



### **Special Otten Johnson Alert: Coping with Crisis and Thinking About the Future (From Our Home Offices)**

*As our communities, nation, and world reel from the impact of the COVID-19 public health crisis, Otten Johnson extends our sincere gratitude to all of the health care providers, first responders, public health leaders, and others who are serving those who are sick and at risk. Since we are business lawyers without the skills or expertise to provide medical care, our contributions to resolving this crisis are largely relegated to working from home to avoid spreading disease and offering financial contributions to worthy organizations supporting our community. But because we cannot help but think of this crisis through the lens of our land use, real estate, and business practices, we are bringing our clients and friends this series of alerts, exploring how the current pandemic affects our work, what we're learning from it, and what the future holds.*

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## **Part 3 - Public Meetings Without Public Gatherings**

March 30, 2020 • [Melinda Beck](#) and [David Brewster](#)

This installment of our series of alerts on the COVID-19 crisis focuses on legal and practical barriers facing local governments with respect to public meetings, and highlights some measures being taken to overcome those barriers.

As federal, state and local governments work to combat COVID-19, we see daily public health orders and regulations prohibiting public gatherings and mandating staying at home, sheltering in place and social distancing. The entire state of Colorado is currently subject to a stay-at-home order issued by the governor on March 25, 2020. Despite this effort to keep the public at home, governments must also continue to govern. They must rethink and reimagine how to do so without holding the in-person public meetings that are inherent to the public process of government (and where a fair portion of our work gets done!).

### **Colorado Open Meetings Law**

The Colorado Open Meetings Law, C.R.S. § 24-6-402 (COML), prescribes the requirements for

decision-making procedures for state and local government entities. Under the COML, all meetings of two or more members of state public entities, and all meetings of a quorum or three members of local public entities, at which the government entity intends to discuss “public business” or take any “formal action” must be kept open to the public at all times. In addition, “full and timely notice” must be provided to the public in advance of any public meeting at which a quorum of the government entity is expected to be present, or at which the government entity intends to adopt a proposed policy, position, resolution, rule, or regulation, or take other formal action. Even with the notice and “open to the public” requirements, the COML contemplates that local governments may incorporate electronic methods, defining a “meeting” as “any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication.”

Pertinently now, the COML does not explicitly address its applicability in emergency situations. However, the Colorado Court of Appeals, in the case of *Lewis v. Town of Nederland*, agreed that so long as local ordinances regarding emergency hearing procedures do not conflict with the basic requirements of the COML, local governments are not likely to run afoul of the COML.

## **Due Process Requirements**

In conducting electronic or telephonic public meetings, local governments must also be mindful of complying with state and federal constitutional due process requirements. Both the Colorado constitution and the Fourteenth Amendment’s due process clause prohibit the government from depriving any person of life, liberty, or property without due process of law. In the context of public land use hearings, for example, the Colorado Supreme Court indicated in *Sundance Hills Homeowners Association v. Board of County Commissioners* that the governing body must provide notice that – at a minimum – specifies the time, place, and subject matter of the public hearing, as well as the nature of the proposal at hand. In addition, procedurally, the hearing must afford affected parties the opportunity to appear before the decision-making body and be heard. Just as with in-person hearings, governing bodies conducting electronic meetings should be prepared to enact and enforce rules regarding how, when, and how long the participants in a hearing may comment on the matter being considered.

## **Adopting Alternative Public Meeting Procedures**

Unfortunately, prior to the COVID-19 pandemic, many governments had not yet taken advantage of the permission the COML grants for electronic public meetings, and their codes or charters still require in-person, live meetings. One exception was the City of Lakewood, which has been using the [Lakewood Speaks](#) platform to allow for electronic public participation in city council and planning commission hearings.

To contend with the COVID-19 crisis, however, many jurisdictions are quickly updating their regulations or using their powers to enact emergency rules. Issues addressed by these new regulations include remote participation by one or more (or all) members of the governing body, remote participation by the public, or even completely virtual meetings where no one is physically present but all are able to participate. Our friends at the Colorado Municipal League

have published an excellent memorandum regarding electronic meeting best practices.

Note that, generally speaking, many of the recently-enacted electronic hearing procedures allow governing bodies to make legislative decisions—such as policy decisions or contract approvals—but do not allow for quasi-judicial decisions on land use matters, which require notice and a public hearing, via videoconference. The reasons for this distinction are varied, but generally pertain to issues of transparency (for example, ensuring that the public knows what a decision-maker is reviewing at a given time) and the ability of quasi-judicial decision-makers to view relevant evidence and evaluate witness credibility as part of their decision-making process.

## **Metro-Area Municipal Meeting Procedures**

Below is a breakdown of the status of electronic public meeting procedures in various municipalities around the Denver metro area.

**Denver** – Through Emergency Rules of Procedure adopted on March 23, 2020, Denver permits council members and the public to access city council meetings electronically. These rules do not apply to quasi-judicial hearings or to executive sessions with associated special rules.

**Northglenn** – On October 28, 2019, Northglenn adopted the Electronic Participation Policy During City Council Meetings. This policy provides for electronic participation by members of the city council in non-emergency situations for any matters that are not quasi-judicial. In emergency situations, such as a health pandemic, the policy permits electronic participation for all council members and does not expressly exclude quasi-judicial matters.

**Boulder** – On March 16, 2020, Boulder adopted an emergency ordinance permitting remote participation for their city council members provided the public can hear the council member and the council member can hear other council members as well as any members of the public recognized to speak. The council can exclude members of the public from personal attendance if the meeting is available to the public by either telephone, over the internet or on televisions and the council provides a means for public participation. The ordinance also permits the council to continue any concept plans or quasi-judicial matters to a time when the council and all interested parties will have adequate opportunity to participate in the consideration of the item.

**Castle Rock** - On March 17, 2020, Castle Rock adopted a resolution permitting town council meeting special procedures for the period of March 17 to June 30, 2020. The resolution provides for electronic participation of council members at public meetings provided that such members participating electronically may not vote in a quasi-judicial public hearing. Connected meetings are also allowed by the resolution under certain circumstances where the public, staff and all members of the town council participate by accessing a commonly linked platform by telephone, video or internet facilitation. However, no quasi-judicial matters will be heard or considered at a connected meeting.

## **Takeaways**

Technology will play a key role in conducting public meetings during the COVID-19 crisis, as local governments must continue to function during this difficult time. Although most jurisdictions are already equipped to provide online notice of public meetings and comply with their notice obligations, not all jurisdictions routinely provide video and other electronic access to their meetings. Cost-effective virtual or online meeting technologies can assist local governments with compliance with their procedural obligations during these unprecedented conditions. Zoom, for example, provides both telephonic and video meeting options, both of which allow a host to, among other things, curate speakers, track participants, send and receive private or public messages, conduct polling, and share screens. These technologies will not only assist governments in conformance with the COML and due process requirements, but will allow government to continue to function while adapting to our evolving world.

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#### **Melinda's Tip**

Group messages with my friends have resulted in a mid-afternoon dance party every work day. Eighties Music = Stress Relief.



#### **David's Tip**

Social distancing doesn't mean you have to be anti-social! I will be enjoying a virtual happy hour using Facetime or Zoom with friends. Keeping in touch = Stress Relief.

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