

# Conducting Meetings and Public Hearings During the COVID-19 Pandemic

The following guidance is for conducting meetings and public hearings during the COVID-19 pandemic. **PLEASE READ THE ENTIRE DOCUMENT BEFORE CONTACTING NYCOM WITH QUESTIONS REGARDING CONDUCTING MEETINGS AND PUBLIC HEARINGS.**

## An Overview of Meetings During the COVID-19 Pandemic

Local officials are finding themselves in situations where conducting business that is essential for the continuation of municipal operations and complying with the technical procedural requirements of State law is impossible in light of public health considerations. Particularly problematic, given the nature of the current crisis, is the in-person requirement of the NYS Open Meetings Law.

On March 13, 2020, Governor Cuomo issued Executive Order No. 202.1 in an effort to address the conflict between the requirements of the Open Meetings Law and the Governor's emergency orders limiting gatherings. Specifically, Executive Order No. 202.1 suspends Article 7 of the Public Officers Law (also known as the Open Meetings Law) to the extent necessary to permit any public body to meet and take such actions authorized by law without allowing the public to be physically present at the meeting. The order also authorizes public bodies to meet remotely by conference call or similar service. If a public body restricts in-person access to its meetings or conducts a meeting remotely by conference call or similar service, the public body must provide the public the ability to view or listen to such meetings and must record and later transcribe such meetings.

Complicating the issue of public bodies conducting meetings is Governor Cuomo's Executive Order 202.10 which was issued on March 23, 2020 and which, in relevant part, prohibits "non-essential gatherings of individuals of any size for any reason (e.g. parties, celebrations or other social events)." What this means for meetings of public bodies is not entirely clear. Are public bodies prohibited from conducting in-person meetings as a result of Executive Order 202.10? Because Executive Order 202.1 authorizes public bodies to conduct meetings using videoconference and teleconference technology, the argument could be made that any "in-person" meeting is non-essential because there is a non-in-person alternative. However, if a public body does not have the capacity to conduct a meeting in conformance with the requirements of Executive Order 202.1, the Open Meetings Law does not allow public bodies to take action via email voting or telephone conference calls. To the extent that neither State law nor an Executive Order from the Governor provides a viable method for local officials to hold a meeting or conduct a public hearing, local officials must do what they need to do to insure that government operations continue to run and that the public's health, safety, and welfare is protected, while striving to comply with the spirit of State law, if technical compliance is not possible or safe.

If an official deviates from the requirements imposed by State statute, they should acknowledge in writing or on the record that they are deviating from the law and state the reasons for doing so. Furthermore, local officials may wish to consider ratifying such actions at a later properly noticed and conducted meeting.

## The Open Meetings Law

### General Requirements

The Open Meetings Law, Article 7 of the Public Officers Law (§§ 100-111), outlines the basic requirements for public bodies to conduct meetings.

The Open Meetings Law defines a "public body" as any entity consisting of two or more members who perform a governmental function and for which a quorum is required to conduct public business.<sup>1</sup> This definition encompasses local legislative bodies<sup>2</sup> such as village boards of trustees and city councils, as well as planning boards<sup>3</sup> and zoning boards of appeals.<sup>4</sup>

Public Officers Law § 102[1] defines a “meeting” as “the official convening of a public body for the purpose of conducting public business.” Historically, this meant that the members of the public body physically gathered to conduct business, but in 2000, Section 102 was amended to allow public body members to attend and participate in meetings via videoconferencing. Pursuant to Public Officers Law § 103, any time a quorum of a public body gathers (either in person or via videoconference) for the purpose of discussing public business, the meeting must be open to the general public, whether or not the body intends to take action.<sup>5</sup> This includes “workshops,” “work sessions,” and “agenda sessions.”<sup>6</sup> Chance meetings or social gatherings are not covered by the law since these are not official meetings; however, public officials should not discuss public business at chance meetings or social gatherings.<sup>7</sup>

In addition, Public Officers Law § 104 requires public bodies to notify the public of the time and place of every meeting. The OML requires notice of every meeting to be:

1. Conspicuously posted in one or more public locations;
2. Given to the news media (television, radio and newspaper); and
3. Conspicuously posted on the village’s website, if it has the ability to do so.

Moreover, Open Meetings Law § 104(4) provides that if videoconferencing is used to conduct the meeting, the notice of the meeting must indicate that members of the public body will be participating via videoconferencing technology. Additionally, the notice must identify the locations from which the members will be participating and state that the public has the right to attend the meeting at any of the meeting locations.

