Legal Guidance:
The Coronavirus and Planning Boards and Boards of Appeals
This guidance identifies general issues for planning boards and boards of appeals during the state of emergency declared due to the COVID-19 pandemic. Boards should contact local legal counsel or MMA Legal Services to discuss specific public meeting and review requirements applicable to the board.

Are planning boards and boards of appeals required to meet during the state of emergency?
Planning boards and boards of appeals are generally required to meet to review applications and appeals governed by state law, municipal charter or ordinance during the state of emergency. At the time of this publication, nothing in state law or the Governor’s Executive Orders authorize boards to completely stop meeting to review applications or appeals. A board could be open to legal challenge if it refuses to meet or fails to review an application or appeal authorized by law, municipal charter or ordinance. For example, applicants and appellants probably have a right to have their applications and appeals heard without unreasonable delay as a matter of fundamental due process or according to the timeframe for review established by an applicable law, charter or ordinance. Similarly, planning board and board of appeals generally must comply with the established decision-making process (including applicable notice or public hearing requirements) and determine whether an applicant or appellant meets the applicable review criteria or standards in the governing ordinance, charter or law.

Planning boards and boards of appeals are probably not required to meet to conduct workshops, review ordinances, or perform other discretionary actions that do not relate to applications or appeals authorized by law or ordinance. Whether a board conducts meetings on discretionary matters is a decision each board should make based on the number of people expected to attend the meeting, current guidance on gathering limits, the ability to implement sanitation and social distancing recommendations, and the rules and procedures adopted by the municipality and/or board pertaining to holding meetings in municipal buildings.

If a board receives an application or appeal that it will not review, such as if the board does not have jurisdiction to hear the application or appeal or it concerns a discretionary act, MMA Legal Services recommends that the board meet and adopt written findings as to why the board is not conducting the review requested.

Is it possible for a planning board or board of appeals to delay review of applications or appeals?
A planning board can probably delay review of an application for a permit or approval on its own initiative, so long as the delay is not unreasonable and does not violate the timeframes established in state law, municipal charter, or ordinance. A planning board might also be able to delay review of an application if the delay would surpass a timeframe established in law, municipal charter or ordinance under certain circumstances. MMA Legal Services strongly recommends that boards delaying review of applications due to the COVID-19 pandemic obtain written consent from the applicant for an extension and consult with legal counsel. If an applicant does not agree to extend a timeframe established by law, municipal charter or ordinance, the planning board probably should not delay review of the application without advice of legal counsel.

An appeal of a planning board or code enforcement officer decision generally must be filed within the timeframe established by state law, municipal charter or ordinance to the board of appeals or Superior Court. A board of appeals does not have any authority to extend the timeframe to file an
appeal to the board, unless expressly authorized by law or ordinance. In contrast, a court may extend a deadline to file an appeal, but only when the applicant has filed a court action and demonstrated “good cause.”

The decision on whether a planning board or board of appeals should delay review of an application or appeal due to COVID-19 health concerns must be made by each individual municipality and board. Boards should consider the state and local health guidance and restrictions that are currently in effect and the conditions in their municipality. Specifically, boards should keep abreast of the Governor’s phased reopening plan and guidance issued by the DECD and review the applicable requirements in each stage to determine whether these require the board to delay the review of applications and appeals. Boards should also consider whether there are state or local ordinance provisions establishing timeframes for review, the nature of the application, whether the board or municipality has adopted policies or procedures for holding meetings in-person or remotely, and the feasibility of holding remote meetings, if applicable.

Can a planning board or board of appeals require individuals attending meetings in-person to wear masks?
Planning boards and board of appeals may require masks be worn when meeting in-person with the board by board policy. If a board adopts such a policy, the board should consider including exceptions to the mask requirement, such as for individuals with medical conditions that prevent or interfere with an individual’s ability to wear a mask and young children.

A board probably cannot refuse to hear an application or appeal if the applicant or members of the public refuse to wear masks at a meeting. However, a board might be able to discuss alternate ways to meet or hear from that person, such as by remote means or by pre-submitted written comments.

If the board is meeting in a public building, the board should also comply with applicable executive orders and municipal ordinances or policies that pertain to wearing masks or meeting in a public building. For example, some municipalities have adopted general mask requirements for public buildings that could apply.

Does a planning board or board of appeals have to meet remotely?
Planning boards and boards of appeals may be required to meet remotely or allow the public to attend board meetings remotely during the state of emergency due to limits on the size of gatherings. A board cannot cap public attendance at board meetings to comply with the public gathering limits without providing a way for board members and the public to attend. At the time of this publication, the Governor has prohibited gatherings of more than 50 people indoors and more than 100 people outdoors (or 5 people per 1,000 square feet of “occupiable outdoor space,” whichever is less). As the state’s re-opening plan progresses, restrictions on gatherings may be relaxed or revert to stricter gathering limits. However, regardless of the gathering limit in effect, the authority to meet remotely remains in force until 30 days after the state of emergency is terminated. MMA has posted updated guidance on conducting board meetings remotely, which can be found on MMA’s Coronavirus Updates and Resources webpage and on the “Legal Updates” page on MMA’s website.

Under the temporary remote meetings authority, the public must be able to hear everyone speaking at the meeting. This can be an issue for planning boards and boards of appeals since the boards act in a quasi-judicial capacity and are generally required to allow applicants, other parties (such as abutters), and possibly the public to speak at meetings. For example, a planning board may be required to hear presentations from an applicant and allow other parties to respond to the presentation. A planning
board or board of appeals may also be required to allow applicants, appellants and members of the public to comment and respond to information discussed at a remote meeting for due process reasons.

