



Coates' Canons Blog: New Rules for Meetings of Public Bodies During State-Level Declared Emergencies

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As a part of the Act to Provide Aid To North Carolinians In Response to the Coronavirus Disease 2019 (COVID-19) Crisis, (S.L. 2020-3, SB 704) the General Assembly has enacted modifications to the laws governing meetings of public bodies, and voting and quorum rules for city and county governing boards. The new law modifies those rules and provides specific guidance regarding remote meetings, including quorum, notice, voting, public comment, and public hearings. These provisions are in Section 4.31 of the Act, (starting on page 61 in the PDF linked above). The new provisions for remote public meetings became effective on May 4, 2020, and only apply when there is a declaration of a state of emergency by the Governor or General Assembly under GS 166A-90.20. They aren't triggered by city or county emergency declarations. The new law also provides that any electronic meeting undertaken via remote participation between March 10, 2020 and the effective date of the new law is not deemed invalid due to the use of the use of electronic communication to conduct that meeting. This blog summarizes the new provisions.

Remote meetings authorized and defined. The new law enacts GS 166A-19.24, which authorizes any public body to conduct remote meetings in accordance with the rules set out in the act, as well as with the provisions of the open meetings law. "Remote meeting" is defined as: *An official meeting, or any part thereof, with between one and all of the members of the public body participating by simultaneous communication.* "Simultaneous communication" is defined as: *Any communication by conference telephone, conference video, or other electronic means.* Official meeting and public body are defined as set out in the open meetings law.

Simultaneous communication requirements. When meeting using simultaneous communication in an official meeting, the method must allow for any member of the public body to hear what is said by the other members of the public body; hear what is said by any individual addressing the public body; and be heard by the other members of the public body when speaking to the public body. In other words, the person participating remotely must be able to hear and be heard throughout the meeting. The law also requires any members who are participating by simultaneous communication and can't be seen by the public body to identify themselves when the roll is taken, when the remote meeting commences, prior to participating in deliberations (including making motions, proposing amendments, and raising points of order), and prior to voting.

Requirements for conducting remote meetings. As with all other official meetings of public bodies, the precise notice requirements that apply to an electronic meeting depend on whether the meeting qualifies as a regular, special, emergency, or recessed meeting. Prior to the new legislation, every electronic meeting notice had to specify the "location and means" whereby members of the public could listen to the meeting. GS 143-318.13(a). Under the new law, an electronic meeting notice issued during a state of emergency declared by the Governor or General Assembly must specify the means by which the public can access the remote "as that meeting occurs." It doesn't have to specify a physical location where members of the public can go to hear the meeting. This exception makes sense because, as we have seen, situations serious enough to trigger a gubernatorial or legislative emergency declaration can sometimes lead to restrictions on mass gatherings.

The remote meetings must be simultaneously streamed online so that simultaneous live audio, and video, if any, is available to the public. If the means of the remote meeting is a conference call, the public body can provide access by providing an opportunity to dial in or stream the audio live and listen to the meeting.

Minutes of remote meetings must reflect the use of simultaneous communication, which members were participating by

simultaneous communication, and when those members joined or left the remote meeting.

The public body must comply with GS 143-318.13(c), which prohibits acting by reference such as deliberating, voting, or otherwise taking action upon any matter by reference to a letter, number or other designation, or other secret device or method, with the intention of making it impossible for persons attending a meeting of the public body to understand what is being deliberated, voted, or acted upon. This provision does not prohibit a public body from deliberating, voting, or otherwise taking action by reference to an agenda, if copies of the agenda, sufficiently worded to enable the public to understand what is being deliberated, voted, or acted upon, are available for public inspection at the meeting.

All documents to be considered during the remote meeting must be provided to each member of the of the public body.

All chats, instant messages, texts, or other written communications between the members of the public body regarding public business during a remote meeting are public records.

Closed Sessions: The new law allows public bodies to meet in closed session as authorized in GS 143-318.11, and makes it clear that a public body is not required to provide access to the remote meeting while it is in closed session. The public body must comply with all of the requirements in the new law and the open meetings law, including noticing an open meeting, allowing access to the open portion of the meeting, making a motion in open session to go into closed session indicating the provision that authorizes the closed session, preparing minutes and a general account, and coming out of closed session to continue the meeting or adjourn. Public bodies may want to consider developing strategies to protect confidential information when members are participating remotely.

