Effective: April 30, 2009

C.R.S.A. § 32-11.5-204

§ 32-11.5-204. Board--**meetings**—records [Fountain Creek Watershed, Flood Control and Greenway District]

Currentness

(1)(a) Except for the initial board, each board shall **meet** in January of each year at a regular place of **meeting** within the district for the qualification of new directors and for the selection of new officers. The initial board at its first **meeting**, and each successor board at the annual **meeting** held in January of each year thereafter, shall, by a majority vote of a quorum of the directors, elect the following officers:

(I) A chairperson who shall preside over all **meetings** of the board and see that the **meetings** and debate are conducted in an orderly and expeditious manner. Except as otherwise permitted by section 32-11.5-203(1)(b)(II), the chairperson shall sign all contracts, agreements, and legal documents of the board and in general shall perform all duties incident to the office of chairperson.

(II) A vice-chairperson who shall assume the duties of the chairperson in the chairperson's absence.

(b)(I) A majority of the directors shall constitute a quorum for the transaction of business by the board unless a different number is set by resolution of the board at the annual **meeting**. Except as otherwise provided in this article or in the bylaws, the affirmative vote of a majority of a quorum of the board of directors shall be sufficient to conduct the business of the board. If less than a quorum is present at a **meeting**, the chairperson or other presiding officer may compel the attendance of any absent member in such manner and under such penalties as the board may provide or may adjourn the **meeting** to a different time and place. If the **meeting** is adjourned, the chairperson shall notify absent directors of the time and place of the adjourned **meeting**.

(II) Subject to the requirement that a quorum of the board be present to vote, the board shall adopt spending or other fiscal policy resolutions, including, but not limited to, resolutions that, subject to applicable voter approval requirements, establish or increase taxes levied or fees imposed and collected by the district or multiple-fiscal year financial obligations to be incurred by the district, and public policy resolutions, including but not limited to resolutions that initiate condemnation proceedings and resolutions to initiate or voluntarily **participate** in litigation, only by a supermajority vote as follows:

Board Members Appointed	Votes Required for Approv
2	2
3	2
4	3
5	4
6	4
7	5
8	6
9	7

(III) Each director or director's alternate shall be entitled to one vote, and voting by proxy shall not be permitted.

(IV) All **meetings** of the board, the technical advisory committee, the citizens advisory group, or any executive committee or other committee designated by the board shall be held in the district subject to the open **meetings** provisions of the “Colorado Sunshine Act of 1972”, part 4 of article 6 of title 24, C.R.S.

(V) The directors, the technical advisory committee, the citizens advisory group, or any executive committee or other committee designated by the board may **participate** in any **meeting** of the board or committee by means of a **telephone** conversation or similar communication equipment by which all persons **participating** in the **meeting** can hear each other at the same time. Such remote **participation** shall constitute presence in person at the **meeting**.

(2)(a) The board shall perform all legislative acts of a general and permanent nature by resolution, which may require approval by a supermajority vote as specified in subparagraph (II) of paragraph (b) of subsection (1) of this section. On all resolutions and orders, the roll shall be called, and the ayes and noes shall be recorded. After passage, all resolutions and orders shall be recorded in the records of the offices of the clerk and recorders of El Paso and Pueblo counties, recorded in a book kept by the district for that purpose, and authenticated by the signature of the presiding officer of the board and the secretary of the board.
(b) The district and the board shall be subject to the "Colorado Open Records Act", article 72 of title 24, C.R.S.
(c) All district records are subject to audit as provided by law for political subdivisions of the state.

C.R.S.A. § 11-57-211

§ 11-57-211. **Meetings** aided by telecommunications devices [Issuance of Public Securities]

Currentness

The act of issuance authorizing the issuance of securities may be adopted by the issuing authority at a **meeting** where one or more members of the issuing authority may **participate** in such **meeting** and may vote on such act of issuance through the use of telecommunications devices. Such **participation** may include but not be limited to the use of a conference **telephone** or similar communications equipment. Such **participation** through telecommunications devices shall constitute presence in person at such **meeting**. However, all such public **meetings** shall have at least one person physically present at the designated **meeting** area to ensure that the public **meeting** is in fact accessible to the public.

Effective: August 3, 2007

C.R.S.A. § 25-25-106

§ 25-25-106. **Meetings** of board--quorum—expenses [Colorado Health Care Facilities]

Currentness

(1) Four members of the board shall constitute a quorum for the purpose of conducting business and exercising its powers. Action may be taken by the board upon the affirmative vote of at least four of its members. A vacancy in the membership of the board shall not impair the right of a quorum of the board to exercise all the rights and perform all the duties of the board.

(2) Each **meeting** of the board for any purpose whatsoever shall be open to the public. Notice of **meetings** shall be as provided in the bylaws of the authority. One or more members of the board may **participate** in a **meeting** of the board or a committee of the board and may vote on resolutions presented at the **meeting** through the use of telecommunications devices, including, but not limited to, a conference **telephone** or similar communications equipment. **Participation** through telecommunications devices shall constitute presence in person at the **meeting**. The use of telecommunications devices shall not supersede any requirements for public hearing otherwise provided by law. Resolutions need not be published or posted, but resolutions and all proceedings and other acts of the board shall be a public record.