If a planning board or board of appeals allows or requires remote attendance at its meetings, the board should try to ensure that the public is able to hear all speakers, particularly when a meeting involves both in-person and remote elements. For example, microphones may need to be provided to speakers present at the meeting so that remote participants are able to hear all comments made at the meeting. Also, to facilitate an orderly proceeding and to reduce the chance of disruptions or confusion, MMA Legal Services recommends that boards adopt procedures addressing public participation at the meeting.

**How may a planning board or board of appeals allow public participation at remote meetings?**

Boards have a few options for managing public participation at a remote meeting. If a videoconferencing or conference call program is used, the board can allow all participants and the public to be “on” during the meeting. This is similar to a regular meeting where anyone who speaks will be heard. However, this can result in disturbances at the meeting. Members of the public may speak out of turn, interrupt, or there could be background noise from participants. It can also be difficult to determine who is speaking. A better option may be to require all non-board members be muted (or in a separate “room” on Zoom) until the board is ready to take comments. At that point, a moderator can unmute participants individually. A board may also require that participants remain muted during the meeting and only accept comments by email or through a chat function, which will be read by the board at the meeting and responded to in turn. Finally, a board probably could require that all comments be submitted prior to the meeting in writing, such as by mail or email. These public comments would be shared with all board members and other parties to the proceedings. Depending on whether public comment is required, the comments can be read out loud during the meeting or made available to the public, such as on the municipality’s website or upon request. In general, if written comments are submitted in response to a specific application, the comments probably should be read into the record and the applicant or other parties should be given an opportunity to respond to those comments. Note, requiring comments in advance may mean that the board will be required to conduct additional meetings to allow applicants, appellants or other parties to respond.

Boards may allow applicants or appellants to present information to the board in a different manner than the public generally is allowed to comment. For example, some boards have found that a program such as Zoom Webinar is helpful when applicants or abutters are presenting application materials or other visual information because it facilitates information sharing and allows for more control over the presentation.

**Are planning boards or boards of appeals required to perform site visits?**

A state law, municipal charter or ordinance may require a board to perform a site visit. As discussed above, planning boards and boards of appeals generally must perform an act if it is required by law, charter or ordinance. However, if a site visit is discretionary and the board can obtain information normally gathered during the site visit in another way, the board may determine that a site visit is not necessary. If a board determines that a site visit is not necessary, MMA Legal Services recommends that boards adopt written findings to this effect.

A site visit conducted by a majority of the members of a board is a public proceeding that the public must be allowed to attend under Maine’s Freedom of Access Act. Due to the increased outdoor
gathering limits it is unlikely that a board will be required to conduct a site visit remotely. However, if a board must conduct a site visit by remote means (such as due to reduced gathering limits) it should note that an audio conference call will probably not be sufficient. Visual and audio conferencing abilities will probably be required. If video conferencing is not feasible at a site, a board probably could adopt a policy that allows the applicant, a designated board member, or the CEO to visit the site and video tape the location. Members of the board and the public can submit questions to the applicant before the video and the applicant can answer those questions while recording the property. The video can then be played at a remote meeting of the board where all board members and the public can see and hear the recorded video. If this option is chosen, all parties should be allowed the opportunity to ask questions and comment on the video of the site visit. Theoretically, a follow up site visit video could be necessary if the board determines that questions remain after the initial videotaped site visit is prepared.

Additional considerations for holding a planning board or board of appeals meeting during the state of emergency:

- Boards should consider whether board members will meet in-person or through remote means and whether the applicant, any parties, or the public will be allowed to be present in-person. A board can meet in-person (with or without the applicant, appellant, or public) as long as the public gathering limits are not exceeded, the board complies with applicable state and local guidance, and recommended social distancing and sanitation measures are taken. A board can also conduct the entire meeting remotely, where everyone, including the board members and applicant or appellant, attends the meeting by electronic means.

- Boards should consider drafting a policy governing the rules of procedures for remote and in-person meetings. Listed below are links to a few remote meeting policies enacted by Maine municipalities. These are provided for informational purposes only and may not be suitable for other municipalities. MMA Legal Services strongly encourages boards to have local legal counsel review the board’s policy to ensure the policy is consistent with state law and local ordinance requirements.

  - City of Saco Guide to Public Meetings: [https://memun.org/Articles/Article-View/ArticleId/13063/City-of-Saco-s-Guide-to-Digital-Public-Meetings#.Xqr5oNNYZPZ](https://memun.org/Articles/Article-View/ArticleId/13063/City-of-Saco-s-Guide-to-Digital-Public-Meetings#.Xqr5oNNYZPZ)


- MMA Legal Services recommends that the board seek the applicant’s and/or appellant’s consent to its proposed meeting procedures. If consent is not given, preferably in writing, the board should consult with legal counsel to review the board’s planned procedures.
• Boards should consider holding a trial run of new technology before reviewing an application or appeal. It might also be helpful to have someone familiar with the platform aid the board with setting up the meeting and be available during the meeting for assistance.

Where can MMA members receive more information?
Additional guidance is located on MMA’s “Coronavirus Updates and Resources” page at www.memun.org. Municipal members are also invited to contact MMA Legal Services for specific advice on these topics at 800-452-8786 or legal@memun.org.

Maine Municipal Association Legal Services
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