Public Hearings: The new law authorizes public bodies to conduct public hearings during a remote meeting and take action based on those hearings. It adds a requirement that written comments may be submitted at any time between the notice of the public hearing and 24 hours after the public hearing. A consequence of this requirement is that the public body will not be able to take action on the matter immediately following the public hearing. It will have to take action at a later meeting or recess the meeting long enough to comply with the 24-hour requirement.

Quasi-Judicial Evidentiary Hearings: These evidentiary hearings are required when a decision involves due process rights, and require evidential testimony by the applicant and other people whose due process rights may be affected. These people have standing to testify and challenge the final decision. The trial-like nature of quasi-judicial evidentiary hearings present difficult issues for remote meetings. The new law does, however, authorize the use of remote meetings for quasi-judicial, subject the following requirements:

- The right of an individual to a hearing and decision occur during emergency;
- 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;
- All due process rights of the parties affected are protected.

This provision raises some difficult issues. It may be challenging for the public body to identify all of the individuals who have standing in order to the obtain their consent. A detailed definition of "Standing" for challenging local government quasi-judicial decisions can be found in GS 160A-393 (d). In some cases it may easy to identify people who have standing but in some cases, people with standing might not be identified until the hearing is under way. In addition, the time frame within which a quasi-judicial meeting may be held is subject to multiple interpretations. It's not clear when the right "occurs." Putting these issues aside, as described in Adam Lovelady's blog post here, there remain many practical challenges and legal risks with conducting quasi-judicial hearings with remote participation.



Quorum: Local governments have struggled with the issue of whether members of a public body who are not physically present can be counted as present for purposes of a quorum. As I noted in a blog post here, this is mostly an issue for the governing boards of cities and counties due to the language in their quorum and voting statutes that make reference to members being present or physically present. For other public bodies, the open meetings generally law generally recognizes electronic meetings as official meetings. The new law modifies the city and county quorum statutes (GS 153A-43, GS 160A-73), making it clear that a member of any public body who is participating by simultaneous communication must be counted as present for purposes of a quorum as long the communication is maintained for that member. *This means that during a state-level state of emergency, there is no requirement to have a quorum physically present at a remote meeting.*

Both the city and county quorum statutes provide that if a member has withdrawn without being excused by a majority of the members present, the member is counted as being present for purposes of a quorum. This provision applies under the new law, but it's not clear how it would work. If a person is participating with video, it would be possible for a person physically move out of the frame of the video and no longer being seen. Other situations are more difficult. What if the person is participating with audio only. If the person puts down the phone and walks away, it would difficult determine if the person is still present. As a practical matter, the presiding officer or any board members could ask the person to confirm that the person is still present. What if the person intentionally terminates the connection? In that case it appears that under the amended quorum rules, that person is no longer counted as being present. Similarly, if the person's connection is severed due to technical issues, the person is no longer participating simultaneously and therefore no longer counted as present.

Voting: The new law provides that the vote of each member is to be counted as if the member physically present only as long as the simultaneous communication is maintained for that person. As noted earlier, under the new law, during a remote meeting all votes must be conducted by roll call. In addition, the new law provides that notwithstanding the authority in GS 143-218(b), no vote by secret or written ballots on paper or electronic may be taken in a remote meeting.

For city and county governing boards, the new law provides that the provisions of GS 153A-44 and GS 160A-75 (the voting statutes) apply. In addition, the new law modifies the voting statutes to provide that a vote or a failure by any member who is participating by simultaneous communication must treated as if the member were physically present. This applies only as long as the communication is maintained for that member.

The default "yes" rule: The city voting statute provides that if a council member is present, has not been excused from voting, and does not vote, the member is counted as voting yes. This is often called the default "yes" rule. The voting statute for boards of county commissioners does not include a default "yes" provision, but many counties have incorporated it into their local rules. How does the default "yes" rule apply to a member who is participating with simultaneous communication? Here's a suggested analysis. Since all votes are roll call, and members participating with simultaneous communication must identify themselves before they vote, only those that have done so can vote. If a person has been identified as being present for the vote, but does not vote, it should be recorded as a yes. If a person is present but doesn't identify him or herself, the person can't vote, and if the person attempts to vote it should not count. If the person has terminated the communication before the vote, or if the person has lost communication due to technical problems, the person is no longer counted as present and cannot vote.

