



VIA ELECTRONIC MAIL

DATE: November 18, 2020

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Division of Local Government Services  
N.J. Department of Community Affairs  
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FROM: New Jersey School Boards Association  
New Jersey State League of Municipalities

RE: ***N.J.A.C. 5:39-1 Remote Meeting Protocol for Local Public Bodies***

The New Jersey School Boards Association and the New Jersey State League of Municipalities are writing to you concerning the above-captioned regulations. This local government coalition (coalition) representing municipalities and school districts appreciates this opportunity to comment.

We thank the DCA for their continued efforts to provide support and guidance to local governments during these uncertain times. Our concerns are outlined below:

- At the outset, the coalition urges the Department of Community Affairs (DCA) to always ensure proper notice to boards of education and charter schools of its regulations that have an impact on them. *N.J.S.A. 52:14B-3a(b)* requires DCA to make its local finance notices readily available to the regulated community through appropriate means, including, but not limited to, posting in a prominent place on the website for the agency. In this instance, LFN 2020-21 was not distributed directly by DCA to all local boards of education despite the fact that boards of education are named on the distribution list. This information was not easily found on the DCA website nor directly e-mailed to all boards of education and charter schools. *N.J.S.A. 52:14B-4*. To ensure that boards of education and charter schools receive timely notice of DCA's regulatory actions that impact them, the coalition recommends that DCA forward such notices to the Department of Education, which maintains an e-mail distribution list of all boards of education and charter schools in New Jersey.
- The coalition seeks clarification as to whether a local public body must follow these regulations in order to hold a public meeting remotely during a declared emergency. Prior to the enactment of P.L. 2020, c.34 (*N.J.S.A. 52:27D-18.11*), the legislature passed and the Governor enacted P.L. 2020, c. 11 (*N.J.S.A. 10:4-9.3*), which permitted remote public meetings and remote participation by the public. Given the fact that *N.J.S.A. 52:27D-18.11* is also permissive and not mandatory, could a local public body choose to hold its remote meetings under *N.J.S.A. 10:4-9.3*, thereby dispensing with these restrictive regulations that were promulgated pursuant to P.L. 2020, c. 34 (*N.J.S.A. 52:27D-18.11*)?

- The stated purpose of the proposed regulations, at *N.J.A.C. 5:39-1.1*, is to “conduct official public business in an open and transparent manner whenever a declared emergency, as defined by this chapter, requires a local public body to conduct a public meeting without physical attendance by members of the public.” However, these regulations also address how a local public body should hold a meeting with physical attendance. For instance, *N.J.A.C. 5:39-1.3(b)* and *1.4(c)* both require that a meeting will not “proceed if the room capacity does not permit any member of the public to attend.” The authorizing legislation only permits emergency regulations for “rules and regulations concerning the conduct of remote (emphasis added) public meetings during a public health emergency or state of emergency that are necessary” to effectuate the purposes of the statute. *N.J.S.A. 52:27D-18.11(b)*. As such, any attempt to regulate anything other than a remote public meeting is void ab initio. Please describe your authority to regulate the physical attendance of the public at meetings that are not remote.
  - The coalition also recommends that the cite to the Open Public Meetings Act (OPMA) be modified to *N.J.S.A. 10:4-6 et seq.* for clarity.
- *N.J.A.C. 5:39-1.2*—The coalition seeks clarification on the definition of “local public body.” While the coalition realizes that this definition is controlled by statute, does the definition cover those boards of education whose territories span county boundaries? For instance, the West Windsor-Plainsboro Regional Board of Education includes municipalities in both Mercer and Middlesex Counties; the Education Services Commission of New Jersey provides services all over the state; and the Morris-Union Jointure Commission encompasses two counties. In these instances, and others, all are considered “boards of education,” however, their territorial jurisdictions exceed those of a particular county. Please clarify. Additionally, the coalition asks whether charter schools are also included in the definition of “local public body.”
- *N.J.A.C. 5:39-1.3*—The coalition is concerned about the language in subsection (b). As stated earlier, the coalition believes that DLGS’ attempt to regulate a physical meeting goes beyond the authority granted to it in the authorizing legislation. Assuming, that DLGS does have the authority to regulate a physical meeting, the coalition asks how a local public body is to measure the “reasonably expected attendance by the public.” During this state of emergency and the daily developments that the pandemic brings, it may be extremely difficult for local officials to estimate attendance at a meeting. Please describe what should occur if a local public body underestimates attendance at the meeting.
  - Subsection (b) also states that “no in-person meeting shall proceed if the room capacity does not permit any member of the public to attend.” Does this mean that if the capacity is exceeded even by just one person for which the room does not have capacity then the meeting must be cancelled? Or would the meeting be merely delayed until a larger room could be found, if possible? Could a local public body encourage those who show up physically to a meeting to return home and participate remotely as a means of keeping the meeting room at or below capacity? What if members of the public show up late to a meeting for which the room is already at capacity—must the meeting immediately cease?
  - Subsection (b) appears to contemplate only two types of meetings: all-in-person or hybrid where the public can attend in person or remote. Do these regulations permit a third type

