

Town of North Wilkesboro Board of Commissioners

Work Session Agenda

May 28, 2020

Zoom Online Platform: Meeting ID# 829 7927 7459

Or at the following link:

<https://us02web.zoom.us/meeting/register/tZYkcOCqgTwuH93DEcivHutqQr1INaB7xFt>

Password: 724921

- I. Call to Order**
- II. Invocation**
- III. Pledge of Allegiance**
- IV. Additions/Deletions**
- V. Approval of Agenda (action)**
- VI. Work Items**

- A.) Coronavirus/COVID-19 Response Update and Reopening Discussion – Wilson
- B.) Virtual Public Hearing Policy – Wilson

A. CORONAVIRUS/COVID-19 RESPONSE UPDATE AND REOPENING DISCUSSION

Hear an update from the Wilkes Health Director and Town Manager on the state of the coronavirus/COVID-19 pandemic in the area, and the Town's response, and;

Discuss schedule and conditions for resuming full Town operations.

STAFF RESOURCES: Wilson Hooper, Town Manager
Rachel Willard, Wilkes Health

BACKGROUND:

- A State of Emergency was declared by Wilkes County, with concurrence from the towns of Wilkesboro, North Wilkesboro, and Ronda, on March 13, 2020. The towns' declaration was amended on March 19, March 26, April 1, and April 15.
- On May 11 the four local governments aligned the terms of the local State of Emergency with those of the State of North Carolina as expressed in Executive Order 138.
- Legally, the area is now in Phase 2 of the statewide reopening, the terms of which are expressed in Executive Order 141.
- However, the area's trends do not meet the criteria for reopening expressed by the Governor or the White House.
- The Mayor maintains the authority to implement other restrictions on the general public as outlined in town code and North Carolina General Statute. He will do so in consultation with the Town Manager, the Town Attorney, and the leaders of the other Wilkes local governments.
- Rachel Willard, Director of the Wilkes Health Department, will share up-to-date information on the state of coronavirus/COVID-19 in the area.
- The Town Manager would also like to engage the Board in discussion over resuming regular Town operations.
- The Town has been operating under a modified service profile since the middle of March, per the authority delegated to the Town Manager by the Board that month. Some public amenities have been closed to the public, some services have been suspended, and some forthcoming events have been cancelled.
- As the state goes through the three phases of reopening, the corresponding legal prohibitions on these services will be lifted.
- Non-essential employees, about 40% of the workforce, have been ordered to stay-at-home. They've been paid 2/3 of their normal wage. Some have applied for unemployment benefits.
- Department heads and the Town Manager have been working on a plan for reopening that needs Mayor and Commissioner input.

ACTION:

- No formal action requested at this time.

ATTACHMENTS:

- 1.) Draft reopening guidelines will be distributed early next week

B. VIRTUAL PUBLIC HEARING POLICY

Discuss Board's preference for virtual public hearings.

STAFF RESOURCES: Wilson Hooper, Town Manager
Debbie Pearson, Town Clerk

FUNDING SOURCES: N/A

BACKGROUND:

- Recent legislation from the NC General Assembly clarifies the conditions under which virtual public meetings are legally permissible.
- The Town Manager will review the statute, along with other relevant open meeting and notification statutes.
- One provision of the new legislation poses a logistical challenge, and staff would like Board input on how to approach it.
- The new legislation requires virtual public hearings be followed by a 24-hour period where the public may submit written comments of the subject.
- There are a number of different interpretations on how to meet this requirement, with most agreeing that action must not be taken until after the expiration of the 24-hour period.
- This statute was the reason last week's Special Meeting was held over two evenings.
- Staff followed County Attorney Tony Triplett's recommendation that the meeting be recessed for 24 hours, then reconvened for final action. This approach prevents having to re-advertise the meeting.
- This approach also is also the quickest, and therefore helpful for addressing pressing items.
- However, this approach is logistically challenging and arguably less transparent.
- Action on matters could be postponed until the next scheduled meeting, which allows for more opportunity to notify the public of the impending action.
- This approach is also more accommodating to staff and elected officials' calendars.
- The Board's direction on this matter will be applied to the upcoming public hearing on the Town budget, and be used as guidance by the Planning Board for their upcoming public hearings.

ACTION:

- Staff requests direction from the Board on their preference for virtual public hearings.

ATTACHMENT:

- 1.) UNC School of Government blog on new virtual meeting legislation

Coates' Canons Blog: New Rules for Meetings of Public Bodies During State-Level Declared Emergencies

By Frayda Bluestein

Article: <https://canons.sog.unc.edu/new-rules-for-meetings-of-public-bodies-during-state-level-declared-emergencies/>

This entry was posted on May 05, 2020 and is filed under Board Member Powers & Authority, Board Structure & Procedures, Featured Posts Related To COVID-19, Land Use & Code Enforcement, Motions, Minutes, & Hearings, Open Government, Open Meetings, Quasi-Judicial Decisions, Quorum & Voting Requirements

