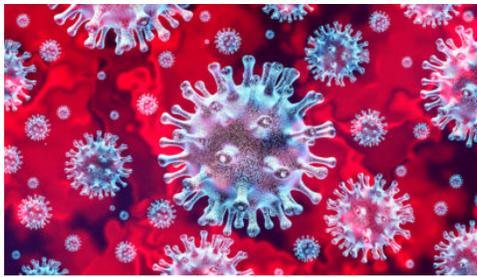


Long Island Land Use and Zoning

Coronavirus & The Open Meetings Law: How To Hold Public Meetings During The COVID-19 Pandemic



By John C. Armentano on March 30, 2020



The public health crisis created by COVID-19 has forced municipal officials statewide to cancel, suspend or postpone previously scheduled public hearings and meetings. How do public bodies conduct their necessary business during these uncertain times? Below is a brief analysis and summary of what options are available.

Background

On March 7, 2020, Governor Cuomo issued Executive Order Number 202 declaring a state of emergency for New York. On March 13, 2020, Governor Cuomo amended this executive order and issued **Executive Order Number 202.1** suspending, among other things, the “in-person” requirements of New York’s Open Meetings Law, contained in Article 7 of the Public Officers Law until April 11, 2020 (or unless further extended). In pertinent part, Executive Order 202.1 states:

Suspension of law allowing the attendance of meetings telephonically or other similar service:

Article 7 of the Public Officers Law, to the extent necessary to permit any public body to meet and take such actions authorized by the law **without permitting in public in-person access to meetings and authorizing such meetings to be held remotely by conference call or similar service**, provided that the public has the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed....(emphasis added)

As a result and to keep government operating, local public bodies are now authorized to conduct public meetings without allowing the public “in-person” access.

Three Options for Holding Public Meetings

Pursuant to Executive Order 202.1, public bodies, such as town boards, village boards of trustees, planning boards and zoning boards, now have three temporary options for conducting public meetings without allowing the public to be present at these meetings:

1. 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) as is provided for under the Open Meetings Law;
2. 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; or
3. 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.

Analysis

Before discussing these options, it is important to distinguish public hearings from public meetings under New York's Open Meetings Law. Section 102(1) of New York's Open Meeting Law defines a "meeting" as the convening of a public body for the purpose of conducting public business and requires that the "meetings" be open to the public. It does not, however, define "public hearing". Common practice dictates that a public hearing is a meeting of a public body, at which the public is provided the opportunity to comment. In fact, many public hearings are required by law for matters, such as the adoption of local laws and for planning boards before they approve subdivision applications.

It has been held that the Open Meetings Law only requires that the meetings of public bodies be open for observation by the public, but does not require that the public be given opportunity to engage in debate. See, *DeSantis v City of Jamestown*, 193 Misc.2d 197, [Supreme Court, Chautauqua County 2002].

The question then becomes, does an online video portal or teleconference that offers the opportunity for the public to comment satisfy the in-person requirement of the Open Meetings Law? Unfortunately, there is no case law on the subject, but the following discussion can be used as a guide.

First Option: Two-Way-Videoconferencing- Public Hearings and Public Meetings

The first option is not new. In 2000, the Legislature specifically added "videoconferencing" to several provisions of the Open Meetings Law. Open Meetings Law § 102(1) defines "meeting" as "the official convening of a public body for the purpose of conducting public business, *including the use of video conferencing for attendance and participation by the members of the public body*" (Open Meetings Law § 102(2)) (emphasis added), and does not distinguish between a "meeting" of a public body and a "hearing" conducted during such meeting.

Confirming that members of the public body need not all be physically in the same room with all members of the public during a board meeting, Open Meetings Law § 103(c) provides: "A public body that uses video conferencing to conduct its meetings shall provide an opportunity for the public to attend, listen and observe *at any site* at which a member participates" (emphasis added). See, *Peterson v Inc. Village of Saltaire*, 77 AD3d 954 [2d Dept 2010].

In *Peterson*, the Appellate Division upheld a public meeting and hearing held by the Mayor of the Village and four trustees in a conference room located within an office building in midtown Manhattan. The meeting was simultaneously broadcast by means of a two-way video conference hook-up to the main room on the first floor of the Village Hall.

Thus, participation in meetings by members of the board by electronic means was already permitted under the Open Meetings Law, as long as members and the public were able to be in two-way communication. This option is not changed by Executive Order 202.1 and only requires that regular minutes be maintained, not a full transcript. This may be the best options for public bodies with access to such technology.

Second Option: Public Board Meetings Without the Public Present- May Not Be Applicable for Public Hearings

The second option is new. Here, members of the public body are physically present in one location; however, there is no "in-person" attendance by the public at that location. The public body meets together and conducts its business without

the public present. Provisions must be made to allow the public to listen or view the conference call meeting, and transcripts of the meeting must be made available. This option allows the public body to physically meet, conduct its business while practicing social distancing and allowing the public to observe the meeting but not allowing any public comment.

This option appears best suited to allow public bodies to conduct public meetings for adopting budgets, entering into contracts etc., but does not appear to satisfy the requirements for conducting a public hearing.

Third Option: Conference Call Public Board Meetings-Without the Public Present – May Not Be Applicable for Public Hearings

The third option is also new and the most socially distancing of all the options. The public body meets via conference call or videoconferencing, 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.

This option provides the most fluidity and may best serve public bodies that need to address immediate issues without the need to convene at any one location.

Importantly, Executive Order 202.1 did not suspend any local laws governing public notices or public meetings. Therefore, municipalities and boards that have adopted local laws establishing meeting protocols may need to relax local requirements.

Finally, Public Officers Law § 104 still requires public bodies to notify the public of the time and place of every meeting. The Open Meetings Law 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.

Conclusion

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.

Be well.