(3) Members of the board shall receive no compensation for services but shall be entitled to the necessary expenses, including traveling and lodging expenses, incurred in the discharge of their official duties. Any payments for expenses shall be paid from funds of the authority

Effective: August 5, 2008

C.R.S.A. § 37-95-105

§ 37-95-105. Records and **meetings** of board--disclosure of interests required

[Colorado Water Resources and Power Development Authority]

Currentness

(1) All resolutions and orders shall be recorded and authenticated by the signature of the chairman and the secretary of the board. Every legislative act of the board of a general or permanent nature shall be by resolution. The book of resolutions, corporate acts, and orders shall be a public record. A public record shall also be made of all other proceedings of the board, minutes of the **meetings**, annual reports, certificates, contracts, and bonds given by officers, employees, and any other agents of the authority. The account of all moneys received by and disbursed on behalf of the authority shall also be a public record. Any public record of the authority shall be open for inspection by any citizen. All records shall be subject to uniform budget and audit laws, as set forth in article 1 of title 29, C.R.S., and shall be subject to regular audits, as provided therein.

(2) All **meetings** of the board shall be open to the public. No business of the board shall be transacted except at a regular or special **meeting** at which a quorum is present. One or more members of the board may **participate** in any **meeting** and may vote through the use of telecommunications devices, including, but not limited to, a conference **telephone** or similar communications equipment. Such **participation** through telecommunications devices shall constitute presence in person at such **meeting**. Such use of telecommunications shall not supersede any requirements for public hearing otherwise provided by law.
(3) Any board member, employee, or other agent or adviser of the board who has a direct or indirect interest in any contract or transaction with the authority shall disclose this interest to the board. This interest shall be set forth in the minutes of the board, and no board member, employee, or other agent or adviser having such interest shall **participate** on behalf of the board in the authentication of any such contract or transaction.

C.R.S.A. § 7-107-108

§ 7-107-108. Meetings by telecommunication [Colorado Corporations]

Currentness

Unless otherwise provided in the bylaws, any or all of the shareholders may participate in an annual or special shareholders' meeting by, or the meeting may be conducted through the use of, any means of communication by which all persons participating in the meeting may hear each other during the meeting. A shareholder participating in a meeting by this means is deemed to be present in person at the meeting.

Credits

C.R.S.A. § 29-4-706

§ 29-4-706. **Meetings** of board [Colorado Housing and Finance Authority]

Currentness

(1) All **meetings** of the board shall be open to the public. No business of the board shall be transacted except at a regular or special **meeting** at which a quorum consisting of at least a majority

of the total membership of the board is present. Any action of the board shall require the affirmative vote of a majority of the members present at such **meeting**.

(2) One or more members of the board may participate in any **meeting** and may vote through the use of **telecommunications** devices, including, but not limited to, a conference telephone or similar communications equipment. Such participation through **telecommunications**devices shall constitute presence in person at such **meeting**. Such use of **telecommunications** shall not supersede any requirements for public hearing otherwise provided by law.

C.R.S.A. § 24-115-106

§ 24-115-106. **Meetings** of board--quorum—expenses [Critical State Needs Financing Act]

Currentness

(1) Three members of the board shall constitute a quorum for the purpose of conducting business and exercising the board's powers. Action may be taken by the board upon the affirmative vote of three members of the board. A vacancy in the membership of the board shall not impair the right of a quorum to exercise all the rights and perform all the duties of the board.

(2) Each **meeting** of the board, for any purpose whatsoever, shall be open to the public and records of the corporation shall be subject to the open records law under article 72 of this title. However, the board may go into executive session as permitted pursuant to section 24-6-402. Notice of **meetings** shall be as provided in the bylaws of the corporation. If a **meeting** of the board is called for the sole purpose of adopting resolutions authorizing the issuance of notes by the corporation, one or more members of the board may participate in the **meeting** and may vote on the resolutions through the usage of **telecommunications** devices, including, but not limited to, the usage of a conference telephone or similar communications equipment. Participation through **telecommunications** devices shall constitute presence in person at such **meeting**, but use of **telecommunications** shall not supersede any requirements for public hearing otherwise provided by law. Resolutions need not be published or posted, but resolutions and all proceedings and other acts of the board are public records.

(3) Members of the board shall receive no compensation for services but shall be entitled to the necessary expenses, including travel and lodging expenses, incurred in the discharge of their official duties. Any payments for expenses shall be paid from the critical needs fund, created in section 24-115-111.

Effective: August 10, 2016

C.R.S.A. § 32-20-104

§ 32-20-104. Colorado new energy improvement district--creation--board--**meetings**--quorum--expenses--records

Currentness

(1) The Colorado new energy improvement district is hereby created as an independent public body corporate, and the boundaries of the district shall include the eligible real property that is owned by a person who has voluntarily joined the district. The district constitutes a public instrumentality, and its exercise of the powers conferred by this article shall be deemed and held to be the performance of an essential public function, but the district:

(a) Shall not be an agency of state government or of any local government;

(b) Shall not be subject to administrative direction by any department, commission, board, or agency of the state or any local government; and

(c) Shall not be a district, as defined in section 20(2)(b) of article X of the state constitution, for purposes of section 20 of said article X.