As a part of the Act to Provide Aid To North Carolinians In Response to the Coronavirus Disease 2019 (COVID-19) Crisis, (S.L. 2020-3, SB 704) the General Assembly has enacted modifications to the laws governing meetings of public bodies, and voting and quorum rules for city and county governing boards. The new law modifies those rules and provides specific guidance regarding remote meetings, including quorum, notice, voting, public comment, and public hearings. These provisions are in Section 4.31 of the Act, (starting on page 61 in the PDF linked above). The new provisions for remote public meetings became effective on May 4, 2020, and only apply when there is a declaration of a state of emergency by the Governor or General Assembly under GS 166A-90.20. They aren't triggered by city or county emergency declarations. The new law also provides that any electronic meeting undertaken via remote participation between March 10, 2020 and the effective date of the new law is not deemed invalid due to the use of the use of electronic communication to conduct that meeting. This blog summarizes the new provisions.

Remote meetings authorized and defined. The new law enacts GS 166A-19.24, which authorizes any public body to conduct remote meetings in accordance with the rules set out in the act, as well as with the provisions of the open meetings law. "Remote meeting" is defined as: *An official meeting, or any part thereof, with between one and all of the members of the public body participating by simultaneous communication.* "Simultaneous communication" is defined as: *Any communication by conference telephone, conference video, or other electronic means.* Official meeting and public body are defined as set out in the open meetings law.

Simultaneous communication requirements. When meeting using simultaneous communication in an official meeting, the method must allow for any member of the public body to hear what is said by the other members of the public body; hear what is said by any individual addressing the public body; and be heard by the other members of the public body when speaking to the public body. In other words, the person participating remotely must be able to hear and be heard throughout the meeting. The law also requires any members who are participating by simultaneous communication and can't be seen by the public body to identify themselves when the roll is taken, when the remote meeting commences, prior to participating in deliberations (including making motions, proposing amendments, and raising points of order), and prior to voting.

Requirements for conducting remote meetings. As with all other official meetings of public bodies, the precise notice requirements that apply to an electronic meeting depend on whether the meeting qualifies as a regular, special, emergency, or recessed meeting. Prior to the new legislation, every electronic meeting notice had to specify the "location and means" whereby members of the public could listen to the meeting. GS 143-318.13(a). Under the new law, an electronic meeting notice issued during a state of emergency declared by the Governor or General Assembly must specify the means by which the public can access the remote "as that meeting occurs." It doesn't have to specify a physical location where members of the public can go to hear the meeting. This exception makes sense because, as we have seen, situations serious enough to trigger a gubernatorial or legislative emergency declaration can sometimes lead to restrictions on mass gatherings.

The remote meetings must be simultaneously streamed online so that simultaneous live audio, and video, if any, is available to the public. If the means of the remote meeting is a conference call, the public body can provide access by providing an opportunity to dial in or stream the audio live and listen to the meeting.

Minutes of remote meetings must reflect the use of simultaneous communication, which members were participating by

simultaneous communication, and when those members joined or left the remote meeting.

The public body must comply with GS 143-318.13(c), which prohibits acting by reference such as deliberating, voting, or otherwise taking action upon any matter by reference to a letter, number or other designation, or other secret device or method, with the intention of making it impossible for persons attending a meeting of the public body to understand what is being deliberated, voted, or acted upon. This provision does not prohibit a public body from deliberating, voting, or otherwise taking action by reference to an agenda, if copies of the agenda, sufficiently worded to enable the public to understand what is being deliberated, voted, or acted upon, are available for public inspection at the meeting.

All documents to be considered during the remote meeting must be provided to each member of the of the public body.

All chats, instant messages, texts, or other written communications between the members of the public body regarding public business during a remote meeting are public records.

Closed Sessions: The new law allows public bodies to meet in closed session as authorized in GS 143-318.11, and makes it clear that a public body is not required to provide access to the remote meeting while it is in closed session. The public body must comply with all of the requirements in the new law and the open meetings law, including noticing an open meeting, allowing access to the open portion of the meeting, making a motion in open session to go into closed session indicating the provision that authorizes the closed session, preparing minutes and a general account, and coming out of closed session to continue the meeting or adjourn. Public bodies may want to consider developing strategies to protect confidential information when members are participating remotely.

Public Hearings: The new law authorizes public bodies to conduct public hearings during a remote meeting and take action based on those hearings. It adds a requirement that written comments may be submitted at any time between the notice of the public hearing and 24 hours after the public hearing. A consequence of this requirement is that the public body will not be able to take action on the matter immediately following the public hearing. It will have to take action at a later meeting or recess the meeting long enough to comply with the 24-hour requirement.

Quasi-Judicial Evidentiary Hearings: These evidentiary hearings are required when a decision involves due process rights, and require evidential testimony by the applicant and other people whose due process rights may be affected. These people have standing to testify and challenge the final decision. The trial-like nature of quasi-judicial evidentiary hearings present difficult issues for remote meetings. The new law does, however, authorize the use of remote meetings for quasi-judicial, subject the following requirements:

- The right of an individual to a hearing and decision occur during emergency;
- All persons subject to the quasi-judicial proceeding who have standing to participate in the quasi-judicial hearing have been given notice of the quasi-judicial hearing and consent to the remote meeting;
- All due process rights of the parties affected are protected.