Implications for Electronic Meetings After the State of Emergency: With the onset of the pandemic, there was broad concern about the lack of clarity regarding the authority and procedures for remote and electronic meetings. In our earlier blog posts and advising for local government officials regarding we attempted to balance adherence to the statutory language and the need to protect the health and safety. The most difficult issues have been how to meet the quorum and voting requirements for city and county governing boards. For most other public bodies, the statutes and procedures are much more open to local policies. In addition, as set out in blog posts regarding strategies for electronic meetings, here and here, there are reasonable practices for electronic meetings that preserve the obligation of access and align with existing law. As noted in my earlier in this blog, the legislature has seen fit validate all the use of electronic means in meetings undertaken between March 10 and May 4.

As we look forward to the effect of the new law, what implications might there be for the use of electronic/remote meetings when there is no emergency? One implication might be that if there was already authority to meet remotely, there would be no reason for the legislature to specifically authorize it in a state of emergency. A different argument might be that the



legislature intended to create specific powers to be authorized only in an emergency. Language in the new law supports that analysis. GS 166A-19.24(h), says: "Not Exclusive. – This section applies only during emergency declarations and does not supersede any authority for electronic meetings under Article 33C of Chapter 143 of the General Statutes." This suggests that the new provisions don't change anything that is already law under the open meetings law. There's an upside to that, in that there's a lot in the new law that is specific to extraordinary circumstances and wouldn't be necessary for normal times. The downside is that we're left with the same questions and no clear answers with respect whether and how local governments can continue some of the practices that have been so critical to maintaining access while doing business during these difficult times.

Links

- www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S704v6.pdf
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-393.html



Coates' Canons Blog: Electronic Meetings During the COVID-19 Emergency: Recommended Practices

By Trey Allen

Article: <https://canons.sog.unc.edu/electronic-meetings-during-the-covid-19-emergency-recommended-practices/>

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[UPDATE: Section 4.31 of Session Law 2020-3 enacted new G.S. 166A-19.24, which imposes a variety of procedural requirements on remote meetings held by public bodies during a state of emergency declared by the Governor or General Assembly. As defined by G.S. 166A-19.24, a "remote meeting" is one at which at least one board member participates by electronic means. In other words, the statute doesn't apply to a meeting where all board members are physically present, even if the board doesn't allow the public to attend in person. For a discussion of the new law's requirements, please see the blog post [here](#). This post still provides useful guidance for meetings where the board members attend in person but members of the public aren't allowed inside the meeting room.]

Electronic meetings have quickly become a fact of life for many local governments in North Carolina as officials have acted to limit the spread of the Coronavirus. This post summarizes some of the advice that my colleagues and I have been giving on best practices for electronic meetings.

In this post, I assume that it's lawful for local government boards to meet and conduct at least some business electronically rather than in person. As my colleague Frayda Bluestein has pointed out [here](#) and [here](#), the quorum statutes for city councils and boards of county commissioners (BOCCs) don't provide clear authority for remote participation by members of those bodies, but they don't expressly forbid such participation either. As explained [here](#), the wording of the city council voting statute also might raise questions about remote participation by council members. Nonetheless, for purposes of this post, I'm going to take it for granted that councils and BOCCs may meet and act electronically.

"Electronic Meeting" Variations

Over the past several weeks I've seen the phrase "electronic meeting" used to cover a range of situations, including the following:

- Board members meet solely by electronic means. The board makes a room available where members of the public can go to listen to (or watch and listen to) the meeting.
- Board members meet solely by electronic means. The board streams the meeting live online or provides a phone number that people can call to listen to the meeting.
- Some or all board members meet in person, but the board (1) limits the number of other attendees in response to social distancing guidelines or restrictions on mass gatherings or (2) completely bans the public from attending the meeting in-person. The board livestreams the meeting or gives out a number people can call to listen to the meeting.

The recommendations in this post apply to all three of the above situations.

Meeting Notice

The open meetings law remains in effect during the COVID-19 state of emergency. Consequently, the law's public notice requirements continue to apply to all official meetings of local government boards.

There's a bit of confusion over the notice requirements for electronic meetings. Some people think of an electronic meeting as something other than a regular, special, emergency, or recessed meeting. That's incorrect. When it comes to notice requirements, an electronic meeting is simply a regular, special, emergency, or recessed meeting conducted by electronic means. The decision to meet electronically doesn't relieve a board of its notice obligations. Indeed, if board

members meet solely by electronic means, they trigger the additional notice requirement set out in G.S. 143-318.13(a) and described below.