The OML does NOT require public bodies to pay for an official advertisement in a newspaper. Rather, the OML merely requires that the news media be notified. NYCOM recommends that public bodies fax or email meeting notices to the news media.

The timing for the notice requirement in Public Officers Law § 104 is written in a rather confusing way. In essence, the OML provides that, if notice of a public body’s meeting is given at least 72 hours prior to the meeting, then the meeting may be held for any reason.<sup>8</sup> However, if notice of a meeting can only be given less than 72 hours in advance of that meeting, then it may be held only if there is an exigent/emergency need for conducting the meeting on less than 72 hours’ notice.<sup>9</sup> What constitutes an emergency in purposes of the OML is not defined in law.

### [Dealing with the Open Meeting Law’s In-Person Requirement During the Pandemic](#)

Obviously there is a natural tension between the Open Meeting Law’s requirement that meetings be open to the general public and the government’s interest in protecting the public’s health, safety, and welfare by actually limiting such gatherings of individuals.

The first recommendation to public bodies dealing with this issue is that they should consider postponing all meetings that are not necessary to conduct essential government business. For example, many villages have scheduled their village budget hearings for mid-March. However, because those villages have until April 15<sup>th</sup> to conduct the hearing, they may wish to consider postponing the hearing until mid-April.

Unfortunately, city councils and village boards of trustees are frequently faced with situations that demand immediate action, such as the adoption of the budget or the approval of payments that local businesses are relying on during these trying economic times. Additionally, ZBAs and planning boards may have time sensitive applications before them for work that may be considered essential and cell tower applications that are governed by the FCC’s shot clock regulations.

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service. If a public body restricts in-person access to its meetings or conducts a meeting remotely by conference call or similar service, the public body must provide the public the ability to view or listen to such meetings and must record and later transcribe such meetings.

### A Summary of Meeting Options During the COVID-19 Pandemic

As a result of Executive Order 202.1, public bodies, such as city councils, village boards of trustee, planning boards, and zoning boards of appeals now have three options for conducting meetings:

1. Members of the public body are physically present but the general public is not allowed to physically attend the meeting location; the public must be allowed to view or listen to such meetings and the public body must record and later transcribe such meetings;
2. Members of the public body meet via conference call or videoconference, with no in-person location; the public must be allowed to listen to or view such meetings and the public body must record and later transcribe such meetings; or
3. Members of the public body are either physically present or participating via videoconferencing and the general public is allowed to physically attend the meeting location(s) in person as is provided for under the Open Meetings Law. Note that it is not clear whether Governor Cuomo's Executive Order 202.10 prohibits meetings that allow in-person attendance. Multiple factors could determine whether in-person attendance at a meeting of a public body is necessary. For example, the ability of the public body to employ videoconference or teleconference technology to conduct their meetings and hearings, the public's access to the videoconference or teleconference technology to be used by the public body, the number of individuals that are expected to attend in person, the ability of the public body to hold in-person meetings while maintaining appropriate social distancing, and the subject matter of the meeting or hearing are all factors that local officials should consider when determining whether to hold in-person meetings. Public bodies are strongly encouraged to use the method authorized pursuant to Executive Order 202.1 if at all possible.

The Executive Order does not indicate by when the recordings must be transcribed. Local officials are encouraged to have the meetings transcribed within a reasonable time, given the circumstances.

Moreover, the public bodies must still prepare the meeting minutes within two weeks of the meeting, and within one week of an executive session.

The notice for these meetings must clearly state the specifics of the meeting:

1. The name of the public body meeting;
2. The date and time of the meeting;
3. Whether the meeting is being conducted in accordance with Executive Order 202.1;
4. The method that the public body will be using to conduct the meeting (e.g., videoconference or teleconference);
5. How the public can view or listen to the meeting;
6. If a meeting will be streamed live over the internet, the public notice for the meeting shall inform the public of the internet address of the website streaming such meeting; and
7. If the meeting will have a public comment period or if a public hearing is being conducted, the noticed should indicate that individuals may submit comments via email or regular mail, whether such written comments must be received prior to the commencement of the meeting or whether the meeting/public hearing will be held open for a specific number of days for the receipt of such written comments, and that the written comments will be made part of the record.

