



Back to Business: Land Use Matters & Public Hearings in Virginia - Help is on the Way!

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While the impact of the COVID-19 pandemic on the real estate development industry remains unclear, state government leaders in Virginia took important action this week to allow local public bodies to review and act upon land use cases during the emergency. This important legislation expands far beyond the prior guidance from the Office of the Attorney General, which limited meetings via electronic means to narrow issues concerning the continuity of government.

Public Meetings in Virginia. Public bodies in Virginia ? e.g. local planning commissions, economic development authorities, city/town councils and boards of supervisors ? must conduct any and all meetings in accordance with the provisions of the Virginia Freedom of Information Act (VFOIA)[1] This includes the requirement that no meeting be conducted through telephonic, video, electronic or other electronic communication means where the members are not physically assembled to discuss or transact business.[2] In addition, public bodies must provide specified notice of the meeting, allow for public comment, ensure that the meeting is available to be photographed, filmed or recorded by any person, and record minutes of the meeting.[3]

Impact of Executive Orders on Meetings of Local Public Bodies. As noted in our prior alert[4], Governor Northam?s declaration of emergency and recommended social distancing practices[5] raised questions as to how local public bodies could comply with both the practices set forth in these orders as well as the conflicting public meeting requirements of VFOIA. These questions were addressed initially by Attorney General Herring in an official advisory opinion on March 20, 2020. He noted that the requirements of VFOIA allow for electronic meetings during a period of emergency declared by the Governor, provided that the nature of the emergency makes it unsafe to assemble a quorum in a single location *and the purpose of the meeting is to address the emergency*. [6] He therefore found that the Code ?permits public bodies that are unable to assemble in person because of the unique characteristics of the COVID-19 virus to meet electronically to make decisions that must be made immediately and where failure to do so could result in irrevocable public harm.? The opinion concluded

that determinations as to what decisions would meet this threshold required a "fact-specific determination" to be made by the public body's counsel.[7]

Divergent Approaches from Local Public Bodies. In the weeks following this guidance, the approach adopted by localities concerning land use public hearings varied across a broad spectrum. At one end, representing the most restrictive view, one city council adopted an ordinance by which all proposed public hearing agenda items, whether for council, the planning commission or any other board or commission, are deemed continued for the duration of the emergency.[8] Contrast this with the more permissive approach of the City of Norfolk, whose City Attorney opined that zoning requests and conditional use permits met the standard for electronic meeting on the basis of the economic impact of these projects and the necessity of enhancing City revenue.[9]

New Authorization for Electronic Public Hearings. The inconsistent approaches to land use public hearings among local bodies may soon be resolved, thanks to clarifying language proposed by Governor Northam and approved by the General Assembly. As part of his amendments to the State Budget (HB 29 & 30), Governor Northam introduced language to expand the ability of public bodies to meet electronically, if "the purpose of the meeting is to discuss or transact the business statutorily required or necessary to continue operations" of the public body, subject to additional requirements pertaining to notice and accessibility by the public. The General Assembly adopted this language, the full text of which is excerpted below, in connection with approval of the State Budget during the Reconvened Session on April 22, 2020, which became effective immediately.

Does "business statutorily required or necessary to continue operations" include public hearings for land use matters? Based on the Code of Virginia, local government attorneys can answer with a resounding "yes!" Consistent with the Dillon Rule of statutory construction[10] the powers of local governments are derived from the state, whether through special law in the form of charters or in the general law codified in the Code of Virginia.[11] These acts confer *authority* upon local governments to conduct their business, subject to the local elected officials' legislative discretion. Similarly, the Code confers upon local elected bodies, i.e. boards of supervisors and city/town councils, broad *authority* and discretion to make legislative land use decisions.[12] Framed against the broad and exclusive authority delegated to local governing bodies to render land use decisions, the Governor's language offers considerable clarification and comfort for local governments concerning the standard for electronic meetings during an emergency. Thus, conducting a public hearing via electronic means to consider land use matters constitutes a meeting to "transact the business statutorily required or necessary" of the public body, if, in the locality's reasonable discretion, it determines that such land use matters are required or necessary business for that jurisdiction.

From a fiscal standpoint, the economic ramifications of the COVID-19 emergency add to the critical need for public hearings to proceed. The approval of land use entitlements for new development projects will catalyze direct investment in the jurisdiction, with a corresponding boost in real estate tax revenue that localities will need to refill their dwindling coffers in the wake of the pandemic. Conversely, the longer an elected body pauses hearings, the greater the lag on the fiscal recovery of the locality. Projects may take as long as two to three years or longer from the time of zoning approval to final completion and occupancy, so the increased assessment and corresponding payments will take time to

be realized. This direct nexus between the daunting revenue losses being created during the emergency and the "necessary business" of the locality in replacing that revenue with new projects offers ample support to justify electronic meetings under the newly adopted standard.

