Conducting Meetings and Public Hearings During the COVID-19 Pandemic

Updated September 4, 2020

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 and Public Hearings 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 difficult and potential 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 live and must record and later transcribe such meetings.


In addition, on April 9, 2020, Governor Cuomo issued Executive Order No. 202.15, which, in relevant part, postponed until June 1, 2020 at the earliest, all in-person public hearings scheduled for April and May of 2020.

On July 6, 2020, the Governor’s Office informed NYCOM that it was their position that the language in Executive Order 202.15 which prohibited in-person public hearings HAS NEVER BEEN EXTENDED and thus expired on June 1, 2020, despite executive orders containing language that has been widely interpreted as extending Executive Order 202.15 beyond June 1, 2020 (see Executive Orders 202.29 and 202.39).

Consequently, pursuant to Executive Order 202.1, which is currently in effect through October 4, 2020, public bodies may conduct meetings and public hearings either remotely pursuant to the requirements of Executive Order 202.1 or in-person following CDC and New York State Department of Health guidance, including 50% facility capacity requirements, social distancing, the wearing of face masks, and heightened cleaning and disinfecting.

Local officials are strongly encouraged to consult with their municipal attorney to ensure that they are complying with the New York State Open Meetings Law and Executive Order 202.1.
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.¹ This definition encompasses local legislative bodies² such as village boards of trustees and city councils, as well as planning boards³ and zoning boards of appeals.⁴

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.⁵ This includes “workshops,” “work sessions,” and “agenda sessions.”⁶ 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.⁷

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.⁸ 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.⁹ 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. 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.

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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.

Executive Order 202.1 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 notice 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.

**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 three 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;
- 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; and
- For administrative proceedings such as applications for zoning variances or special use permits, to allow applicants to present their case for the requested relief and to create a record upon which the public body’s determination must be based.
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
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Consequently, public bodies may conduct public hearings in person or, pursuant to Executive Order 202.1, remotely so long as the method used affords the public a reasonable opportunity to comment at the hearing.

Considerations if a Public Body is Conducting In-Person Meetings and Public Hearings
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. Meetings and public hearings should be conducted in facilities that can accommodate the number of individuals who are expected to attend at no more than 50% of the facilities’ capacity.
4. Public bodies should limit the number of individuals allowed to enter the meeting room in order to maximize social distance and to comply with the 50% facility capacity limit.
5. Meeting rooms should be configured so that chairs are spaced out to comply with recommended minimum social distances.
6. Attendees should be required to wear a face mask if they can medically tolerate it.
7. 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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1 Public Officers Law § 102(2).
5 Orange Co. Publications v. City of Newburgh, 60 A.D.2d 409 (2d Dep't. 1978), aff'd. 45 N.Y.2d 947.
7 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).
8 Public Officers Law § 104(1).
9 Public Officers Law § 104(2).