(2)(a) The district is governed by a board of directors, which shall exercise the powers of the district, shall, by a majority vote of a quorum of its members, select from its membership a chair, vice-chair, and secretary, and is composed of seven members, including:
(I) The director of the Colorado energy office created in section 24-38.5-101(1), C.R.S., or the director's designee;
(II) The following six members appointed by the governor:
(A) One member who has executive-level experience in commercial or residential real estate development;
(B) Two members who each have at least ten years of executive-level experience with one or more financial institutions, at least one of whom has had such experience with one or more financial institutions having total assets of less than one billion dollars;
(C) One member who has executive-level experience in the utility industry;
(D) One member who represents the energy efficiency industry; and
(E) One member who represents the renewable energy industry.
(III) Repealed by Laws 2013, Ch. 347, § 3, eff. May 28, 2013.
(IV) Repealed by Laws 2013, Ch. 347, § 3, eff. May 28, 2013.
(V) Repealed by Laws 2013, Ch. 347, § 3, eff. May 28, 2013.
(VI) Repealed by Laws 2013, Ch. 347, § 3, eff. May 28, 2013.
(b) The terms of the appointed members shall be four years; except that the terms of the members initially appointed by the governor, the speaker of the house of representatives, and the minority leader of the senate shall be two years.
(c)(I) Notwithstanding any other law, it is not a conflict of interest for a trustee, director, officer, or employee of any public utility, financial institution, investment banking firm, brokerage firm, commercial bank or trust company, insurance company, law firm, or other firm, corporation, or business entity to serve as a board member, the executive director of the district, or an employee of the district. However, a board member, executive director, or other employee who is also such a trustee, director, officer, or employee shall disclose his or her business affiliation to the board and shall abstain from voting or otherwise taking action in any instance in which his or her business affiliation is directly involved.
(II) A member of the board, any executive director of the district, and any employee of the district shall be immune from civil liability for any action taken in good faith in the course of the member's, director's, or employee's duties for the district.
(d) Members of the board shall receive no compensation for services but shall be entitled to the necessary expenses, including travel and lodging expenses, incurred in the discharge of their official duties. Any payments for compensation and expenses shall be paid from funds of the district.
(3) Four members of the board shall constitute a quorum for the purpose of conducting business and exercising the powers of the board. Action may be taken by the board upon the affirmative vote of at least four of its members. No vacancy in the membership of the board shall impair the right of a quorum to exercise all the rights and perform all the duties of the board.
(4) The district shall be subject to the open **meetings** provisions of the “Colorado Sunshine Act of 1972”, part 4 of article 6 of title 24, C.R.S., and the “Colorado Open Records Act”, part 2 of article 72 of title 24, C.R.S.

The board shall also promulgate and adhere to policies and procedures that govern its conduct, provide meaningful opportunities for public input, and establish standards and procedures for calling emergency **meetings**. One or more members of the board may participate in a **meeting** of the board and may vote through the use of **telecommunications** devices, including, but not limited to, a conference telephone or similar communications equipment. Participation through **telecommunications** devices shall constitute presence in person at a **meeting**. The use of **telecommunications** devices shall not supersede any requirements for a public hearing otherwise provided by law.

(5) The district shall be subject to the “Local Government Budget Law of Colorado”, part 1 of article 1 of title 29, C.R.S., and the “Colorado Local Government Audit Law”, part 6 of article 1 of title 29, C.R.S.
(6) The district is a special district included within the definition of the state or any of its political subdivisions for purposes of and as set forth in section 2(14.6) of article XXVIII of the state constitution and is, accordingly, subject to the sole source contracting provisions of sections 15 to 17 of said article XXVIII.
(7) Because the district is not a part of state government or a county or municipality, neither the district nor any member of the board, executive director of the district, or employee of the district shall be subject to the provisions of article XXIX of the state constitution.

Credits

C.R.S.A. § 7-56-305

§ 7-56-305. Member voting [Colorado Cooperatives]

Currentness

(1)(a) Members of a cooperative may vote either in person or, if provided in the articles or the bylaws of the cooperative or a resolution of the board with respect to a particular issue, by any of the following methods:
(I) Mail or electronic transmission if a means is provided to verify that a member so voting has received the exact wording of the matter upon which the vote is to be taken;

(II) **Telecommunication**; or

(III) Any other means by which all persons in the **meeting** may communicate with each other during the **meeting**.
(b) Whenever in this article reference is made to voting by membership, the vote may be taken in any manner established pursuant to this section unless specifically provided otherwise in this article or by the board with respect to a particular matter upon which the vote is to be taken.
(c) With respect to a matter where a vote has been cast by an authorized means other than the person being present and voting in person, the person casting the vote shall be counted as present and voting for purposes of those provisions in this article that refer to persons “present and voting”.
(d) Proxy or cumulative voting shall be prohibited except as permitted by the articles or bylaws of organizations incorporated prior to July 6, 1973; except that, where a member is other than an individual, its vote may be cast by a representative authorized pursuant to this article.
(2) Except as otherwise provided in subsection (3) of this section, each member of a cooperative formed under this article shall be entitled to one vote only.
(3) Any cooperative formed under this article may provide in its articles for proportional voting rights allowing members more than one vote based upon the patronage of a member with the cooperative, the amount of patronage equity held in the cooperative, or any combination of these methods. However, no member may be entitled to more than one vote in any case where a law of this state specifically requires otherwise. In no event shall any member have less than one vote and no member may have more than two and one-half percent of the total votes of members of the cooperative. If the number of members in the cooperative is such that, solely by virtue of the number of members, one member may have more than two and one-half percent based on proportional voting, then each member of the cooperative shall be entitled to one vote only.
(4) Unless otherwise provided in this article or in the cooperative's articles, when a cooperative has provided for proportional voting, it shall be deemed to have intended that the references in this article to a vote of a specified proportion of members or similar terminology as necessary for approval of a matter submitted to a membership vote shall mean a determination based on a proportion of the total votes entitled to be cast or actually cast by members as applicable in the particular reference.

