

MAYOR
Michael L. Alvarez

MAYOR PRO TEM
David L. Cohn

TOWN MANAGER
Scott J. Kaufhold, P.E.



TOWN COUNCIL

Gordon B. Daniels

Gary M. Savoie

Amy R. Stanton

Mark A. Wireman

**Indian Trail Town Council
Regular Meeting
Tuesday, October 25, 2016
Civic Building—6:30 PM**

AGENDA

1. **CALL MEETING TO ORDER & PLEDGE OF ALLEGIANCE**
2. **MOMENT OF SILENCE**
3. **ACTION ITEM:** Council Consideration to Approve a Remote Participation Policy by Adopting Resolution #R161025-01 (Mayor Alvarez)
4. **AGENDA ADDITIONS & DELETIONS** **Action**
5. **MOTION TO APPROVE AGENDA** **Action**
6. **PRESENTATIONS**
7. **PUBLIC COMMENTS**
8. **LAW ENFORCEMENT UPDATE**
9. **CONSENT AGENDA** **Action**
 - a) Approve Draft Minutes October 11, 2016 Regular Town Council Meeting
 - b) Approve Budget Amendment #628
 - c) Approve Crismark Street Acceptance
 - d) Approve written copy of the Public Safety Committee amended By-Laws (reducing membership amount to 7 as approved by Council 10-11-16)
 - e) Approve Union County Sheriff's Office Agreement Amendment #3 (adding Lieutenant position)
10. **PUBLIC HEARINGS** **Action**
 - a) **The Hawfield/Heritage Annexation and Conditional Zoning**
 - 1) **Annexation Ordinance #143 Hawfield/Heritage:** a voluntary annexation request to annex two (2) parcels of land into the corporate limits of Indian Trail; Tax Parcel ID numbers 07120005 90 and 07120008, located on Hawfield Road and totaling approximately 8.26 acres. Applicant: Queen City Land LLC

- 2) **CZ2016-005 Hawfield/Heritage:** this is a rezoning request to establish a Conditional Zoning Single Family (CZ SF-4) district for 316 single family detached units on parcels 0720005 90, 07120008, 07120003, 07120005A and 07123001J, totaling approximately 163 acres. the parcels are located on the north side of Wesley Chapel Road. Applicant: Queen City Land, LLC

Council will follow these steps:

- 1) receive a staff presentation for 10a(1) & 10a(2);
- 2) receive a presentation by the applicant (or applicant's agents) for 10a(1) & 10a(2);
- 3) open public comments for 10a(1) and receive public comments for 10a(1);
- 4) close public comments for 10(a)(1);
- 5) open public comments for 10a(2) and receive public comments for 10a(2);
- 6) close public comments for 10a(2);
- 7) engage in Council discussion regarding the project asking questions of staff and/or applicant as necessary;
- 8) take action to approve or deny the annexation application 10a(1)-[If the annexation is approved, Council will then take action regarding the Conditional Zoning request which shall begin with action regarding the consistency findings followed by action specific to the Conditional Zoning. If the annexation is denied no further action is necessary]

11. OLD BUSINESS ITEMS

Action

- a) Council to consider adopting the Honorary Citizen/Business/Organization Program. (formally referred to as "Person of the Month"-tabled item originally brought forth by Mayor Pro Tem Cohn)

12. NEW BUSINESS ITEMS

Action

- a) Council to consider approving amendments to the Rules of Procedures/Bylaws for the Transportation Advisory Committee and Parks, Art, Recreation and Culture (PARC) Committee; primary changes include reducing the membership number to five (5) for each committee in order be more effective at reaching a quorum. (Mr. Kaufhold)
- b) Council to consider allocating funds from the Governing Body's budget to provide a holiday luncheon for staff at a restaurant. (Mayor Pro Tem Cohn)

13. DISCUSSION ITEMS

- a) Council to discuss the draft ordinance amendment establishing an agenda setting committee and, if Council is ready to move forward, schedule a public hearing for Tuesday, November 15, 2016, 6:30 PM at the Civic Building--100Navajo Trail, Indian Trail, NC for Amendments to Council's Rules of Procedures contained in Section 30.02 of the Code of Ordinances. (Mr. Kaufhold)

14. UPDATES

- a) Manager's Update: Scott Kaufhold, Town Manager

15. COUNCIL COMMENTS

16. CLOSED SESSION

Action

17. ADJOURN

Action

TOWN OF INDIAN TRAIL AGENDA ITEM REQUEST FORM

This form must be completed and attached to all supporting documentation for items to be included on the Town of Indian Trail Town Council Agenda.

Submitted By: Mayor Alvarez Department: Council

Contact Phone # () _____ Date Submitted 10-13-16

Date of Town Council Meeting to consider this item: 10-25-16

Please indicate how much time you expect this matter to take: 5 min

Description (give short summary of topic, this is how item appears on the Agenda.)

Council to adopt a Remote Participation Policy

Who will attend Council meeting able to respond to questions? Give name & title:

Mayor Alvarez, Town Manager & Town Attorney

Where does this item need to appear? Check all that apply: ****This should be the very first item on the agenda after the Pledge/Moment of Silence

Consent Agenda Schedule Public Hearing** Discussion
 Presentation/Recognition Closed Session Work session
 New Business Old Business

*Board, commission, or group requesting joint meeting: _____

Supply General Statute or local ordinance that governs this item (attach copy) _____ UNC School of Government Law Bulletin regarding remote participation and draft policy with adopting resolution _____

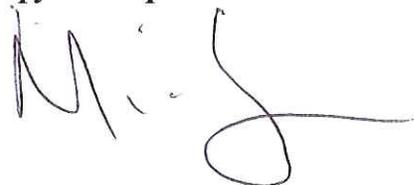
Has this item been reviewed by Town Attorney? Yes No _____ (Attach recommendation.)

