

All persons subject to the quasi-judicial proceeding who have standing to participate in the quasi-judicial hearing have been given notice of the quasi-judicial hearing and consent to the remote meeting.

The persons with standing here will be the same as those identified by G.S. 160A-393 for standing to appeal a quasi-judicial decision to superior court: the applicant, an individual with an ownership interest in the subject property (or an option for such), the local government (when a decision by the local government is being appealed), an individual who will suffer special damages, or an association that includes a member who will suffer special damages. In order to hold a remote evidentiary hearing under the new statute, the local government will need consent from each of those parties with standing. To be clear, this is specific to parties with legal standing; this does not give a member of the general public a veto over a remote evidentiary hearing.

Determining standing of the applicant, the landowner, and the local government may be easy, but determining standing for neighbors who suffer special damages is more challenging, as highlighted in recent caselaw and as outlined in this blog on Standing and Quasi-Judicial Hearings. And, in contrast to a court case where the parties are known ahead of time, for many zoning matters individuals with standing may not assert rights until the hearing—or even after the hearing.

This already-tricky area of quasi-judicial practice is further complicated by the new law on remote evidentiary hearing. The new statute for remote meetings requires consent from all persons with standing, even if they are indifferent to the case. This puts the local government in a position of identifying who has standing prior to the hearing. But, standing is a question of law for the board, not an administrative task for staff.

One option is to seek consent from each nearby property owner who receives notice (essentially presuming they have standing). That would be overly generous to the neighbors' case for standing, but it would be a way of casting a broad net to ensure consent from anyone who does have standing. The request for consent could even invite the individual to allege standing (as is sometimes requested on applications of appeals of staff decisions or appeals of certificates of appropriateness). If a neighbor withholds consent, then the board could either wait and hold the evidentiary hearing in person at a later time or attempt the remote hearing, starting with the threshold question of standing of the individual withholding consent. To be sure, that latter option would be a practically awkward and legally tricky remote hearing on the topic of standing of an individual who is objecting to the remote hearing.

Alternatively, a local government could seek consent only from a very few neighboring owners with a clear showing of special damages (along the lines of the *Cherry* case discussed in the blog on standing linked above). Then, if there was a challenge from another individual, it would be resolved on appeal to superior court. A challenge to this approach is that there is a narrow determination of standing by staff (not the board) and prior to the hearing itself.

Regardless of the approach, it will be prudent to send notice of the decision to the same individuals that received notice of the evidentiary hearing—notifying those interested individuals of the outcome and starting the clock for appeal to superior court.

All due process rights of the parties affected are protected.

Finally, as is always the case in quasi-judicial evidentiary hearings, the due process rights of the parties must be honored in a remote evidentiary hearing. There are legal and practical challenges to doing that remotely. Those challenges are not insurmountable, but they are substantial. How is evidence submitted and reviewed? How are witnesses cross-examined? What if a party does not have the technology or connectivity to participate fully? These are all questions that must be addressed if and when a local government moves forward with a quasi-judicial evidentiary hearing.

Some of those legal concerns and practical considerations are outlined in my recent blog post on Remote Participation in Quasi-Judicial Evidentiary Hearings. Among other things, use video conference (and test it out ahead of time), establish clear ground rules for all involved, and avoid handling hotly contested cases remotely, if possible.

Conclusion

The rules for remote public meetings of Session Law 2020-3 are outlined in the new G.S. 166A-19.24 and carefully analyzed in Frayda Bluestein's blog post on the topic. Those rules will apply to governing boards, planning boards, boards of adjustment, and other local development boards that may be meeting during a declared emergency.

Additionally, if a board is holding a public hearing remotely—such as for a zoning amendment or rezoning—then the additional requirements for remote public hearings will apply. Notably, the board will need to allow for written public comments from the time of published notice until 24 hours after the hearing. This means that the board will need to vote at a recessed or subsequent meeting.

And finally, if a board is holding a quasi-judicial evidentiary hearing remotely, the following conditions must apply: the right to a hearing and decision occurs during the emergency, all individuals with standing consent to the remote hearing, and all due process rights are preserved.

Links

- www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2019-2020/SL2020-3.pdf