UNC SCHOOL OF GOVERNMENT

LOCAL GOVERNMENT LAW BULLETIN NO. 133 | AUGUST 2013

Remote Participation in Local Government Board Meetings

Frayda S. Bluestein

An important vote is on the agenda for a city council meeting tonight. One council member is stuck in Chicago. May she call in and participate in the meeting and the vote by cell phone? Can a board member be considered to be "present" if she is not physically at the meeting? Governing boards of public entities increasingly face these questions as technology provides an ever-increasing array of options for electronic communication. Some North Carolina local governments currently allow members to "call in" to meetings, but no state statute specifically authorizes this.

A local government board action is valid only if taken in a legal meeting.[1] A meeting is legal if the applicable notice requirements have been met and a quorum is present.[2] This bulletin analyzes whether a board member can be considered to be present for purposes of a quorum if he or she participates remotely by phone, video, or other method. It also considers whether a local government has statutory authority to allow remote participation under a local policy. It concludes that until the North Carolina legislature or courts explicitly address these questions, city and county governing boards may be vulnerable to a legal challenge if a member who participates electronically casts a deciding vote or is necessary to establish a quorum.

Legal risk can be avoided if remote participation is allowed only when the member's presence is not necessary to constitute a quorum, where the matter involves discussion only, or where the remote participant's vote is not the deciding vote. Assuming remote participation is legal in some or all situations, the question of whether members of a particular board may participate remotely is a matter for the board to decide—an individual board member does not have an automatic right to participate if he or she is not physically present. This bulletin concludes with some practical suggestions for issues that might be addressed in a locally adopted remote participation policy.

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1. Kistler v. Bd. of Educ. Randolph Cnty., 233 N.C. 400, 64 S.E. 2d 403 (1951); O'Neal v. Wake Cnty., 196 N.C. 184, 145 S.E. 28 (1928).

2. Iredell Cnty. Bd. of Educ. v. Dickson, 235 N.C. 359, 70 S.E.2d 14 (1952).

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Statutory Provisions Governing Presence at Meetings

When analyzing the scope of local government authority, one typically looks for an affirmative grant of authority. The absence of a prohibition is not enough to indicate that a particular action will be legal.[3] There are no statutes that specifically authorize remote participation in meetings.[4] State statutes do, however, grant broad authority for city and county governing boards to adopt their own rules of procedure for meetings.[5] Cities may adopt local rules "not inconsistent with the city charter, general law, or generally accepted principles of parliamentary procedure,"[6] and county procedures must be "in keeping with the size and nature of the board and in the spirit of generally accepted principles of parliamentary procedure."[7] These provisions provide broad authority for boards to manage the conduct of their meetings. A local rule adopted under this authority could allow remote participation and delineate the circumstances and procedures governing such participation. Indeed, several North Carolina local governments and numerous state boards currently allow members to participate by phone.[8]

It may be argued, however, that the matter of whether a person must be physically present in order to be counted toward a quorum, to vote, and to be considered present for all other legal purposes is not a proper subject for a rule of procedure that is within the board's discretion to adopt. This specific question has not been addressed in the North Carolina statutes or case law.

The quorum statutes that apply to city and county governing boards set out the number of members that must be present for a legally valid meeting to take place.[9] Nothing in these statutes specifically says that members must be *physically* present to count toward a quorum. The voting statute for cities,[10] however, does specifically mention physical presence. It provides that a person who fails to vote, has not been excused from voting, and yet remains "physically present" is counted as voting "yes." This could be read to reflect a legislative intent that physical presence

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3. Lanvale Props., LLC v. Cnty. of Cabarrus, 336 N.C. 142, 150, 731 S.E.2d 800, 807 (2012); Jefferson Standard Life Ins. Co. v Guilford Cnty., 225 N.C. 293, 34 S.E. 2d 430 (1945).

4. In 2008, the General Assembly enacted local legislation authorizing the Hyde County Board of Commissioners to conduct business using "simultaneous communication" (defined as a conference telephone call or other electronic means). S.L. 2008-111. It might be argued that the enactment of this law implies that such authority does not otherwise exist for counties or other local governments. Language in the act itself suggests that the legislature anticipated the possibility of this argument and took steps to prevent it. Section 3.2 of the act says, "Nothing in this act shall be construed to affect the validity of actions related to electronic meetings of any other public body." This language appears to convey the legislature's intent that the act does not imply a lack of authority for other units of government, but simply sets out the procedures for and limitations on the use of simultaneous communication for Hyde County.