of meeting where the local public body meets physically yet the public is remote? This would alleviate many of the concerns surrounding meeting room capacity.

- *N.J.A.C. 5:39-1.4*—The coalition is concerned that the remote-meeting technologies required under this section will create a cost to the local public body. Has the DLGS identified a funding source for this mandate?
  - Subsection (c) appears to require that if the board is meeting physically, the public must be allowed to attend in person. The coalition reiterates its concerns about meeting capacity raised in subsection (b) above. This requirement that a meeting held in person shall not prohibit members of the public from attending in person runs contrary to the stated purpose of these regulations which is “to ensure that local public bodies can conduct official business...without physical attendance by members of the public.”
  - Subsection (e) requires that documents that would normally be provided to the public at a physical meeting must be provided to them either by making them visible or by providing a link to the materials. How far in advance of the meeting must the materials be posted? How long must the materials remain posted on the website?
  - Subsection (f) requires local public bodies to accept public comments before the meeting. This is a requirement that goes beyond what is contemplated in the Open Public Meetings Act, *N.J.S.A. 10:4-6 et seq.* *N.J.S.A. 10:4-12* specifically states:

Nothing in this act shall be construed to limit the discretion of a public body to permit, prohibit, or regulate the active participation of the public at any meeting, except that a municipal governing body and a board of education shall be required to set aside a portion of every meeting of the municipal governing body or board of education, the length of the portion to be determined by the municipal governing body or board of education, for public comment on any governmental or school district issue that a member of the public feels may be of concern to the residents of the municipality or school district.

There is nothing in the OPMA that requires that a local public body read letters from the public into the record. Under *N.J.S.A. 10:4-7*, the legislature recognized the “right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies.” Further, the legislature also recognized “the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way.” *N.J.S.A. 52:27D-18.11* must be consistent with the OPMA and must provide reasonable “public notice and allowance for public input.” There is nothing in the authorizing statute that requires letters sent prior to the meeting be read as part of public comment at the meeting. Such requirement is not contemplated by *N.J.S.A. 52:27D-18.11* and is inconsistent with the OPMA. Requiring the local public body to read previously submitted letters at the meeting, means that the public need not be present at or witness the meeting in order for their comments to be considered by the local public body. Such a regulatory requirement is void *ab initio*.

Assuming that this regulatory provision is valid, the next consideration is whether it can be implemented without creating First Amendment liability for the local public body. The regulation requires that previously submitted comments be read by the official responsible for creating the meeting agenda using the same time limits as would be given by those who actually voice their comments at a meeting. Liability may be created because the official may not place the same emphasis on various words or phrases as the actual commenter. As such, because the comments are read by a government official, the public may view the reading or summarizing of such comments as government censorship, creating unnecessary liability for the local public body and the official. The requirement for public officials to read previously submitted comments should be eliminated from these regulations. Additionally, what does it mean for a local public body to have “addressed” the previously submitted letter? Addressing comments at meetings is not required by the OPMA. This creates additional liability as local public bodies try to immediately address issues raised in the letters without engaging in their usual deliberative processes.

The submittal of written comments and the requirement that such comments be read aloud into the record also presents a heightened problem for land use boards and others during *quasi-judicial* proceedings. By way of example, written comments cannot be allowed for applications for developments before planning boards or boards of adjustment because it precludes the right of cross-examination that both the board and the applicant possess.

