



Law Department

**SUBJECT:** Remote Meetings of the Village Board during the Governor's Executive Order Declaring an Emergency.

**DATE:** May 5, 2020

**To:** President and Village Board of Trustees

**FROM:** [Jeffrey M. Stein](#), Assistant Village Manager/Corporation Counsel

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**Executive Summary**

At the April 28, 2020 Village Board meeting, the Corporation Counsel was directed to provide the Village Board with a memorandum on the Village Board's ability to conduct remote meetings. As part of that inquiry, the Corporation Counsel was also asked if there were any limitations upon the items that can be placed on an agenda.

*Remote Meetings*

The Village Board meetings that have taken place electronically were done so within the confines of the law. The Governor has expressly authorized the ability of municipalities to meet without being "physically present." The Village's Emergency Order specifically authorizes electronic meetings and supersedes such restrictions in the Village Code.

*Limitations on Agenda Items*

The Village Board has the discretion to determine when to hold its electronic meetings and what agenda items it should vote on during those meetings. Having no black or white letter of the law as to what is "necessary" or an "immediate need," and given the wide discretion the Village Board has in determining its own affairs, the actions the Village Board has taken and is proposed to take at future meetings is lawful.

The following discusses each of the above concerns in greater detail.

**QUESTION 1: Can the Village lawfully hold electronic meetings during the statewide emergency?**

**ANSWER: Yes, the Village can lawfully hold meetings electronically under both State law and the Village Code.**

Absent an emergency order like the one issued by the Governor of the State of Illinois (“Governor”), both the Illinois Open Meetings Act (“OMA) and the Village Code would require the physical presence of members of the Village Board or members of the subsidiary bodies to be present during their respective public meetings. The law stated below is what is normally in effect and has been modified by both the State’s and the Village’s Emergency Orders.

#### *State and Local Law otherwise Suspended*

The OMA places many requirements upon public bodies to hold meetings. One of those requirements is that “a quorum of members of a public body must be physically present at the location of an open meeting.” 5 ILCS 120/2.01. Section 7 of the OMA still requires a quorum to be physically present, but allows for municipalities to adopt a rule to permit members of that public body to attend the “meeting by other means” if the member is prevented from physically attending the meeting for various reasons. 5 ILCS 120/7.

Absent an emergency order, the Village has not adopted rules that permit members of the public body to attend the “meeting by other means.” Section 2-105 of the Wilmette Village Code states in relevant part:

A member of the Board of Trustees must be physically present at the place of any regular, special, committee-of-the-whole, standing committee, ad hoc committee, or special committee meeting, any board or commission meeting, or any other public meeting provided for by law or in this Code, in order to be considered present for the purposes of constituting a quorum, in order to vote, or in order to participate in the discussion of any matter of business at said meeting.

Section 2-105(a), Wilmette Village Code.

#### *Orders Suspending the Above Provisions*

The Governor issued numerous Executive Orders in regards to COVID-19. Some of those Executive Orders contain language directly relevant to the Village being able to lawfully hold Village Board (and any other meeting of a committee, commission or board of the Village) without having members of the Village Board physically present together at one location. In addition to the Governor’s Executive Orders, the Illinois Attorney General (“AG”) issued a guidance to public bodies in regards to OMA during the COVID-19 Pandemic. The Village President also issued and the Village Board subsequently adopted its own emergency order. Each of these documents play a part in the Village’s ability to lawfully hold an electronic meeting.

#### *Governor’s Executive Orders*

On March 16, 2020, the Governor issued Executive Order 2020-07 in response to the COVID-19 outbreak. Pursuant to the Governor’s authority under the Illinois Emergency Management Act, the Governor suspended “(1) the requirement in 5 ILCS 120/2.01 that

‘members of a public body must be physically present’ ... and (2) the conditions in 5 ILCS 120/7 limiting when remote participation is permitted....” Section 6 of Executive Order 2020-07.

Executive Order 2020-07 (and the subsequent Executive Orders that contain the same provision as the one quoted above) also states that public bodies are *encouraged* to postpone consideration of public business where possible; however, it also states, “when a meeting is necessary, public bodies are *encouraged* to provide video, audio, and/or telephonic access to meetings to ensure members of the public may monitor the meeting, and to update their websites and social media feeds to keep the public fully apprised of any modifications to their meeting schedules or the format of their meetings due to COVID-19, as well as their activities relation to COVID-19.” Section 6 of Executive Order 2020-07 (emphasis added).

#### *Illinois Attorney General's Guidance*

The AG issued a document on March 18, 2020, which was updated on April 9, 2020, titled “Guidance to Public Bodies on the Open Meetings Act and the Freedom of Information Act during the COVID-19 Pandemic” (“AG Guidance Document”). The AG – as the title suggests – provides its guidance on what public bodies should do and/or are encouraged to do when it comes to holding public meetings under the OMA. It is important to note that this document is guidance and not the law. With that being said, deference should be given to the AG on matters regarding the OMA.