5. Sections 160A-71(c), 153A-41 of the North Carolina General Statutes (hereinafter G.S.).

6. G.S. 160A-71(c).

7. G.S. 153A-41.

8. Although it might be assumed that state agencies have more flexibility in structuring their meeting procedures than do local governments, the law is otherwise. State agencies are dependent upon enabling statutes and are limited to those powers expressly granted by the constitution or legislature and those implied by those powers expressly granted. *See* High Rock Lake Partners, LLC v. N.C. Dep't of Transp. (DOT), 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012) (citations, internal quotation marks omitted) ("The DOT possesses only those powers expressly granted to it by our legislature or those which exist by necessary implication in a statutory grant of authority. . . . [T]he responsibility for determining the limits of statutory grants of authority to an administrative agency is a judicial function for the courts to perform. . . . In making this determination we apply the enabling legislation practically so that the agency's powers include all those the General Assembly intended the agency to exercise.").

9. G.S. 160A-74, 153A-43.

10. G.S. 160A-75.

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is required. The provision is capable of being applied, however, to a member who participates from a remote location, since the crux of the provision is that a person must be excused from the meeting or excused from voting in order to avoid being counted as voting. A remote participant, if considered to be present for purposes of a quorum, could be excused from voting or from the meeting (by terminating the electronic connection) in order to avoid being counted as voting "yes" under the statute. Since there is no other provision in the city or county statutes that specifically requires physical presence, it is an open question as to whether a remote participant may be counted for quorum purposes.

If a person participating electronically is not necessary to establish a quorum—that is, if the number of members physically present is sufficient to establish a quorum—such participation creates no risk to the validity of the meeting. If the remote participant is necessary to establish a quorum, however, or if he or she casts a deciding vote, the action taken in the meeting may be subject to challenge. In that case, it will be up to a court to resolve the issue of whether such participation is valid in North Carolina.

Cases Addressing Electronic Participation

Cases in other states have held that a local governing board member can be considered "present" when participating electronically from a remote location. A Maryland case, for example, found that a requirement for physical presence was satisfied by a board member's participation by telephone, holding, "we believe the term 'present' and 'convene' can encompass participation through the use of technology."[11] The Maryland court relied on *Freedom Oil Co. v. Illinois Pollution Control Board*,[12] in which an Illinois appellate court found that a state agency had authority to conduct a meeting at which two out of six members participated by phone. Relying on an Illinois Attorney General's opinion, as well as on other cases, the court found that the board's conduct of a special meeting by telephone conference "[fell] within the Board's specific authority to conduct meetings" and that it did not violate the state's open meetings law.[13]

Would a North Carolina court recognize the possibility of including remote participants when determining a quorum? At least one North Carolina appellate decision supports the notion that local government authority should be interpreted in light of changes in technology. In *BellSouth Telecommunications, Inc. v. City of Laurinburg*,[14] the North Carolina Court of Appeals held that the statutory authority for cities to operate cable systems included authority to operate a fiber optic network. The court reasoned that the legislature intended local

11. Tuzeer v. Yim, LLC, 29 A.3d 1019, 1034 (Md. Ct. Spec. App. 2011) (citing Freedom Oil Co. v. Ill. Pollution Control Bd., 655 N.E.2d 1184, 1191 (Ill. App. Ct. 1995)), *cert. denied*, 35 A.3d 489 (Md. 2012) (phone participation by zoning board member did not violate open meetings law).

12. 655 N.E.2d 1184 (Ill. App. Ct. 1995).

13. *Id*. at 1189. Although this case involved a state agency, the court noted that such agencies do not have inherent authority, so the question addressed by the holding is analogous to the question of whether electronic participation is within the scope of a local government's authority to conduct meetings (see *supra* note 8). While the *Freedom Oil* case acknowledges other cases holding that physical presence is required, those cases involved alleged violations of open meetings laws when electronic meetings were held without public notice or access. These cases are not relevant to the issue of whether such participation is lawful when conducted as part of a properly noticed meeting, with public access, under the North Carolina open meetings law, which explicitly recognizes electronic meetings.

14. 168 N.C. App. 75, 606 S.E.2d 721, *discretionary review denied*, 359 N.C. 629 (2005).

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government activity to "grow in reasonable stride with technological advancements."[15] Advances in technology have improved the quality and convenience of remote participation. Indeed, many citizens regularly watch board meetings in the comfort of their own homes via live streaming to televisions and computers. As noted below, the open meetings law has for decades included procedures for conducting and providing access to electronic meetings, and the city and county quorum statutes do not create an explicit requirement for physical presence.

Until the matter is resolved by legislation or court ruling, however, boards must make their own judgments, in consultation with their attorneys, as to whether the risk of a challenge is worth the inclusion of members who cannot attend a meeting. Because there is broad authority for establishing local procedures, the risk of challenge can be minimized if electronic participation is allowed only when the number of physically present members is sufficient to establish a quorum.

Rules for Appointed Boards

This discussion has, so far, focused on city and county governing boards, since there are specific statutes that govern their quorum and voting requirements. But local governing boards, in turn, create many appointed boards, whose purposes and procedures are established in local ordinances and resolutions. These boards are rarely subject to specific statutory requirements.[16] Local governments are free to establish the procedures for these boards, and these procedures could include provisions for remote participation. As noted below, special consideration should be given to the use of electronic participation in boards that function as quasi-judicial decision-makers.