This provision raises some difficult issues. It may be challenging for the public body to identify all of the individuals who have standing in order to the obtain their consent. A detailed definition of "Standing" for challenging local government quasi-judicial decisions can be found in GS 160A-393 (d). In some cases it may easy to identify people who have standing but in some cases, people with standing might not be identified until the hearing is under way. In addition, the time frame within which a quasi-judicial meeting may be held is subject to multiple interpretations. It's not clear when the right "occurs." Putting these issues aside, as described in Adam Lovelady's blog post here, there remain many practical challenges and legal risks with conducting quasi-judicial hearings with remote participation.



Quorum: Local governments have struggled with the issue of whether members of a public body who are not physically present can be counted as present for purposes of a quorum. As I noted in a blog post here, this is mostly an issue for the governing boards of cities and counties due to the language in their quorum and voting statutes that make reference to members being present or physically present. For other public bodies, the open meetings generally law generally recognizes electronic meetings as official meetings. The new law modifies the city and county quorum statutes (GS 153A-43, GS 160A-73), making it clear that a member of any public body who is participating by simultaneous communication must be counted as present for purposes of a quorum as long the communication is maintained for that member. *This means that during a state-level state of emergency, there is no requirement to have a quorum physically present at a remote meeting.*

Both the city and county quorum statutes provide that if a member has withdrawn without being excused by a majority of the members present, the member is counted as being present for purposes of a quorum. This provision applies under the new law, but it's not clear how it would work. If a person is participating with video, it would be possible for a person physically move out of the frame of the video and no longer being seen. Other situations are more difficult. What if the person is participating with audio only. If the person puts down the phone and walks away, it would difficult determine if the person is still present. As a practical matter, the presiding officer or any board members could ask the person to confirm that the person is still present. What if the person intentionally terminates the connection? In that case it appears that under the amended quorum rules, that person is no longer counted as being present. Similarly, if the person's connection is severed due to technical issues, the person is no longer participating simultaneously and therefore no longer counted as present.

Voting: The new law provides that the vote of each member is to be counted as if the member physically present only as long as the simultaneous communication is maintained for that person. As noted earlier, under the new law, during a remote meeting all votes must be conducted by roll call. In addition, the new law provides that notwithstanding the authority in GS 143-218(b), no vote by secret or written ballots on paper or electronic may be taken in a remote meeting.

For city and county governing boards, the new law provides that the provisions of GS 153A-44 and GS 160A-75 (the voting statutes) apply. In addition, the new law modifies the voting statutes to provide that a vote or a failure by any member who is participating by simultaneous communication must treated as if the member were physically present. This applies only as long as the communication is maintained for that member.

The default "yes" rule: The city voting statute provides that if a council member is present, has not been excused from voting, and does not vote, the member is counted as voting yes. This is often called the default "yes" rule. The voting statute for boards of county commissioners does not include a default "yes" provision, but many counties have incorporated it into their local rules. How does the default "yes" rule apply to a member who is participating with simultaneous communication? Here's a suggested analysis. Since all votes are roll call, and members participating with simultaneous communication must identify themselves before they vote, only those that have done so can vote. If a person has been identified as being present for the vote, but does not vote, it should be recorded as a yes. If a person is present but doesn't identify him or herself, the person can't vote, and if the person attempts to vote it should not count. If the person has terminated the communication before the vote, or if the person has lost communication due to technical problems, the person is no longer counted as present and cannot vote.

Implications for Electronic Meetings After the State of Emergency: With the onset of the pandemic, there was broad concern about the lack of clarity regarding the authority and procedures for remote and electronic meetings. In our earlier blog posts and advising for local government officials regarding we attempted to balance adherence to the statutory language and the need to protect the health and safety. The most difficult issues have been how to meet the quorum and voting requirements for city and county governing boards. For most other public bodies, the statutes and procedures are much more open to local policies. In addition, as set out in blog posts regarding strategies for electronic meetings, here and here, there are reasonable practices for electronic meetings that preserve the obligation of access and align with existing law. As noted in my earlier in this blog, the legislature has seen fit validate all the use of electronic means in meetings undertaken between March 10 and May 4.

As we look forward to the effect of the new law, what implications might there be for the use of electronic/remote meetings when there is no emergency? One implication might be that if there was already authority to meet remotely, there would be no reason for the legislature to specifically authorize it in a state of emergency. A different argument might be that the

legislature intended to create specific powers to be authorized only in an emergency. Language in the new law supports that analysis. GS 166A-19.24(h), says: "Not Exclusive. – This section applies only during emergency declarations and does not supersede any authority for electronic meetings under Article 33C of Chapter 143 of the General Statutes." This suggests that the new provisions don't change anything that is already law under the open meetings law. There's an upside to that, in that there's a lot in the new law that is specific to extraordinary circumstances and wouldn't be necessary for normal times. The downside is that we're left with the same questions and no clear answers with respect whether and how local governments can continue some of the practices that have been so critical to maintaining access while doing business during these difficult times.

Links

- www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S704v6.pdf
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-393.html