

Best Practices for Conducting Meetings by Electronic Means

Overview

As one of the many actions Tennessee's Governor Lee has taken to address the risks that the COVID-19 pandemic is creating for public health in our state, the governor issued [Executive Order No. 16 \(EO 16\)](#) to permit local governing bodies to conduct meetings electronically. Shortly thereafter, the State Comptroller's Office issued [guidance](#), which was subsequently revised, on how local governing bodies should conduct electronic public meetings consistent with EO 16. Copies of EO 16 and the revised guidance from the Comptroller's Office are attached and we would urge you to carefully review these materials before undertaking an electronic meeting.

The validity of actions taken by public governing bodies is often critical to the work that our public finance attorneys undertake for local governments. Such actions could include bond resolutions, actions relating to economic incentives, and other actions involving public finance. After having observed the undertaking of a number of electronic meetings of local government entities pursuant to EO 16, we would encourage you to consider the issues outlined below in undertaking an electronic public meeting. Please note that many of the points discussed are not legally mandated but should be considered as best practices, in our judgment, for conducting an electronic meeting.

Notice of Meeting

Tennessee's open meeting laws generally require reasonable public notice to be given of any meeting of a local governing body. Local governing bodies take widely different approaches to giving notice of meetings. A common practice for local governing bodies is to establish a regular meeting schedule at the beginning of the year and publish that schedule in a local newspaper. Other local governing bodies give notice of each regular meeting. Specific notice should be given of special meetings, in which case the purpose of the special meeting should be given in the notice. EO 16 does not waive the requirement for giving proper notice of the meeting.

The Comptroller Office's guidance does, however, provide additional information for providing notice of an electronic meeting. That guidance urges governing bodies to include in the notice detailed instructions on how the public can access the meeting electronically. The Comptroller Office's guidance recommends that the notice still include the time, place and date of the meeting even if there is no physical public access to the meeting. The notice should also address if there will not be a physical location of the meeting.

As a practical matter, if a local governing body has not given previous notice of a meeting that will be held electronically, the governing body should provide notice of the meeting in the manner that the governing body typically gives notice of such meetings (assuming that approach complies with the open meeting laws) and should include the additional information suggested by the Comptroller Office's guidance. If the meeting is a special meeting, the notice should also include the matters to be considered at the meeting. If the meeting will include the consideration of a public finance matter, we would strongly urge you to publish the notice in a newspaper of general circulation in your jurisdiction and obtain an affidavit as to its publication.

If you have previously given notice of your governing body's regular meetings for the year and are just giving notice that the meeting will be conducted electronically, we would encourage you to disseminate a notice to that effect, including the information suggested by the Comptroller Office's guidance, in the same manner as you gave notice of your regular meetings. That information should include information as to how the public can access the meeting. If a public finance matter will be considered at the meeting, we would urge you to publish this supplemental notice in a newspaper of general circulation in your jurisdiction and obtain an affidavit as to its publication if possible. We would also encourage you to post the notice that the meeting will be held electronically at the physical location at which the meeting was to be held in case any person attempts to attend the meeting in person.

Please contact us if you would like assistance in drafting and disseminating an appropriate public notice for an electronic meeting at which a public finance matter will be considered.

Preparation for Electronic Meeting

EO 16 urges local governing bodies to include clear notice of the agenda for the governing body's meeting, and the Comptroller Office's guidance urges local governing bodies to include the meeting agenda in the notice of the meeting. Generally, state law does not require a local governing body to have a formal agenda, although many local charters require an agenda to be used for local government meetings. Moreover, the use of an agenda is just good practice to provide order to a meeting. Given EO 16 and the Comptroller Office's guidance, we would strongly encourage the appropriate person, who will usually be the presiding officer of the governing body, to establish and disseminate an agenda prior to an electronic meeting.

EO 16 was specifically adopted to authorize local governing bodies to conduct essential business. In developing an agenda, we would encourage you to only include items that are essential to be considered at the time of the meeting and that cannot reasonably be delayed until when the governing body can meet in person with the public physically present. Even when only essential items of business are included, an agenda for a regular meeting of a governing body may be so lengthy that it is not feasible to publish the entire agenda in a local newspaper (or the cost may be prohibitive). In such cases, we would urge you to post your agenda on the governing body's website and include in the notice a reference to that website location where the agenda may be viewed. If your governing body does not have a website, as is true for many public instrumentalities such as industrial development boards, we would encourage you to ask the municipality with which the instrumentality is affiliated to utilize that municipality's website or create a Facebook page for purposes of posting notices and agenda. For a specially called meeting, please note that any notice should, regardless of whether the meeting is being conducted electronically, include the purpose of the meeting.

Agendas are often modified at the beginning of a local governing body's meeting, in accordance with the governing body's rules or regular rules of order, to add or delete agenda items. If this occurs at a regular meeting of the governing body and in accordance with the governing body's normal rules, the addition of agenda items should be appropriate. We would encourage you, however, to note on any agenda posted before a public meeting that the agenda may be modified by the governing body at the meeting in accordance with the regular rules of that governing body if that is the case.