North Carolina Open Meetings Law and Electronic Participation

Compliance with the state open meetings law[17] is an essential component of a lawful meeting. This law requires public bodies to provide notice of and access to "official meetings."[18] Under the statute, an "official meeting" occurs when a majority of a public body meets, assembles, or gathers together at any time or place to conduct the business of the public body. "Official meeting" also specifically includes "the simultaneous communication by conference telephone or other electronic means."[19]

The statute's mention of a conference call or other electronic means of gathering is sometimes interpreted as a source of authority for electronic participation in local government and other public board meetings. After all, if a board is considered to be in an official meeting when its members gather together electronically, perhaps a partially electronic meeting is also considered an official meeting, which is authorized under the open meetings law. This interpretation is not universally accepted. Indeed, the language is open to several interpretations.

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15. *Id*. at 86–87, 606 S.E.2d at 728.

16. An important exception is local boards of adjustment, which carry out specific quasi-judicial functions and are governed by statutory provisions affecting voting and conflicts of interest. *See* G.S. 160A-388; 153A-345.

17. G.S. Chapter 143, Article 33C.

18. *See* G.S. 143-318.10(a) ("each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting").

19. G.S. 143-318.10(d).

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The open meetings law is designed to make sure that the public has access whenever a majority of the members of a public body—enough to make a binding decision—gather together on public business. It would be easy to circumvent the statute if members could simply call, email, or video conference and do their work outside of the public eye. So the statutes include such electronic gatherings within the definition of "official meeting." But does the inclusion of electronic meetings *authorize* these types of meetings for all public agencies, or does it simply make clear that (1) if these types of meetings occur and notice is not given, they are illegal, and (2) if these types of meetings are otherwise authorized, public notice and access must be provided?

The statute clearly implies that at least some types of public bodies may lawfully conduct electronic meetings. If all the statute did was to include electronic meetings in the definition of an official meeting, it could be viewed as prohibitive—designed to make clear that members of public bodies can't avoid the requirements of the statute by meeting electronically. But the law also includes procedures for conducting electronic meetings, requiring notice and a location at which the public may listen to a meeting conducted electronically.[20] There would be no reason to include these provisions if no public bodies have or could ever have authority to conduct a valid electronic meeting.

School of Government faculty members who are familiar with the act's history have long advised that the language regarding electronic and telephone conferencing was included because some public bodies, primarily some state boards, were already conducting meetings by telephone. The provisions were apparently designed to make sure that there was a guarantee of public access to such meetings. While the law does recognize the possibility of electronic meetings, the open meetings law itself neither creates nor restricts the authority of particular types of public bodies to conduct electronic meetings. It simply describes the types of meetings to which the public has access and prescribes procedures for providing access whenever electronic means are used.

It is important to note that the open meetings law provisions relate to meetings of a majority of a given board. Nothing in this law—or in any other statutory provision relating to public bodies—directly addresses the validity of electronic participation by individual members of a public body in a properly noticed meeting. Nonetheless, the recognition of and rules for electronic meetings in the open meetings law suggest that electronic participation by members of a board will not violate the open meetings law, so long as procedures for providing access are met.[21]

Board Discretion to Allow Electronic Participation

Assuming that remote participation in a board meeting is legal or does not pose a risk of legal challenge, does a local government board member have a right to participate remotely? The answer is "no." There is no legal basis for asserting such a right. As noted above, a governing board has authority to establish the rules for its meetings. It is up to the board to decide, by majority vote, whether or not to allow such participation and, if so, under what circumstances and subject to what rules.

20. G.S. 143-318.13(a).

21. *See* Tuzeer v. Yim, LLC, 29 A.3d 1019 (Md. Ct. Spec. App. 2011), *cert. denied*, 35 A.3d 489 (Md. 2012) (phone participation by zoning board member did not violate open meetings law).

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Local Policies for Remote Participation

There are both practical and legal considerations that a local government should address if it decides to allow remote participation. For example, local policies should specify when remote participation will be allowed and how the process will be managed when it occurs.

When developing local policies, a governing board should consider the purposes of meetings and the laws that govern them. Most of the legal requirements are designed to provide public access to every aspect of the deliberative and decision-making process, except when it takes place in closed session. Meetings are also for the benefit of the members of the public body themselves. The decision-making process involves interaction among the members, as well as member interaction with the public. A state remote participation policy that was reviewed for this bulletin stated that its purpose was to promote full participation of board members while ensuring access and transparency for the public.[22] A balance of these considerations is a useful goal when developing procedures for remote participation.[23]

Technological Considerations

Technology provides many choices for audio and video access so that remote participants can be seen and heard at the meeting's physical location. But not every jurisdiction will have that technology in place, along with the staff resources to manage and maintain it. It may require added expense and more than the usual advance planning to make sure everything works at the meeting. This may be even more challenging for emergency meetings in which electronic participation may be important due to the short notice involved. Even with a decent phone connection, a remote participant may not be able to observe the other board members or the public. This may be a technical and legal issue for quasi-judicial hearings, as discussed in more detail below. Two-way video is a possible solution, as it can improve the experience for both the board members and the public, but it is heavily dependent on high-quality video systems and adequate Internet connectivity transmission speeds (i.e., broadband) in order to minimize delays and content loss.