What action is requested of the Council? Approve the policy

What action is requested of the Manager? arrange for the logistics to carry out policy

Are Town funds required? Yes / No \$ _____ Funding Source _____

** If requesting a Public Hearing, attach a copy or sample Ad to run in newspaper **



Town of Indian Trail

Memo

TO: Mayor and Town Council
FROM: Kelley Southward, Town Clerk
DATE: October 25, 2016



SUBJECT: Special Business Item: Council consideration to approve a Policy for Remote Participation by Council Members for Town Council Meetings

Mayor Alvarez has asked that this item be included for Council's consideration and that such be included as the first item of business after the Pledge of Allegiance and Moment of Silence on the October 25, 2016 Town Council Agenda.

In a Local Government Law Bulletin by Frayda S. Bluestein of the UNC School of Government it is noted that statutes are unclear about remote participation by Council Members for Town Council Meetings. However, Ms. Bluestein notes that statutes clearly give Councils the authority to adopt their own rules of procedures for meetings. Further, the bulletin notes that in this day of advanced technological capabilities many governing bodies allow for remote participation. Finally, Ms. Bluestein suggests that if a governing body wants to allow remote participation then a policy to define when and for what reasons remote participation is acceptable as well as outline other guidelines should be adopted by Council.

Staff has drafted a policy for remote participation for Council's consideration. Attached is the draft policy as well as the legal bulletin by Ms. Bluestein.



**TOWN OF INDIAN TRAIL
RESOLUTION #R161025-01
RESOLUTION ADOPTING A POLICY AUTHORIZING REMOTE PARTICIPATION
BY TOWN COUNCIL MEMBERS FOR TOWN COUNCIL MEETINGS**

WHEREAS, the Town of Indian Trail Town Council desires to allow remote participation by Town Council Members in briefings and meetings of the Council under limited circumstances, subject to the provisions of the attached Policy for Remote Participation By Council Members for Town Council Meetings.

NOW, THEREFORE BE IT RESOLVED that the Indian Trail Town Council hereby adopts the attached Policy for Remote Participation By Council Members for Town Council Meetings, which authorizes remote participation by Council Members in briefings and meetings of the Council subject to the limitations and provisions contained in the policy.

Adopted this the 25th day of October 2016. The Policy for Remote Participation by Council Members for Town Council Meetings shall be effective and in full force immediately upon adoption.

(SEAL)

Michael L. Alvarez, Mayor

Attest:

Kelley Southward, Town Clerk



TOWN OF INDIAN TRAIL POLICY FOR REMOTE PARTICIPATION BY COUNCIL MEMBERS FOR TOWN COUNCIL MEETINGS

This Policy is established by the Town Council of the Town of Indian Trail, NC for the purpose of defining the circumstances for allowing a Council Member to remotely attend and participate in official meetings and briefings. Remote attendance and participation shall be subject to the following rules and procedures:

1. Remote (either audio or audio/visual) participation may be used only in limited circumstances. The Mayor (or Mayor Pro Tem when acting as Chairman in place of the Mayor) may not participate remotely to chair meetings. The Mayor may attend a meeting remotely and, if recognized by the Chair of the meeting, engage in Council discussion. The Mayor shall not be permitted to cast any votes to break ties when attending a meeting remotely as such is part of Mayoral duties when chairing a meeting. A Council Member desiring to participate in a meeting remotely must assert one or more of the following four (4) reasons for being physically unable to attend the meeting:
 - a) Personal illness or disability;
 - b) Employment purposes;
 - c) Family or other emergency; or
 - d) To participate in other scheduled Town related meetings which make it logistically impossible to attend the Board meeting.
2. Remote participation may be allowed only during open sessions when a quorum of the Council is physically present at the meeting and the Council Member participating remotely is not necessary to establish a quorum.
3. Remote participation shall not be allowed during the following:
 - a) Quasi-judicial proceedings; and
 - b) Closed sessions
4. A Council Member desiring to participate in a meeting remotely must notify the Town Manager or Town Clerk of the need for remote participation and request approval by the Mayor of his/her remote participation at least 24 hours prior to the start of the meeting, unless advance notice is impractical.

5. At the start of the official meeting and prior to participating in deliberations, the Mayor shall announce that a Council Member is participating remotely. Such Council Member shall identify himself/herself and state the reason that he/she is participating remotely.
6. A Council Member participating remotely shall be allowed to participate in all open session Council briefing discussions and open session official Board meeting discussions with the exception of quasi-judicial hearings. A Council Member participating remotely shall be able to vote on matters allowed under the policy.
7. A Council Member participating remotely shall be provided with all documents to be considered during the meeting.
8. A Council Member participating remotely shall participate via simultaneous and/or electronic communication and must be fully heard and if possible seen by other members of the Council and any other individuals in attendance at the official meeting. Use of 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 is necessary. If clear audio is not available, the Mayor (or acting Chair) may elect to disallow or discontinue the remote participation.
9. A Council Member participating remotely shall provide a voice vote which can be heard and recorded if participating by telephone and shall provide a voice and hand vote if participating by video.

Adopted October 25, 2016.

Mayor Michael L. Alvarez



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.

The author is Associate Dean for Faculty Development and Professor of Public Law and Government at the School of Government. The author gratefully acknowledges research assistance provided by Christopher Tyner, School of Government Legal Research Associate.

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).

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

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.

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).

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 law¹⁷ 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.

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).

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).

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?"

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 policies 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).

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 communications²⁸ or personnel matters²⁹), 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.

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>.