In addition to establishing an agenda, the second significant action that must be taken in preparation for a meeting is the selection of the digital platform that will be used to conduct the meeting. EO 16, as interpreted by the Comptroller Office, clearly provides that either a video or an audio format can be used. Given that local governing bodies have much different levels of access to technological assistance and have different levels of experience in broadcasting public meetings, we do not believe that there is one technological solution that has been proven to be the best approach for all local governing bodies. We would encourage local governing bodies who do not have experience with broadcasting meetings to explore as many options as is reasonably possible and select the option that best fits the governing body's needs.

Based on our experience in attending electronic meetings, we would share the following observations.

- Many local entities are successfully holding video meetings, and the most successful ones have conducted a practice session with their governing body members prior to the actual meeting.
- Many members of local governing bodies do not appear to have the necessary equipment, such as a video camera and microphone, readily available to participate in a video meeting, and unless the governing body is in a position to provide such equipment, the governing body may want to consider using an audio format so that all members of the governing body can participate on an equal basis.
- We have also noted that it can be easier to allow public input using an audio format instead of a video format and that an audio format may be easier to secure from hacking by persons wanting to interfere with the meeting.
- Finally, whichever format you choose to use, we would encourage you to allow the participation by at least as many persons as would be able to physically attend your meetings if held in their normal location. If you normally hold your meetings in a conference room that can hold up to 50 persons, we would encourage you to use a platform that would allow at least that number of persons to virtually join the meeting.

Conduct of Meeting

Generally, an electronic meeting can be conducted in the same manner as a regular meeting with some relatively minor variations. First, EO 16 states that the governing body must determine that holding the meeting electronically is necessary to protect the health, safety and welfare of Tennesseans in light of the COVID-19 outbreak. We would encourage each governing body to make that determination at the beginning of each electronic meeting and include such determination in the minutes.

Second, the Comptroller Office's guidance encourages that all votes be undertaken by roll call. We would also encourage the presiding officer of the governing body to ask for a roll call vote on all matters being considered at the meeting even if that is not the governing body's normal practice.

Third, we would encourage members of the governing body to identify themselves prior to speaking so that members of the public (as well as the person taking minutes) will know who is speaking. This approach is particularly important for meetings held using an audio-only format.

The Comptroller Office's guidance includes suggested etiquette for holding a virtual meeting, which is very helpful. Probably the most important suggestion is to encourage all participants in a virtual meeting to mute their video microphone or telephone unless speaking. From our experience, the most significant problem with virtual meetings, particularly with a large number of participants, is background noise.

Finally, we would encourage governing bodies to have a technological moderator for each meeting, which may be a member of the governing body. The moderator should be able to receive emails and/or texts during the meeting from members of the governing body or the public if there are technological problems that are preventing the meeting from being clearly heard by the participants or the public.

Public Attendance and Input

EO 16 and the Comptroller Office's guidance acknowledge that it may not be possible to allow the public to virtually attend an electronic meeting of a governing body. Given the widespread and cost effective availability of conference calling, we would encourage you to permit public attendance at a virtual meeting if at all possible, particularly if a public finance matter will be considered.

State open meetings law does not require local governing bodies to accept public input at public meetings, although many governing bodies are required by local ordinance to accept public input at meetings or have voluntarily chosen to accept public input. It is challenging to receive public input at a virtual meeting, particularly if the meeting is being held using a video platform, although some local governments with significant technological experience are implementing video meetings with public participation.

We would recommend that if your governing body normally accepts public input on each agenda item, that the notice of the electronic meeting ask the public to provide any public input ahead of the meeting in writing and sent to a specified email address. We would encourage you to require any such public input to be provided several hours before the meeting so that it can be disseminated to the members of the governing body in time for the comments to be reviewed. If you wish to also receive public input during the meeting, we would encourage you to ask participants to register with the moderator for the meeting ahead of time and that you have the technological ability to unmute participants when it is time for them to speak. Any public input should be subject to the normal limitations as to number of speakers and time limitations as the governing body normally applies.

A governing body will also often need information from a third party in order to vote on a matter. For example, a local government will often want its financial advisor to explain public finance matters such as a bond resolution before voting. In such a case, the electronic platform should permit such third parties to be unmuted and speak at the appropriate time.

Post-Meeting Actions

If an electronic meeting is held and the public is not allowed to attend virtually, EO 16 requires the governing body to make a clear audio or video recording of the meeting and post that recording within two business days after the meeting. While we think that very few, if any, public meetings cannot allow virtual public attendance, we would still recommend, as a prudent practice, that any electronic meeting be recorded and that the recording be posted for public convenience.

Please contact any member of our Public Finance Team if you need assistance with holding an electronic meeting, particularly if your governing body will be considering a matter relating to public finance.

Authors



Mark Mamantov
(865) 521-0365
mmamantov@bassberry.com



Jordana Nelson
(865) 521-0362
jordana.nelson@bassberry.com



Russell Miller
(615) 742-7778
rmiller@bassberry.com



Jeff Oldham
(615) 742-7704
joldham@bassberry.com



Jay Moneyhun
(865) 521-0368
jmoneyhun@bassberry.com



Alexandrea Samber
(865) 521-2038
alex.samber@bassberry.com