

OHIO MUNICIPAL ATTORNEYS

Thoughts on conducting virtual meetings

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Jerry Strozdas

This week the Ohio General Assembly passed an omnibus bill addressing several issues posed by the coronavirus emergency. Sub.H.B.197. Part of the bill is an amendment to the Ohio Open Meetings Law that permits public bodies to conduct meetings and hearings electronically during the emergency. (At p.31 of the bill.) This short paper is an effort to provide some guidance on conducting virtual meetings in compliance with the amendment.

SCOPE

The statute would add a new section to the Open Meetings Law. The Open Meetings Law may not apply to your city¹. The conduct of meetings has been held to be a “power of local self-government” that is part of your Home Rule power under the Ohio Constitution. If your city has exercised that power and established its own open meeting rules, the Open Meeting Law has no application and neither does this amendment.

The amendment affects every “public body” as defined under ORC 121.22. The definition of public body is unchanged.

Public bodies must, subject to certain exceptions not relevant here, conduct business in public meetings. Under current law, a public meeting requires members of the public body be present in the same room and members of the public must be permitted access to that room. These requirements are at odds with the exigencies of the coronavirus emergency.

The amendment enacts a new section ORC 121.221. It establishes criteria under which the objective of openness can be served without requiring public officials or members of the public to jeopardize their health by exposing them to the dangers of contagion.

EQUIPMENT REQUIREMENTS

Meetings can be conducted “by means of teleconference, video conference or any other similar electronic technology...” You must ensure that the public can “observe and hear” the discussions and deliberations of all the members of the public body.

¹ “City” includes villages.

There are countless services that are available on the internet for teleconferencing that would fulfill and go well beyond the requirements of the amendment. Virtually every computer and every smart phone has a camera that can be utilized to enable the members to see each other. Expensive new equipment may not need to be purchased.

If you intend to conduct virtual meetings, test the technology you intend to use before you go live. Members of city councils and boards may not be technologically sophisticated and may not know how to turn on the cameras on their home computers, or how to access the program you intend to use.

PUBLIC ACCESS

New Section 121.221(B)(4) states:

“ The public body shall provide the public access to a meeting held under this section, and to any hearing held under this section that the public would otherwise be entitled to attend, commensurate with the method in which the meeting or hearing is being conducted,...”²

This seems to allow for executive sessions to be held without public access. It would also allow for disciplinary hearing and other hearings that need not be public to be conducted electronically without affording access to the public.

Section 121.221(B)(4). Continues by saying that the access may be by means of methods

“including, but not limited to, examples such as live-streaming by means of the internet, local

radio, television, cable, or public access channels, call in information for a teleconference, or by means of any other similar electronic technology.”

The next sentence requires that “the public can observe and hear the discussions and deliberations of all the members of the public body, ...”

Live streaming on your city’s website or on Facebook, YouTube or some other widely available site will likely suffice.

Although teleconferences are specifically mentioned, traditional audio only teleconferences will likely not suffice, because the public will not be able to “observe” the members of the public body.³ Teleconferences can also be awkward because there will likely be a limit on the number of people who can call in.

² The “commensurate with” phrase seems superfluous and confusing.

³ An early draft proposal only required that the public be able to “hear” the members of the public body. The addition of the word “observe” is presumed to be deliberate.

Additionally, you may not be able to easily limit non-members of the public body from speaking out of turn.

NOTICE

The statute requires 24-hour advance notice of a virtual meeting under this section. The method of notice is not specified; it must be “reasonable.” Notice must be given to any media who have requested meeting notices and to the public. Parties to hearings conducted under this section also must be given 24-hour notice.

In the case of an emergency meeting, “immediate notice to the media is required in lieu of the 24-hour notice to the media and the public.

Local charters, ordinances or rules of council may have separate notice provisions. You should review them and see if they need to be amended or suspended for the duration of the emergency.

HEARINGS

The amendment also applies to hearings. The amendment requires that parties to virtual hearings be able to introduce documents and question witnesses via “the use of electronic equipment that is widely available to the general public...” Be sure the software you plan to use is accessible to the parties. Especially where a party is unrepresented, a trial run may be time well spent.

Hearings which do not require the swearing in of witnesses present no problems. However, municipal hearings which require a witness to be sworn in should not be held if possible. Ohio’s new notary law draws a distinction between a normal notary and a notary able to notarize individuals who are not actually before them to be notarized. As such it will be difficult to obtain a notary who will be able to perform the notarization that would be required.

In addition, handling documents in a virtual hearing presents challenges. I presume that exchanging pdfs of documents prior to the hearing via email would comply with the amendment. However, it will be tough to be sure that the parties, the witnesses and hearing panels are looking at the same documents during the course of the hearing.

Consider whether it is worthwhile to conduct virtual hearings under the amendment in light of the challenges. Rescheduling to a later date when you are able to conduct an in-person hearing might better serve all concerned.

EFFECT

If you comply with the stated conditions - members can hear each other, proper notice was given, and the public can watch - the meeting will qualify as a public meeting compliant with the Open Meeting Law. Members of the public body who “attend” a compliant meeting count for the purposes of a quorum and may vote.

TERM

The OMAA preferred that this amendment remain in effect for the duration of the emergency and apply in any future emergency declared by the Governor. The legislature limited the amendment to the duration of the existing emergency, or December 1, whichever comes first.

PUBLIC PARTICIPATION

The amendment does not address public participation in virtual meetings. That is because existing law does not address public participation. Neither the current statute nor the amendment confers a right for the public to speak at a public meeting.

Most cities with which I am familiar allow some degree of public participation at their meetings. Participation may be required by charter or ordinance. Most likely it is allowed by rule of council or the ancient rule of “the way we’ve always done it.”

Find the source of your participation practices. If they are in your Charter, you’ll have to find a way to accommodate them.⁴ Otherwise, consider asking your council to suspend the rule or ordinance for the duration of the emergency.

THIS DOCUMENT CONSTITUTE THE THOUGHTS OF JERRY STROZDAS, FORMER CITY ATTORNEY FOR SPRINGFIELD AND WAS VETTED BY A SUBCOMMITTEE OF THE OHIO MUNICIPAL ATTORNEYS ASSOCIATION. IT IS NOT INTENDED TO BE LEGAL ADVICE, BUT RATHER A COMMENTARY ON SUB. H.B. 197 AS IT PERTAINS TO VIRTUAL MEETINGS. PLEASE CONSULT YOUR MUNICIPAL LEGAL COUNSEL FOR ACTUAL LEGAL ADVISE.

⁴ Many of the more sophisticated meeting apps available will allow the submission of comments and questions.