Recommendations

- Provide the public notice required under normal circumstances for a regular, special, emergency, or recessed meeting, as applicable.

Meeting Type	Required Notice
Regular G.S. 143-318.12(a), (d)	<ul style="list-style-type: none"> • File regular meeting schedule showing each meeting's time and location with relevant city or county clerk. • Post meeting schedule on city's or county's website. • If regular meeting of BOCC, satisfy extra notice requirements in G.S. 153A-40(a). • If change is made to time or location of meeting on schedule, file revised schedule with city or county clerk at least 7 calendar days before first meeting held pursuant to revised schedule. <ul style="list-style-type: none"> ◦ If regular meeting schedule lists physical location, switching to purely electronic meeting likely amounts to schedule change and, thus, triggers 7-day filing requirement. • If change is to BOCC's regular meeting schedule, fulfill extra notice requirements in G.S. 153A-40(a).
Special G.S. 143-318.12(b)(2), (e)	<ul style="list-style-type: none"> • At least 48 hours in advance of meeting, post written notice of meeting's time, place, and purpose(s) on board's bulletin board or meeting room door. • At least 48 hours before meeting, provide notice by mail, e-mail, or delivery to all individuals and media organizations that have submitted written requests for notice. • Prior to meeting, post notice on board's website, if website is maintained by at least one city or county employee. • If special meeting of BOCC, notify commissioners as mandated by G.S. 153A-40(b). • If special meeting of city council, notify council members as mandated by G.S. 160A-71(b).
Emergency G.S. 143-318.12(b)(3)	<ul style="list-style-type: none"> • Provide notice to any media organizations that have submitted written requests for notice. Notice may occur by e-mail, phone, or method used to notify board members. • If emergency meeting of BOCC, satisfy extra notice requirements in G.S. 153A-40(b). • If emergency meeting of city council, notify members as mandated by G.S. 160A-71(b).
Recessed G.S. 143-318.12(b)(1), (e)	<ul style="list-style-type: none"> • When recessing regular, special, or emergency meeting, announce time and place of recessed meeting in open session. • Prior to meeting, post notice of meeting's time and place on board's website, if the website is maintained by at least one city or county employees.
	<ul style="list-style-type: none"> • If board members plan to meet solely by electronic means, comply with G.S. 143-318.13(a) by indicating on the notice the location and means whereby the public may listen to the meeting. • If the board has restricted or banned in-person attendance, include instructions on the notice on how the public can listen to or watch and listen to the meeting.

Quorum

A quorum is necessary for a local government board to conduct business at any meeting, including an electronic one. The default rule is that a quorum consists of a simple majority (more than half) of a deliberative body's members. Statutes dictate the quorum calculation methods for city councils and BOCCs, as discussed in more detail here.

Recommendations

- *At the outset of the meeting, verify the identities of all members participating remotely.*
 - Ask all remote members to state their names for the record.
 - If a member participates by audio only, but the other members are confident that they recognize the member's voice, it's probably reasonable to rely on voice recognition alone. Of course, verification is easier and more reliable if remote members use platforms that allow other members to see and hear them.
- *Follow a clear rule for determining how the quorum will be affected when members lose or deliberately terminate their connections.*
 - When a connection is lost, the presiding officer may want to call a brief recess while an attempt is made to reconnect with the remote member.
 - In most cases, the default rule is that members who lose or terminate their connections no longer count as present for quorum purposes.
 - Under the quorum statutes for city councils and BOCCs, a member who leaves a meeting without being excused by majority vote of the remaining members still counts as present for quorum purposes. If the city council or BOCC treats members who participate remotely as present for quorum purposes, it makes sense to treat the loss of a member's connection as equivalent to a member's physical departure from the meeting room. If the council or BOCC unexpectedly loses its connection with a member, and efforts to restore the connection prove unsuccessful, the remaining members should probably vote to excuse the member unless they have reason to believe that the member deliberately terminated the connection.

Motions & Voting

The minutes of local government board meetings must record motions made and the outcomes of the votes on those motions. When board members participate by electronic means, it can be harder than usual for members and the public to tell what motions were made, who made them, and how each member voted on them. Too much confusion could lead people to question whether a motion really passed (or failed, as the case may be).