Note that under normal Open Meetings Law rules, the public has a right to attend in person at any location where a videoconference meeting is taken place. However, if a public body is conducting a meeting pursuant to Executive Order 202.1, the public does not have a right to attend the meeting at the videoconferencing locations and the meeting notice does not need to include the location of the public members.

If a public body intends to conduct an executive session, it must still notice and enter into an open meeting before entering into the executive session, even if it is invoking Executive Order 202.1 to conduct the meeting via videoconference or teleconference.

### [Practical Considerations for Conducting Meetings Via Videoconference or Teleconference](#)

Local officials should consider implementing the following practices if they intend to conduct their meetings and public hearings via videoconference or teleconference:

- Practice with the technology before the actual meeting.
  - Make sure that every member can connect, share their screen (if necessary), and use their microphone and video camera;
  - Make sure that the meeting host knows how to mute individuals who are logging on to view the meeting or hearing;
  - Test the recording function so that the video/audio can be recorded and later transcribed in accordance with the requirements of Executive Order 202.1;
  - Practice having a mock public comment, including having people sign up to speak and queue to make their comments so that individuals are not talking over each other;
- Have people identify themselves before speaking so that it is clear who is saying what;
- Conduct roll call votes so that the clerk can accurately record how each member voted, as is required by the Freedom of Information Law.

### [What if the Public Body Cannot Conduct the Meeting In Accordance with the Governor's Executive Order?](#)

If a public body lacks the technology to comply with the requirement of Executive Order 202.1, the public body should follow the guidance below.

On March 9, 2020, the New York State Committee on Open Government issued guidance regarding the "Open Meetings Law 'In-Person' Requirement and the Novel Coronavirus." The guidance acknowledges that there is no process in State law for local governments to waive the Open Meetings Law's "in-person" requirement for conducting meetings.

Furthermore, the Committee conceded that there is no jurisprudence regarding the ability of local governments to forego or waive the "in-person" meeting requirement. Nonetheless, the Committee opined that judicial review of alleged violations of the Open Meetings Law will likely take into consideration the public body's desire to protect the public health while continuing to perform necessary government functions. However, the Committee urges that if a public body determines that limiting public in-person access to an open meeting is necessary in response to the COVID-19 virus, that the public body limit discussions and actions taken to those matters for which harm would be caused by delay in order to mitigate potential impact of constituents.

Stated differently, while State law does not expressly allow public bodies to conduct a meeting without allowing the public to be actually present, if local officials deem that conducting in-person meetings would threaten public health, they should limit non-in-person meetings to discussions and actions of business which must be conducted to keep the local government operating and to protect the public's health, safety, and welfare. Moreover, public bodies should consider implementing technology that allows the public to observe such meetings via web-based video technology. Alternatively, public bodies may wish to consider minimizing the number of attendees at meetings or holding meetings in larger venues so that the recommended minimum social distancing of 6 feet may be maintained by members of the public who do attend the meeting. See below for more recommendations for conducting in-person meetings.

## Public Hearings During the COVID-19 Pandemic

### What Is A Public Hearing?

Many statutes require the holding of a public hearing before a public body may take a specific action. Perhaps the most well-known public hearing requirement is for enacting local laws and adopting budgets. There are, however, many other instances when public hearings must be held, including but not limited to: establishing reserve funds, granting a franchise, adopting a comprehensive plan, changing an official map, reviewing site plans, and approving special use permits and subdivision proposals.

***Despite the myriad requirements to hold a public hearing, there is practically no statutory guidance and very little case law as to what a public hearing is or how to conduct one.*** Moreover, while there are many statutory references to public hearings, each reference must be read and interpreted individually to determine if there are special requirements for noticing and conducting that particular public hearing.

### Why Are Public Hearings Required?

When attempting to divine the requirements for conducting public hearings, it is necessary to consider the two most important reasons for requiring public hearings:

- To insure that the public body or agency charged with taking action on a particular issue is fully aware of the public's sentiment about the proposed action, and
- To give the public an opportunity to voice their concerns, opposition, or support for the proposed action and to bolster the public's confidence in the public body's decision.

Stated differently, public hearing requirements have frequently been interpreted to mean that the public must be given a "meaningful opportunity" to be heard. It is with these overriding justifications in mind that public hearings must be addressed.