Many Localities Are Getting Back to Business. While local governments continue to revise their policies and procedures for meeting during the emergency, this important clarification by the Governor and the General Assembly bolstered the authority of public bodies to meet via electronic means as they consider and act upon land use matters, including rezonings and special use permit applications, for the duration of the COVID-19 emergency. Those jurisdictions that desire to expand their tax base and advance new development projects, while ensuring the health and safety of public hearing participants, staff and officials, are now on solid legal footing in doing so.

Williams Mullen's land use team continues to monitor the protocols and procedures of the local public bodies within our practice footprint and will provide updates on this evolving landscape.

Amendment 28 to HB 29: Allow policy-making boards to meet virtually during emergency declarations

Item 4-0.01

Operating Policies

Page 280, after line 26, insert:

g. Notwithstanding any other provision of law, any public body, including any state, local, regional, or regulatory body, or a governing board as defined in § 54.1-2345 of the Code of Virginia may meet by electronic communication means without a quorum of the public body or any member of the governing board physically assembled at one location when the Governor has declared a state of emergency in accordance with § 44-146.17, provided that (i) the nature of the declared emergency makes it impracticable or unsafe for the public body or governing board to assemble in a single location; (ii) the purpose of meeting is to discuss or transact the business statutorily required or necessary to continue operations of the public body or common interest community association as defined in § 54.1-2345 of the Code of Virginia and the discharge of its lawful purposes, duties, and responsibilities; (iii) a public body shall make available a recording or transcript of the meeting on its website in accordance with the timeframes established in §§ 2.2-3707 and 2.2-3707.1 of the Code of Virginia; and (iv) the governing board shall distribute minutes of a meeting held pursuant to this subdivision to common interest community association members by the same method used to provide notice of the meeting.

A public body or governing board convening a meeting in accordance with this subdivision shall:

1. Give notice to the public or common interest community association members using the best available method given the nature of the emergency, which notice shall be given contemporaneously with the notice provided to members of the public body or governing board conducting the meeting;
2. Make arrangements for public access or common interest community association members access to such meeting through electronic means including, to the extent practicable, videoconferencing

technology. If the means of communication allows, provide the public or common interest community association members with an opportunity to comment; and

3. Public bodies must otherwise comply with the provisions of § 2.2-3708.2 of the Code of Virginia.

The nature of the emergency, the fact that the meeting was held by electronic communication means, and the type of electronic communication means by which the meeting was held shall be stated in the minutes of the public body or governing board.?

Explanation:

(This amendment provides authority for public bodies, including agencies, boards, and common interest communities to conduct electronic meetings during a declared state of emergency when it is impracticable or unsafe to assemble a quorum in a single location.)

Please note: This alert contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel.

Please click [here](#) for additional legal updates from Williams Mullen regarding COVID-19.

[1] Va. Code ann § 2.2-3700 *et seq.* (1950)

[2] Va. Code ann. § 2.2-3707.

[3] *Id.*

[4] <https://www.williamsmullen.com/news/covid-19-emergency-impacts-land-use-development-virginia>.

[5] See Exec. Order No. 51 (March 12, 2020) as expanded by Exec. Order No. 53 (March 23, 2020). The recommended distancing policies were made mandatory by Exec. Order No. 55 (March 30, 2020) as amended and extended (April 15, 2020).

[6] Op. Att’y Gen. Va. (March 20, 2020), interpreting Va. Code ann. § 2.2-3708.2(A)(3) (emphasis added), available at <https://www.oag.state.va.us/files/Opinions/2020/Sullivan-Opinion-Request.pdf>.

[7] *Id.* at 3.

[8] The same city announced that it is no longer accepting any new development applications, including rezonings, special use permits, site plans or subdivision plats for major developments, or any application which requires a community meeting or public hearing before City Council or any board or commission.

[9] <https://www.pilotonline.com/government/local/vp-nw-norfolk-coronavirus-virtual-meetings-20200413-kxezkyxvzffjmcgwlk6uba7pq-story.html>

[10] *See, e.g., Jennings v. Board of Supervisors of Northumberland County*, 281 Va. 511, 516, 708 S.E.2d 841, 844 (2011) (“a locality’s zoning powers are fixed by statute and are limited to those conferred expressly or by necessary implication?”).

[11] *See, e.g., Va. Code Ann. § 15.2-900 et seq.* (General Powers of Local Governments).

[12] Va. Code Ann. § 15.2-2280; *see Tribble v. Bland*, 250 Va. 20, 24, 458 S.E.2d 297, 299 (1995) (describing the land use authority delegated to localities by Virginia Code § 15.2-2280 as “broad authority”).

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