City councils and BOCCs have another reason to ensure that the minutes correctly document the votes, or failures to vote, of their members. State law requires council members and county commissioners to vote except when they are excused from voting for legally valid reasons. G.S. 153A-44; 160A-75. Generally, under G.S. 160A-75, the unexcused failure to vote by a council member who's "physically present," or who has left the meeting without being excused, must be recorded as an affirmative vote. As I discussed in a previous blog post, G.S. 160A-75's use of the phrase "physically present" likely means that the statute's default "yes" rule doesn't apply to members who attend meetings electronically. Councils that want the default "yes" rule to apply to those members need to adopt local rules to that effect. The same is true for the many BOCCs and local appointed boards that have adopted their own default "yes" rules modeled on G.S. 160A-75.

Recommendations

- *Restate each motion and name the member who made it.*
 - The presiding officer is supposed to restate each motion that's properly before the board at every meeting. *Robert's Rules of Order Newly Revised* (11th), p. 39, ll. 8-10 ("In principle, the chair must state the question on a motion immediately after it has been made and seconded, unless he is obliged to rule that the motion is out of order[.]").
- *During voting, call on each member who participates electronically separately and by name.*
 - This measure may not be necessary if the technology being used makes it clear how each member voted.
- *If "yes" votes are recorded for unexcused failures to vote by members who are physically present or who have left without being excused, extend that rule to unexcused failures to vote by members who attend electronically.*

Public Access to Meetings with Attendance Restrictions

Some public bodies have limited the number of people who may attend their meetings in light of mass gathering restrictions or social distancing guidelines. Others have totally banned in-person attendance at their meetings. Any public body that sharply restricts or prohibits in-person attendance must take reasonable steps to make its meetings publicly accessible by other means.

Recommendations

- *Stream meetings live on an online platform that allows the public to see and hear the meetings.*
- *Provide a phone number that people without internet access can call to listen to the meetings.*
- *Consider posting recordings of the meetings online.*

Public Comment Periods

Each BOCC must hold at least one public comment period at a regular meeting every month. G.S. 153A-52.1. Each city council must hold at least one public comment period at a regular meeting during any month in which it holds a regular meeting. G.S. 160A-81.1. Obviously, where boards have restricted or prohibited in-person attendance at meetings, people can't take part in public comment periods in the usual way. It's a good idea for those boards to offer virtual public comment periods that approximate traditional public comment periods. This view accords with Frayda's advice in a prior blog post: "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."

Recommendations

- *Allow people to post comments online or submit them by e-mail or text during the public comment period.*
- *Have the clerk or another official read aloud comments submitted by e-mail or posted online.*
 - The board should prepare for the possibility that some comments will be abusive or obscene. Subject to constitutional limitations discussed in the blog post found here, city councils may adopt public comment policies that require decorum and prohibit abuse. E-mails and online comments that violate lawful public comment policies don't have to be read aloud.
- *Consider using an online platform or call-in number that will enable people to address the board during the public comment period.*
 - The board will need to have the ability to mute speakers as necessary to maintain control of the meeting.

Public Hearings

Various state laws require city councils or BOCCs to hold public hearings before they take certain actions, such as adopting zoning ordinance amendments. (See here for a list of actions for which public hearings must be held.) As with public comment periods, a council or BOCC that has restricted or banned in-person attendance at meetings has necessarily impaired the ability of people to take part in public hearings in the usual way.

There's no clear law in North Carolina on whether, or under what circumstances, boards may satisfy public hearing requirements through virtual public hearings. For this reason, the safest course is to delay action on non-urgent matters subject to those requirements until it's possible to conduct hearings in person. The law permits a city council or BOCC to continue a public hearing in open session without further advertisement. G.S. 153A-52; 160A-81.

Recommendation

- *If the board decides to hold a public hearing electronically, follow the recommendations for virtual public comment periods.*

Quasi-Judicial Hearings

Remote participation in quasi-judicial hearings raises due process and other legal issues. It's best to avoid conducting



those hearings electronically. Any board that decides to hold a quasi-judicial hearing by electronic means should review the blog post by my colleague Adam Lovelady on this topic.

Links

- www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S704v6.pdf
- www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/Ig1b133.pdf
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-318.13.html
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-318.12.html
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-44.html
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_160a/GS_160a-75.html
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_153a/GS_153a-52.1.html
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_160a/GS_160a-81.1.html
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-52.html
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_160a/GS_160a-81.html

