



ALABAMA LEAGUE OF MUNICIPALITIES

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MAYOR RONNIE MARKS, ATHENS
President

TO: Mayors, Councilmembers, City Clerks
FROM: Alabama League of Municipalities
Date: March 15, 2020
Re: Open Meetings Act – Coronavirus – COVID-19

We have received numerous inquiries regarding cancelling meetings, prohibiting the public from meetings and options for electronic meetings under the Alabama Open Meetings Act (OMA). Questions have arisen not only regarding council meetings but also planning commission meetings, committee meetings and utility board meetings. We are reaching out to the Governor's office seeking guidance on whether she will use her emergency powers to provide some relief from the strict application of the OMA. We will provide guidance as we receive it.

We'd like to thank Shane Black with Hand Arendall for providing thorough and thoughtful advice to the municipalities he represents. Based on his advice, we offer the following:

The Open Meetings Act (OMA) generally requires that meetings covered by the OMA "shall be open to the public during meetings", Ala. Code 36-25A-1 (1975), and it does not provide for an exception for an event like what is before us now. Also, we are not aware of any authority, outside of being in more than one county, allowing for video teleconference of meetings. Ala. Code § 36-25A-5.1 (1975). While the Governor could arguably provide a limited waiver from these requirements, *see* Ala. Code § 31-9-8(a)(5) (1975) (allowing Governor the authority "[t]o perform and exercise such other functions, powers and duties as are necessary to promote and secure the safety and protection of the civilian population"); Ala. Code §31-9-13 (1975) (stating that the "orders, rules, and regulations promulgated by the Governor as authorized by this article shall have the full force and effect of law" and that "[a]ll existing laws, ordinances, rules, and regulations or parts thereof inconsistent with ... any order, rule, or regulation issued under the authority of this article, shall be suspended during the period of time and to the extent that such inconsistency exists"), the Governor has not done so at this point. Until the Governor acts, cities may want to consider the following:

1. Actively discourage the public from attending these public meetings due to the imminent public health concern and offer the public reasonable alternatives. These alternatives could include: (a) livestreaming the public meeting in an online format where the public can watch and hear the meeting as it happens, and (b) incorporating technological features to allow a member of the public to communicate with the governmental body during public hearings and citizen comment portions of meetings, and to be heard by those persons watching the livestream event (even if that includes "telephoning in" on speakerphone). By "virtually" recreating the experience of attending such a meeting, the City can present these features as a reasonable alternative to physical attendance. There are some low-cost virtual applications that can support these options.
2. Consider issuing a directive that members of the public who have been diagnosed with COVID-19, who have family members who have been so diagnosed, who are showing symptoms of COVID-19, or who

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meet other reasonable criteria, are prohibited from attending public meetings. Instead, such persons may participate in the meetings virtually as set forth above. Keep in mind that this point is not set forth in the statutes. Instead, it rests on an untested, but reasonable legal argument, that the City’s power to “prevent the introduction of contagious... diseases” and “adopt such ordinances and regulations as the council or other governing body may deem necessary to insure good sanitary condition in public places” extends to such a rule, and that the attendance by such persons would be so disruptive that it would upset and thwart the legislature’s purpose that meetings remain “open to the public”. See Ala. Code § 11-47-131 (1975); Ala. Code § 36-25A-1 (1975).

3. Consider requiring department heads who are not offering official reports, but who merely attend in case they are called upon by the council, watch the meeting in their offices via the “virtual” option and be ready to be called if they are needed.

4. Postpone special recognitions of athletic teams, awards and other non-business items that bring larger numbers of citizens to the meetings.

5. Take steps to shorten the meetings, such as utilizing consent agendas and restricting reports to only essential matters.

6. For those members of the public who nonetheless choose to attend public meetings, the requirement that the meetings “be open to the public” does not dictate specific matters such as seating arrangements and other meeting room logistics. Accordingly, the Mayor can impose reasonable rules (and the City Council can ratify these rules) concerning the meeting area, such as restricting personal interactions during meeting breaks and creating a physical separation between the public and the city officials so as to logistically create an artificial “social separation”. This could include, for example, the placement of portable tables between the audience and the governmental body. The City Clerk could read a statement prior to the meeting concerning the rules restricting personal interactions so that these rules do not present awkward interpersonal exchanges.

7. As for the members of the governing body itself, an in-person quorum, as always, is required for business to be done. However, if there is a concern about one or more members (including, for example, a member that is more vulnerable to the contagion), then there is nothing to prevent that member from being seated at a distance from the others, or alternatively, viewing the meeting “virtually” and even commenting on matters “remotely” via telephone or some other means, so long as all members of the governing body and the public can hear what that official is saying. However, in such a case, it is important to remember that the member’s vote cannot be counted, and that person cannot be counted as a part of the quorum (as they are technically not in attendance). The Open Meetings Act expressly prohibits the use of “electronic communications to circumvent” the Act, but it is certainly arguable that there is no circumvention where the member’s vote is not counted and his/her comments are able to be heard by the public.