Guidelines promulgated by the Massachusetts Attorney General's Office specify which remote participation methods may be used during a public body's meetings:

> Acceptable means of remote participation include telephone, internet, or satellite enabled audio or video conferencing, or any other technology that enables the remote participant and all persons present at the meeting location to be clearly audible to one another. Accommodations must be made for any public body member who requires TTY service, video relay service, or other form of adaptive telecommunications. Text messaging, instant messaging, email and web chat without audio are *not* acceptable methods of remote participation.[24]

Technical glitches can become distracting, can disrupt the flow of a meeting, and may create legal issues about whether and at what specific times a person is considered to be present. Local

22. Mass. Attorney Gen.'s Regulations, 940 CMR 29.10, *Remote Participation*, www.mass.gov/ago/government-resources/open-meeting-law/940-cmr-2900.html#Remote.

23. Attorney General of Massachusetts, *Attorney General's Open Meeting Law Guide*, "May a Member of the Public Body Participate Remotely?" www.mass.gov/ago/government-resources/open-meeting-law/attorney-generals-open-meeting-law-guide.html#Remote. These guidelines provide a good example of matters that may be addressed in a remote participation policy.

24. *See id.*, "What Are the Acceptable Means of Remote Participation?"

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governments that allow remote participation should create and test internal procedures so that the necessary arrangements are reliably in place for remote participation when it occurs.

When to Allow Remote Participation

Reasons for Remote Participation

A review of remote participation polices and rules currently in use (mostly from other states) reveals that the decision about when remote participation should be allowed involves core policy and board relation issues. A board member who regularly misses board meetings may be viewed as simply not placing sufficient priority on board service.[25] To promote regular attendance, policies typically allow remote participation only in specific circumstances when a member is unable to attend. Examples include illness or disability of the member or a close relative, military service, unexpected lack of child care, family emergency, and work or public service obligations that require the member to be away. Policies may also include a statement that remote participation will not be allowed solely for the convenience of the board member or merely to avoid attending one or more particular meetings.

Permissible Only When a Quorum Is Present

Some policies allow remote participation only when enough members are physically present to constitute a quorum. This eliminates the legal issue, discussed above, regarding whether a remote participant can be considered to be present for purposes of establishing a quorum. It also, in effect, places a limit on how many people can participate remotely at a single meeting. This promotes ease of interaction among board members and potentially reduces technological challenges that might arise if more than a few members are connected electronically from separate locations. Some policies explicitly limit the number of members who can participate remotely in a particular meeting.

Permissible Only for Certain Kinds of Meetings

A policy might designate specific kinds of meetings at which remote participation is or is not permitted. Two types of meetings involve unique challenges for remote participation: quasi-judicial hearings and closed sessions.

Quasi-Judicial hearings. Local elected and appointed boards sometimes have responsibility for making decisions and conducting procedures in a quasi-judicial capacity. This occurs, for example, in a personnel grievance or termination hearing and in several types of land use proceedings, such as consideration of conditional or special use permits or variances. Quasi-judicial proceedings place the board in the role of a judge, hearing evidence and applying a legal standard found in an ordinance or statute. North Carolina courts have held that the basic elements of due process must be met in a quasi-judicial hearing, such as sworn testimony, an opportunity for the parties to be heard, and a neutral decision-maker.[26] Board members must at such hearings observe and evaluate the evidence and testimony, and the parties must have an opportunity to be heard. The board must decide the matter on the evidence presented and cannot rely on *ex*

25. Although there is no authority under North Carolina law for a city or county governing board to sanction or remove a board member for too many absences, rules for optional appointed boards could include sanctions, including removal, for failure to attend. See Frayda Bluestein, "Unexcused Absences," *Coates' Canons: NC Local Government Law Blog* (UNC School of Government, Jan. 24, 2013), http://canons.sog.unc.edu/?p=6975.

26. Humble Oil & Ref. Co. v. Bd. of Aldermen, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974).

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parte communications. Both the board and the applicant or petitioner have important roles in meeting these requirements, which include being able to observe evidence and demeanor and engage in cross-examination. Remote participation by one or more members of a quasi-judicial body raises special concerns in light of these requirements. Even though members who are physically present may receive or send information during the meeting using mobile electronic devices, remote participation may make it more difficult to monitor their communications for compliance with the standards that apply to quasi-judicial proceedings.

Given the additional legal and technical requirements that may apply to quasi-judicial hearings, a governing body might want to implement a policy prohibiting remote participation in these types of meetings. If a board's policy does allow remote participation, however, it should include minimum requirements for ensuring that both remote participants and the other parties involved can participate in and observe the proceedings as necessary to meet the applicable level of due process.

Closed sessions. The open meetings law provides several reasons for public bodies to meet in closed session.[27] For some—but not all—of these situations, remote participation can present challenges. If the purpose of the meeting is to preserve confidentiality (such as for attorney-client communications[28] or personnel matters[29]), for instance, remote participation may raise concerns about whether information is being improperly shared.

Of course, even individuals who are physically present might be difficult to monitor given how easy it is to communicate with others electronically using mobile devices. Furthermore, although many board members may assume that it is illegal to share information from closed session meetings, the open meetings law does not explicitly prohibit it. Indeed, a person who is physically present at a meeting who communicates electronically (for example, by text message) with someone outside the meeting is not necessarily violating the law. A legal issue arises only with respect to communications involving specific types of information or records that are confidential under a specific legal provision.[30]

A local policy might prohibit remote participation in all closed sessions, or it might bar it only in those dealing with confidential information. In cases where remote participation is allowed, procedures might be developed to ensure, to the extent possible, that the non-present member is alone and can be seen and heard by all the members participating.