### Public Hearings Compared To "Meetings"

Pursuant to the Public Officers Law, a meeting is the convening of a quorum of a public body for the purpose of conducting business. A public hearing is a meeting of the public body, at which the public must be allowed to comment on the matter that is the subject of the public hearing. This comment requirement differs from regular meetings of public bodies. Pursuant to the Open Meetings Law, the public must be allowed to attend "meetings" of public bodies but has no right to speak or comment at such "meetings," although any public body may allow the public to speak at its meetings.

Another distinction between meetings and public hearings is the notice requirement. The Open Meetings Law merely requires public bodies to notify the news media of a meeting. The Open Meetings Law does not require the publication of an official advertisement. By contrast, most public hearing requirements mandate the publication of an official legal advertisement in a local newspaper. Local officials must refer to each statute which mandates a public hearing for the specific notice requirements mandated.

### Public Hearings During the COVID Pandemic

As noted above, State law does not define what a public hearing is. Despite this lack of definition, it is clear that the common meaning of a public hearing is to allow for in-person public comment, although written comments should always be accepted and even encouraged. Some local officials have inquired whether an online video portal or teleconference that offers the opportunity for the public to comment could be employed in place of an in-person public hearing. In normal times, under normal circumstances, NYCOM is of the opinion that State mandated public hearings must always have a reasonable opportunity for the public to comment in person before the public body.

These, however, are not normal times or normal conditions. Public bodies must balance the need to take action with the right of the public to attend a public hearing in person. Moreover, as previously noted, on March 23, 2020, Governor Cuomo issued Executive Order 202.10, which prohibits "non-essential gatherings of individuals of any size for any reason (e.g. parties, celebrations or other social events)."

While there is no case law to support this position, if a public body gives the public a reasonable opportunity to submit meaningful comment via online videoconferencing technology and in writing via email, local officials are likely to have a strong case should their actions be challenged.

If local officials decide to allow for in-person public participating at a public hearing, they could impose a limit on the maximum number of individuals allowed at a hearing based upon the capacity of the meeting room. If local officials consider implementing such a limit, they should establish a policy whereby individuals interested in speaking in person can sign-up and then be selected randomly. Individuals who are not selected to participate in-person should be given the opportunity to participate via video or teleconference and to submit written comments.

Local officials are strongly encouraged to consult with their municipal attorney before undertaking any course of action that is not expressly set forth in State law or one of the Governor's Executive Orders.

## Considerations if a Public Body is Conducting an In-Person Meeting or Hearing Attendance

1. Public bodies should encourage individuals to submit comments in writing or to participate via videoconference or teleconference as an alternative to in-person attendance or participation if that technology is available.
2. Public bodies should encourage individuals who are not feeling well, who are showing symptoms of COVID-19, or who are members of the population who are particularly susceptible to COVID-19 to not attend the meeting.
3. Public bodies should limit the number of individuals allowed to enter the meeting room in order to maximize social distance.
4. Meeting rooms should be configured so that chairs are spaced out to comply with recommended minimum social distances.
5. Meeting rooms should be thoroughly cleaned before and after each meeting and public hearing.

## Consult with Your Municipal Attorney

Unfortunately, State law does not provide a clear rule for holding open meetings and conducting public hearings during a pandemic. To a certain degree, conducting public business is antithetical to containing a pandemic and protecting the public's health. However, local officials have to do what is necessary to make sure that the essential functions of local government continue, particularly in times of crisis. City and village officials are strongly encouraged to consult with the attorney before taking action that is not clearly authorized under New York State law.

In addition, NYCOM members should not hesitate to email or call the NYCOM offices if they have any questions about holding meetings or conducting public hearings during this pandemic.

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<sup>1</sup> Public Officers Law § 102(2).

<sup>2</sup> N.Y. St. Comm. Open Gov't. OML-AO-3026.

<sup>3</sup> N.Y. St. Comm. Open Gov't. OML-AO-3048.

<sup>4</sup> N.Y. St. Comm. Open Gov't. OML-AO-2982.

<sup>5</sup> Orange Co. Publications v. City of Newburgh, 60 A.D.2d 409 (2d Dep't. 1978), aff'd. 45 N.Y.2d 947.

<sup>6</sup> N.Y. St. Comm. Open Gov't. OML-AO-4506.

<sup>7</sup> Kissel v. D'Amato, 97 Misc.2d 675 (Sup. Ct. Nassau Co. 1979), mod on other grounds, 72 A.D.2d 790 (2d Dep't. 1979).

<sup>8</sup> Public Officers Law § 104(1).

<sup>9</sup> Public Officers Law § 104(2).