



# Fairbanks North Star Borough

Department of Law

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**To: Directors, Assembly, Mayor**

**From: Jill S. Dolan, Borough Attorney**

**Date: March 15, 2020**

**RE: Open Meetings Act (OMA) and Borough Code Guidance Regarding COVID-19 (coronavirus)**

From time to time, emergencies happen that require special considerations for the conduct of public meetings. Both state law and borough code have requirements that you should be considering. This guidance is not intended to be specific advice for any specific meeting for any particular body, but rather, provides general considerations as well as the legal requirements you should consider in making decisions on how to conduct public meetings. Please consider that there may be other legal developments or law changes that may impact this guidance.<sup>1</sup>

1. What considerations and requirements are there with respect to currently scheduled meetings and for scheduling future meetings?

Borough code provides set dates and times for certain meetings (e.g., the third Wednesday of the month, quarterly, etc.). The presiding officer, chairs, and assigned clerks should immediately review Borough code with respect to meeting requirements for their respective body. Within these requirements, the following should be considered:

- a. Does the meeting really need to be held, or can it be postponed or delayed?
- b. Can the meeting be canceled or rescheduled?
  - a. Cancel=matters heard at next regular meeting
  - b. Reschedule=future special meeting
- c. Is it possible to only act on certain, time-sensitive items in order to limit time in the public meeting and the number of persons attending?
- d. Is teleconferencing or remote participation an option?
  - a. Current rules have quorum/quasi-judicial limitations both for members of boards/commissions and parties to participate.
  - b. Emergency suspension of ordinances is on Assembly agenda 3/19/20

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<sup>1</sup> Please note that I developed this memorandum based on guidance that the State of Washington Office of Attorney General put out on March 6, 2020. My intention was not to plagiarize but to borrow what I regarded as a helpful document during this time.

- e. What options does FNSB have for the public to participate remotely?
  - a. Attend vs participate (live stream, written comment process)
  - b. Can a separate room be established to distance people and avoid large groups?
- f. Can staff reports be provided by memorandum or videoconferencing?
- g. Can we strongly urge written comments and advertise to the public how to submit written comments versus in-person testimony?

2. How can a meeting be canceled or rescheduled?

Canceled Meetings

For purposes of this guidance, I am using the term “canceled” to mean that a meeting has been scheduled and the meeting will not take place or moved to a different time. If a meeting is canceled, the agenda will not be heard, but instead the items on it would be considered for placement on the next regularly scheduled meeting.

The Open Meetings Act does not provide specific requirements for canceling meetings. In an emergency situation, best practice is to provide the public as much notice as possible of the cancellation utilizing the same procedures that were done to notice the meeting. At a minimum, notice should be posted at the principal office of the Borough (i.e., JHAC) as well as at the meeting location, if different. If the meeting is canceled due to an unanticipated lack of quorum, the body should go on record to establish this fact. In the absence of a quorum for the transaction of business, any number less than a quorum may recess a meeting to a later time or date. Please be sure that the location, date, and time are available.

With respect to who has authority to cancel a meeting, neither state law, borough code, nor Robert’s Rules directly addresses this. Once scheduled, typically even a presiding officer cannot cancel a meeting. However, this is an evolving, declared public health emergency, and therefore it is reasonable that the mayor for boards and commissions and the presiding officer for the Assembly and board of equalization will have this authority.

Rescheduled Meetings

A rescheduled meeting is one that is set to a future special meeting; typically, the chair or presiding officer has authority to call a special meeting. This option is preferred over cancellation if there are time-sensitive matters or other

problems with delay are probable (e.g., agendas that contain an unrealistic number of items). Special meetings have the same requirements as regular meetings, except that they are called for a different time than that set for regular meetings. These are in addition to, not in place of, regular meetings.

3. Can all members of the Assembly or of a board or commission participate by teleconference?

The Open Meetings Act provides that meetings may be held teleconference; both the members of the body and the public are authorized to participate from remote locations. Speaker phones or the equivalent must be used so that all persons present, regardless of physical location, can hear the meeting and participate. You must do the following:

1. Provide in the public notice that it will be by teleconference and the location of the teleconference facilities that will be used; and
2. Materials must be available at the teleconference locations; and
3. Votes must be by roll call, so it is known how each member votes.

Borough code has additional restrictions on meetings held by teleconference. Currently, these restrictions must be complied with; however, there is an emergency ordinance (Ord. No. 2020-12) proposed for a special meeting to be held on March 19, 2020 that if adopted will authorize the mayor or presiding officer to relax those restrictions (for instance, for the number of members that may appear by teleconference, etc.). This will NOT allow the time for public notice and other OMA requirements of a meeting to be relaxed unless it is an emergency meeting.

4. Can the Assembly or other body conduct a meeting by exchange of texts, emails, remote bulletin board or similar technology and later make those documents available to the public?

No. You must meet in a publicly noticed meeting where the public can attend.

5. Can the public participate by phone? What options are there for public participation?

The OMA does not require public comment, but AS 29.20.020 does require that the governing body provide reasonable opportunity to be heard at regular and special meetings. "Reasonably opportunity" is not defined in law, and any rule that has been adopted providing for the public to attend should generally be complied with. Ask whether there are reasonable access and reasonable

accommodations being made for the public to attend and participate as any changes are considered.

Please note that simply allowing citizens to call into a meeting that is held at a single site generally will not be considered a teleconference meeting under the OMA provided doing so has the intent of expanding and not restricting public access to the meeting.

Code does not currently provide for public participation by phone at Assembly meetings; however, the emergency ordinance (Ord. No. 2020-12) will allow the presiding officer to modify the assembly's rules of procedure. Currently, citizens may present written testimony by filing said testimony with the clerk at or before the time scheduled for public hearing on the item or the time scheduled for citizens comments if the item is not scheduled for public hearing, but otherwise must appear in person.

Code and rules of procedure adopted by boards and commissions currently allow participation by phone or by written affidavit in limited circumstances. These rules should be complied with unless and until Ordinance No. 2020-12 is adopted. If that occurs, the mayor will have the authority to expand this participation.