Procedures for Remote Participation

Approval Process

As noted above, local policies may allow remote participation only for specified reasons. Policies may also require that a person must request approval to participate remotely in advance, for example, by filing a request with the clerk at least twenty-four or forty-eight hours in advance of the meeting, with exceptions, perhaps, for emergency meetings. The policy should delineate whether the board or some designee of the board must approve the request.

It is important to consider the potential for abuse and manipulation should the board not have objective bases and procedures in place for approving or disallowing remote participation.

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27. *See* G.S. 143-318.11.

28. G.S. 143-318.11(a)(3).

29. G.S. 143-318.11(a)(6).

30. *See* Frayda Bluestein, "What Happens in Closed Session, Stays in Closed Session . . . Or Does It?" *Coates' Canons: NC Local Government Blog* (UNC School of Government, Dec. 9, 2009), http://canons.sog.unc.edu/?p=1463.

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Even without the added dimension of remote participation, board majorities can schedule meetings or agenda items, knowing when particular members will or will not be able to attend. The potential for manipulation increases if the same majorities have complete discretion in deciding whether individual members are allowed to participate remotely. This is of special concern if remote participants are allowed to vote, a matter discussed below.

Discouraging Excessive Absences

A local policy might limit the number of times an individual board member may participate remotely. Even if there is no authority to sanction members for excessive absences (as is the case for governing board members),[31] the board has discretion to disallow remote participation in cases where board members are abusing the privilege. Board majorities must exercise this authority carefully to avoid manipulation of the process for political advantage.

Voting and Written Ballots

A local policy should address the question of whether remote participants may vote and, if so, what procedures will be used to record and verify their votes. If a remote participant is considered to be present, the presumption is that he or she would be entitled to vote. Indeed, under the voting statute for city governing boards, a person is presumed to vote "yes" if he or she is present by remote means and has not been excused from voting. For these reasons, it would be important to have specific means for determining whether a person is still participating when a vote comes up. Policies can provide for a person to explicitly notify the board when the remote participant is leaving the meeting or rejoining the meeting by terminating or restarting the electronic connection. A policy could also state that a person is not considered present if the connection is lost unintentionally, due to technical problems.

A voice vote by telephone, which can be heard and recorded, could satisfy the basic voting requirements, unless votes are being taken by written ballot. It is possible that a fax, email, or text could be considered a written ballot, if the notion of an electronic signature (generally now accepted as binding in other circumstances) is accepted in this context. The obvious concern would be whether the remote participant in fact did the voting, but a person participating by electronic means could verify the action or, if there is video, could be observed doing it.

Minutes to Reflect Remote Participation

Minutes of meetings at which remote participation occurs should reflect which members are physically present and which are not. They should also reflect when members are excused from voting or are excused to leave or rejoin the meeting, just as they would for members who are physically present.

Majority of Board in a Remote Location

In most cases, the need for remote participation arises when a majority of the board meets in its regular location and one or two members are unable to physically attend. It is possible to imagine, however, a situation where a majority of a board is away, perhaps together attending training or a meeting, and a need for a meeting arises. Consider a five-member board, with three members who are out of town. An issue arises, and the mayor calls a special meeting to take place in city hall, with the three absent members participating by conference telephone call. For cities, there is no legal requirement regarding where meetings take place, but the notice of the meeting

31. *See supra* note 25.

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must identify its location. If the city follows the procedures for providing visual and audio transmission at city hall under G.S. 143-318.13(a), it would appear that a notice stating that the meeting will take place at city hall would be valid, even if a majority of the board is participating from another location. It might be prudent to also provide notice of the location at which the three members are located, if they are all in the same place.

Under state law, a county board of commissioners must hold its meetings within the county, except in certain specified cases.[32] In the absence of any specific authority to the contrary, it is best to assume that a majority of the board must be physically present in the county to comply with this requirement. Although it is technically possible for citizens to attend a meeting in the county at which a majority of the board is participating and can be seen and heard by electronic transmission, this approach might not be viewed as being compliant with the in-county meeting requirement.

Conclusion

Is remote participation more trouble than it is worth? That is up to local boards to decide. Despite some uncertainty about the legality, for quorum and voting purposes, of remote participation, it is clear that there are and will continue to be times when both the board's and the public's interests are best served by accommodating one or more board members' need to participate from another location. Indeed, a remote participant seems not so different from those who are present, when you consider the extent to which technology permeates meetings. Citizens participate remotely through video streaming, and members and attendees increasingly access electronic devices during meetings. Local policies addressing the legal and practical aspects of remote participation for elected and appointed boards can balance the needs of the boards and the needs of citizens, while incorporating available technology to accommodate these interests.

This bulletin has emphasized the two biggest legal risks in allowing remote participation: the possibility of a challenge to (1) the presence of a quorum and (2) the validity of a vote cast remotely, especially if the remote participant casts the deciding vote. The first risk can be avoided by adopting a local policy that requires a quorum to be physically present. The second risk may not be one that can be avoided by local policy. As noted above, a person who participates in a meeting remotely and is considered to be present has a right to participate fully, including in voting. It may not be possible to know in advance whether the remote participant will be the deciding vote, and it would open the process to unacceptable manipulation if remote participation rights were determined based on the expected outcome of a particular vote. So this risk is one that board members may have to consider and balance against the value of full participation in deciding whether to allow remote participation.

32. G.S. 153A-40.

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