

Legal Guidance:

The Coronavirus and Planning Boards and Boards of Appeals

Planning boards and boards of appeals face distinct issues when meeting during the state of emergency imposed due to the COVID-19 pandemic. This guidance identifies general issues for boards during this time. However, boards should contact local legal counsel or MMA Legal Services to discuss specific situations since there are many factors that could inform the best course of action for the board.

Are planning boards and boards of appeals required to meet?

Planning boards and boards of appeals are generally required to meet to review applications and appeals governed by state law, municipal charter or ordinance. Applicants and appellants generally have a right to have their applications and appeals heard without unreasonable delay as a matter of fundamental due process or within the timeframes for review established by an applicable law or ordinance. At this time, nothing in state law, the emergency legislation (P.L. 2019, ch. 617), or the Governor's Executive Orders authorizes boards to completely stop meeting to review applications or appeals. Most statutes and local ordinances governing land use applications remain in effect as before the state of emergency was declared. Completely failing to address an application or appeal authorized by law or ordinance may leave the board open to a legal challenge.

A board probably isn't required to meet to conduct workshops, review ordinances, or perform other actions that do not relate to applications or appeals authorized by law or ordinance. A board should probably delay meeting to conduct non-essential operations until after the state of emergency has ended. However, if a board receives an application or appeal that it does not have jurisdiction to hear or the board determines that it is not required to perform a specific act or review under state law, a municipal charter or ordinance, MMA 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 until after the state of emergency is terminated?

A planning board may be able to delay review of an application for a permit or approval on its own initiative if the delay is not unreasonable and does not violate the timeframes established in state law, municipal charter, or ordinance. It is possible that a planning board may also delay review of an application if the delay would surpass a timeframe established in law, municipal charter or ordinance. 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, unless expressly authorized by law or ordinance. In contrast, a court may generally extend a deadline to file an appeal, but only when the applicant has filed a court action and demonstrated “good cause.”

Does a planning board or board of appeals have to meet remotely?

Planning boards and boards of appeals may be required to meet 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 any public gathering limits without providing a way for the public to attend remotely. At the time of this publication, the Governor has prohibited gatherings of more than 10 people. As the state’s re-opening plan progresses, and executive orders are implemented, restriction on gatherings may be relaxed or lifted. However, boards that choose to do so may continue to meet remotely until 30 days after the state of emergency is terminated. MMA has posted separate [guidance on conducting board meetings remotely](#), which can be found on MMA’s Coronavirus Updates and Resources webpage.

Under the temporary remote meetings authority, the public must be able to hear everyone speaking at the meeting. Note that planning boards and boards of appeals act in a quasi-judicial capacity. Therefore, planning boards and boards of appeals are generally required to allow applicants, other “parties” such as abutters, and possibly the public to also speak at board 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 board of appeals may be required to hear new evidence from an appellant at its meetings. 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 and to build a record with sufficient information to make a decision.

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 a specific participant. 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, this 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 public comments.

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 are generally not authorized to completely fail to perform an act required by law or ordinance due to the COVID-19 pandemic. 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. MMA recommends that boards adopt written findings that a site visit is not necessary.

If a site visit must be conducted, the site visit may need to be conducted remotely while the Governor's Order limiting public gatherings is in effect. Note that 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. However conducting a site visit remotely may be difficult, if not impossible, to perform in the same manner as other board meetings. For example, an audio conference call will probably not be sufficient, visual and audio conferencing abilities will probably be required, and a video conference may not be feasible at the site. Some boards have found it helpful to adopt a board policy allowing 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 remote planning board or board of appeals meeting:

- Boards should draft a board policy governing the rules of procedures for remote meetings. Listed below are links to a few 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 the municipal attorney review the board's policy to ensure the policy is consistent with state law and all 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>
 - City of Portland Guide to Participating in Remote Public Meetings: <https://portlandmaine.gov/DocumentCenter/View/27644/Guide-to-Remote-Public-Participation-updated-4-23-20?bidId=>
- It is recommended that the board seek the applicant's consent to its proposed meeting procedures. If consent is not given, preferably in writing, MMA suggests the board consult with legal counsel to review the board's planned procedures.
- Boards should consider whether board members will meet in-person or through remote means, and whether the applicant or any parties will be allowed to be present in-person. A board can meet in-person, probably with the applicant or appellant present, as long as no more than 10 people are present in the room, proper social distancing measures are taken, and everyone else is able to attend the meeting remotely. A board can also conduct the entire meeting remotely, where everyone, including the board members and applicant or appellant, is attending the meeting via electronic means.
- 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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