

CLIENT ALERT

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ELECTRONIC PUBLIC MEETINGS – TIME-SENSITIVE STEPS FOR LOCAL UNITS OF GOVERNMENT TO TAKE NOW IN THE FACE OF UNCERTAIN FUTURE LEGISLATIVE AND ADMINISTRATIVE ACTION

by Peter H. Webster, Thomas H. Forshee, and Aimee R. Gibbs

Michigan's Open Meetings Act (OMA) has been amended a number of times since the beginning of the COVID-19 pandemic to address and allow electronic meetings under certain circumstances. The current state of the law is that electronic meetings are authorized for "any reason" only through March 30, 2021. Thereafter, electronic meetings would only be allowed under limited circumstances, which will require action by a local unit of government.

The Michigan Department of Health and Human Services' (MDHHS) Gatherings and Face Mask Order in effect through April 19, 2021 is also an essential part of the equation. Like previous versions of the MDHHS Order, this MDHHS Order does not specifically address "public meetings." Interestingly, this time around, the FAQ associated with the Order and posted on the State's website **does** address public meetings. When the MDHHS Order and the FAQs are read together, it appears the State's position is that up to 25 members attending a meeting of a public body can meet in-person, and "the public may also attend the meeting in person subject to all applicable masking and distancing requirements. For public attendance to be permitted beyond 25 persons, the event must be designed to ensure that every person can avoid mingling or engaging in physical contact with persons from outside their household." All meetings covered by the OMA – whether conducted virtually or in-person – must also comply with the recent OMA amendment, [Public Act 254 of 2020](#). Of course, a local unit does not control how many members of the public may want to attend any given meeting in-person.

Therefore, a local unit that decides to have an in-person board meeting under the steps set forth below will have to determine what they will do if a member of the public shows up and cannot be admitted due to insufficient space. Being excluded from a public meeting is generally a violation of the Open Meetings Act. (See MCL 15.263). This is a consideration that will be especially important to local units with smaller meeting venues or local units that have a high level of participation from the public. One possible resolution is to post the meeting as "virtual" or "hybrid," where, for example, the board attends in person, but the public attends virtually. Technology for these hybrid meetings must be carefully placed so that the public can see, hear, and be seen. The technology must permit the public to be heard and engage in two-way communication with the board. Lastly, the public must be able to identify which board member is speaking and how each board member votes.

Given the current state of the law, what steps must be taken to ensure that meetings comply with the law and regulations?

If a local unit wishes to continue to hold electronic meetings after March 30, 2021, pursuant to the OMA, it must declare a local state of emergency (or rely on a county declaration if so

declared), since there is no current statewide declaration. Under a local state or county emergency declaration, a local unit may hold electronic meetings through December 31, 2021, subject to any amendments. Most local units would declare the state of emergency pursuant to the Emergency Management Act or by passing an ordinance authorizing the declaration. Dickinson Wright is prepared to assist clients in the drafting of resolutions or ordinances necessary to effectuate the declaration of a local state of emergency, which may vary by local unit, depending on Charter provisions. In general, the chief executive officer of the local unit (unless someone else is designated by the Charter) must appoint an emergency management coordinator and declare a state of emergency. If the state of emergency is to be longer than 7 days, the local governing body must also approve such declaration by resolution. MCL 30.410 It should be noted that even apart from the above procedures, certain members of a public body may attend electronically through December 31, 2021 if they have a medical condition or are engaged in military duty.

If a local unit wishes to resume in-person meetings, it should make sure that the venue can accommodate the expected number of people likely to attend the meeting in compliance with existing MDHHS orders or otherwise consider a "hybrid" meeting format, as described above. Such in-person meetings may have to be postponed or rescheduled if mingling or physical contact cannot be prevented due to the number of attendees, so caution should be used if there are time-sensitive matters that can't be moved to another date. Local units should investigate alternate meeting sites or meet outdoors (weather permitting), where gathering limits are much more lenient and could accommodate most public meetings (currently 300 people or fewer).

Those local units resuming in-person meetings before April 1, 2021 must: "(a) To the extent feasible under the circumstances, ensure adherence to social distancing and mitigation measures recommended by the Centers for Disease Control and Prevention for purposes of preventing the spread of COVID-19, including the measure that an individual remains at least 6 feet from anyone from outside the individual's household. (b) Adopt heightened standards of facility cleaning and disinfection to limit participant exposure to COVID-19, as well as protocols to clean and disinfect in the event of a positive COVID-19 case in the public body's meeting place." MCL 15.263(1).

As a final note, a Michigan Senate bill has recently been introduced to extend the "any reason" electronic public meeting allowance through June 30, 2021. Additionally, a Michigan House bill was introduced to allow certain bodies to meet electronically beyond March 30, depending on their status as unelected officials and its compensation levels, presumably to allow boards of review to continue to meet electronically for any reason. However, as of the time of this alert, it appears unlikely that either of these bills are anticipated to be enacted in the near future.

In summary, if a public body desires to hold a virtual meeting after March 30, 2021 through December 31, 2021, it must, in advance, declare a local state of emergency under local ordinance or State law. Otherwise, after such date, a public meeting must be held in person subject to the March 2, 2021 MDHHS Order, and a member

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of the public body may only participate remotely if a member of the military service or because of the member's medical condition.

Dickinson Wright can prepare resolutions or ordinances for declaring a local state of emergencies in order to continue electronic public meetings. The March 31, 2021 date is fast approaching, so it is essential to have a plan for public meetings after that date. Dickinson Wright is also keeping abreast of potential amendments to the OMA/MDHHS Orders and will update advice as needed, given the fast-changing regulations in this area.

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