- Subsection (h) requires the adoption of standard procedures and requirements for public comment at the meeting and submitted prior to the meeting. This subsection mandates particular procedures when dealing with a disruptive member of the public. The coalition believes that an DLGS should not mandate specific procedures because every local public body has unique circumstances concerning how they handle disruptive members of the public. Rather, DLGS should require every local public body to have policy/procedures, but leave the specifics to local discretion because of the potential for liability concerning public commenters. The requirement, for instance, to engage the commenters in a “dialogue” could potentially lead to liability for the local public body or its members. See, for instance, *N.J.S.A. 18A:12-24.1(e) and (j)*. See also, *Besler v. West Windsor-Plainsboro Reg. Bd. of Educ.*, 201 N.J. 544 (2010).
- Subsection (i) requires that the electronic platforms used for public meetings be hosted on servers using the FedRAMP cloud standard or the cloud host provides annual evidence of an audit report. Under the DLGS guidance issued with these regulations, free meeting services are not to be used. Therefore, this becomes an unfunded mandate for local public bodies. Please provide the funding source to support this mandate.
- *N.J.A.C. 5:39-1.5(e)* requires updating of the annual notice if the local public body expects to hold a series of its regular public meetings as remote meetings. This requirement seems redundant and burdensome if the local public body has already met the notice requirements in *N.J.A.C. 5:39-1.5(a) through (c)*.

- *N.J.A.C. 5:39-1.7(b)* – The coalition is concerned that subsection (b) requires an applicant to submit all exhibits to the land use board secretary not less than two days in advance of the remote public meeting which is inconsistent with the Municipal Land Use Law (MLUL). Under *N.J.S.A. 40:55D-10b*, any maps and/or documents for which approval is sought are required to be on file and available for public inspection at least ten days prior to the date of the hearing, during the normal business hours in the office of the administrative officer. The regulations should be clarified to ensure that the reference to “exhibits” does not undermine or negate the ten-day requirement under the MLUL cited above.

Second, that same MLUL section allows an applicant to produce other documents, records or testimony at the hearing to substantiate or clarify or supplement the previously filed maps and documents. It should be clarified that the requirement for all “exhibits” to be submitted to the land use board secretary no less than two days in advance of the remote public meeting does not preclude an applicant from providing other documents, records or testimony at the hearing. Alternatively, consideration should be given to revising the regulation to require the land use board secretary to upload onto the website the maps and documents for which approval is sought at the hearing at least 10 days before the date of the hearing, consistent with the MLUL requirement set forth in *N.J.S.A. 40:55D-10b* referenced above.

- *N.J.A.C. 5:39-1.7(c)* requires that individuals giving sworn testimony at a remote public hearing shall appear by video in addition to audio. This is problematic where, for example, a member of the public commenting on a development application before a land use board provides sworn testimony. It is not unusual for a member of the public to be sworn by the presiding officer or attorney before making a public comment on an application for development. Strict adherence to the proposed rule would require that member of the public attend the meeting using both audio and video, precluding the individual from participation by audio only. While the intent of the regulation is laudable, it may be a barrier to a member of the public who desires to comment on an application unless sworn testimony is provided. Alternatively, the language can be reworked to require witnesses of the applicant or witnesses of an objector to appear by audio *and* video means and be limited to providing sworn testimony only if appearing in that fashion. It is submitted that this alternative may have formed the underlying basis for the requirement in the first place which, if true, is appropriate. This same language appears in *N.J.A.C. 5:39-1.4(d)*.

The coalition thanks you for the opportunity to comment on these emergency regulations. The COVID-19 public health emergency has had a profound effect on how citizens and governments interact with one another. It has required adaptation to these changed, but hopefully temporary, circumstances. Although initially slowed by the initial impact of the pandemic, government continues to operate. Local officials pioneered efforts to ensure citizens received needed services while simultaneously maintaining proper safety precautions. Since the outbreak of the pandemic, local government has successfully innovated to meet these challenges. These proposed remote meeting regulations should embrace the flexibility inherent in local control and only mandate those procedures that are absolutely necessary to meet the statutory requirements of the Open Public Meetings Act.