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By Electronic Mail Only

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John Kaehny, Executive Director
Reinvent Albany
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The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except as otherwise indicated.

Dear Mr. Kaehny:

I am writing in response to your request, on behalf of Reinvent Albany and eight other groups, for guidance on "detailing what the Open Meetings Law (OML) requires public bodies to do, now that the COVID-19 emergency order has ended." This advisory opinion will be posted on the Committee's website in order to make it available to all interested parties.

The fundamental premise of the OML is that any person who is interested in the deliberations of a public body must be permitted to be present to view and listen to such deliberations as they occur. In March 2020, in recognition of the declared disaster emergency associated with the spread of COVID-19, Governor Andrew M. Cuomo issued Executive Order 202.1 which suspended what is known as the "in person" requirements of the OML and permitted public bodies to meet virtually to prevent the spread of the virus, as long as members of the public who wished to listen in or view the proceedings could do so contemporaneously with the holding of the meeting. Recently, however, Governor Cuomo declared the disaster emergency over and, on June 25, 2021, issued Executive Order 210 rescinding Executive Order 202.1. In the brief time since the Governor rescinded his order and the preexisting requirements of the OML have been back in operation, staff of the Committee on Open Government have received many inquiries relating to the "pre- and now post-pandemic" permitted use of videoconferencing during an open meeting.

As a reminder, the legislative declaration of the OML provides that it is essential that public business be performed in an open and public manner and that the citizens be "fully aware of and able to *observe* the performance of public officials." OML § 100 (emphasis added). This right to observe includes the right to attend and listen to the deliberations of public bodies at *any* remote location from which a member of a public body participates in the meeting. *Id*. § 103(c). The OML defines "meeting" as "the official convening

of a public body for the purpose of conducting public business, *including the use of videoconferencing*[1] *for attendance and participation by the members of the public body*." *Id*. § 102(1) (emphasis added).[2]

As a prerequisite for a member of a public body to participate and/or vote by videoconference, the OML requires that the public be provided with "an opportunity to attend, listen and observe at any site at which a member participates." OML § 103(c). For this reason, the statutory notice of the open meeting must include all of the locations of the meeting at which any member is participating, including the location(s) of the member(s) participating by videoconference:

> If videoconferencing is used to conduct a meeting, public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting and *state that the public has the right to attend the meeting at any of the locations*.

Id. § 104(4) (emphasis added). This is true even if members of the public body are participating by videoconference from a "private" location such as a home or while on vacation.

In summary, now that Executive Order 202.1 is no longer in effect, the meeting notice must again include the following when the public body is using videoconferencing:

- A statement that videoconferencing will be used;
- The exact location from which *every* member of the public body is participating; and
- Statement that the public has the right to attend the meeting at *any* location from which a member of the public body is participating.

Members of the public body who are participating by videoconferencing also have the right to attend, participate, and vote in executive session.

It is important to note that the requirements of the OML relating to the use of videoconferencing apply only to the *members* of the public body. There is nothing in the OML which would prohibit a public body from offering the public the additional option to view a meeting through the use of livestreaming, broadcasting, videoconferencing, or other remote access means, as long as the statutory requirements relating to the right to in-person attendance have been met. Moreover, the OML does not prohibit a public body from permitting invited guests (*i.e*., anyone who is not a member of the public body, but who has been asked to actively participate in the meeting) to speak or testify[3] using a remote access platform. Indeed, we have heard anecdotally that many members of the public find being able to watch and listen to meetings, and where permitted participate, using remote access technology, rather than having to go to the Town Hall (for instance), to be beneficial.

You state in your letter that "[a]dvocates also have expressed confusion about how the [OML] applies to hearings as opposed to meetings." There are, in our view, both differences between a "hearing" and a "meeting" and instances in which a "hearing" and a "meeting" overlap. In a Court of Appeals decision rendered in 1978, the Court held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the OML, regardless of whether there is an intent to take action or the characterization of the gathering. *See Orange County Publications, Division of*

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[1] Since the rescission of Executive Order 202.1, there is no longer any authority for a public body to conduct a meeting by *teleconference* or for a member of a public body to participate or vote in a meeting by teleconference. Judicial decisions dealing with votes taken by telephone have found the votes to be a nullity. *See, e.g., Town of Eastchester v. NYS Board of Real Property Services*, 23 A.D.3d 484, 486 (2d Dep't 2005) (invalidating actions taken by telephone vote); *Cheevers v. Town of Union* (Supreme Ct. Broome Co. Sept. 3, 1998) (unreported opinion) (same).

[2] Section 41 of the New York State General Construction Law includes a reference to videoconferencing in its definition of the word "quorum": "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, *gathered together in the presence of each other or through the use of videoconferencing* . . . shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty."

[3] Testimony at a meeting that is also a *hearing* may be governed by additional statutory requirements.

Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 45 N.Y.2d 947, 948-49 (1978). The Court affirmed a decision of the Appellate Division that dealt specifically with so-called "work sessions" and similar gatherings during which there was merely an intent to discuss but no intent to take formal action. The appellate court held that:

> We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public records and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute.

Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 A.D.2d 409, 415 (2d Dept. 1978); *cf. Clark v. Lyon*, 537 N.Y.S.2d 934, 935 (3d Dep't 1989) (finding that legislature made "reasonable efforts" to comply with mandate in Pub. Off. L. § 103(b) that "meetings and hearings" be held in "barrier-free" public locations). Given this judicial precedent, it is and has consistently been our view that a hearing conducted by a quorum[4] of a public body constitutes a "meeting" subject to the requirements of the OML. *See* OML-AO-5509 (2016) ("when a majority of a public body conducts a hearing, it has been advised that the hearing is also a meeting" and subject to the requirements of the OML).

Finally, you have asked with respect to a meeting: "what qualifies as 'reasonable efforts' to accommodate both people with ambulatory disabilities and members of the public." While the Committee has no statutory advisory jurisdiction with respect to either the Public Buildings Law Article 4-A or Title III the federal Americans with Disabilities Act dealing with required "reasonable efforts" to make public accommodations (42 U.S.C. § 12101 et seq. (1990)), we note that in our limited view, determining what qualifies as "reasonable efforts" relating to ensuring "that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings" (OML § 103(e)) requires a subjective review of presented facts. What might be considered a "reasonable effort" for a small town or village board in a small municipality may not be considered reasonable for a larger municipal or State-level public body.

Thank you for your inquiry.

Very truly yours,

/s/ Shoshanah Bewlay

Shoshanah Bewlay

[4] We have also consistently advised, however, that a public body need not have a quorum present in order to conduct a hearing, and where less than a majority of members of the public body are present (in person or by videoconference) for a hearing, such hearing is not a meeting subject to the OML. *See* OML-AO-5509 (2016).