In the AG Guidance Document, the AG states:

OMA requires that a quorum of members of the public body be physically present at the meeting location and allows for limited circumstances in which remote access is acceptable. Executive Order Nos. 2020-07 and 2020-18 suspend the in-person presence requirements and eliminate the limitation on remote access. If a meeting is necessary, *public bodies are encouraged to utilize remote access as allowed by the Executive Order*.

AG Guidance Document pg. 3 (emphasis added).

The AG Guidance Document further states that “[p]ublic bodies determining whether to hold meetings at this time should exercise good judgment and discretion and utilize the availability of remote participation to help curb the spread of COVID-19.” AG Guidance Document pg. 4.

The AG’s guidance on public bodies convening via electronic means is as follows:

If public bodies are convening via electronic means, such as by conference call or by web-assisted meetings, the public body *should* ensure that the public has a means to both observe and comment during

these meetings. This can be achieved by sharing conference call or other log-in information in the notice of the public meeting. To help ensure all meetings are “convenient and open” to the public to the greatest extent possible, public bodies should offer multiple ways for the public to access a public meeting, such as offering both a telephone number and a weblink, so that individuals who do not have internet services have an option to access the meeting. AG Guidance Document pg. 4 (emphasis added).

*Village of Wilmette Declaration of Local Disaster and Public Health Emergency (“Village Emergency Order”)*

Pursuant to Section 2-1126 of the Village Code, the Village President is empowered to issue orders during a time of an emergency to temporarily suspend, limit, cancel, convene, reschedule, postpone, continue or relocate all meetings of the Village Board of Trustees, and any subsidiary village committee, commission, board, authority or other public body of the village, as deemed appropriate by the Village President. Wilmette Village Code Section 2-1126.

Based upon that authority, on March 17, 2020, the Village President issued the first Village Emergency Order and on March 24, 2020, the Village Board extended that Village Emergency Order. The following language was contained in the original March 17, 2020 Emergency Order and all is still in effect:

Meeting Cancellation/Postponement. The Village Manager shall cancel or postpone, to the extent possible and feasible, all regularly scheduled public meetings in the month of April of 2020. Pursuant to the Executive Orders, all necessary and required *meetings may be held electronically* and shall only have agenda items that require immediate action by the relevant board, committee or commission. Such meetings shall attempt to comply with the encouragements stated in the Executive Orders when holding electronic meetings. A summary of all meetings shall be posted on the Village’s website within 48 hours from the conclusion of said meeting.

Village’s Emergency Orders dated March 17, 2020; April 7, 2020; April 17, 2020 (emphasis added).

Furthermore, in each of the Emergency Orders issued by the Village President, there was express direction given to the Village Manager to “schedule an electronic meeting” for the next regularly scheduled meeting date.

**Analysis**

The first concern that was raised at the April 28, 2020 Village Board meeting was the question can the Village Board lawfully hold an electronic meeting when looking at the Governor’s Executive Orders, the Village’s Emergency Orders and the Village Code.

A plain reading of the language of the Governor’s Executive Orders clearly suspends the physically present requirement under the OMA. The Governor’s Executive Order then encourages public bodies to provide video, audio, and/or telephonic access to meetings to ensure members of the public may monitor the meeting. Based upon that order, the AG not only accepts “remote access” meetings as a lawful method for public bodies to convene a meeting, but also encourages such method. The AG also provided non-mandatory guidance on how the public body should conduct such meetings electronically. Therefore, it is clear that an electronic meeting may be held (and seems to be the preferred method) by the Village Board under the suspension of the OMA.

In regards to the Village Code, those sections in conflict with the Village’s Emergency Declaration are superseded by the said declaration, and the Village may lawfully proceed with an electronic meeting. This authority is provided to the Village President as part of his emergency powers. The Village Board then approved and extended the order issued and therefore it supersedes the underlying, conflicting Village Code provisions referenced above.

During the April 28, 2020 meeting, it was stated that the Village Code in Section 2-105 “precludes participation of a Trustee in a meeting by telephone” and that specific section had not been addressed by the Village’s Emergency Order. Section 2-105 of the Village Code does not expressly preclude participation by telephone, but rather that section has similar language to the OMA that requires a member of the Village Board to be physically present. This specific requirement is addressed and superseded in the Village’s Emergency Order which states all meetings may be held “electronically.”

While the Village Code does not specifically address Trustee participation in public meetings by telephone, the Village’s New Trustee Orientation materials do as follows:

- ***Can a member of a public body attend a public meeting by telephone or other electronic means?***

The Village Board has adopted an ordinance prohibiting electronic attendance at meetings by members of public bodies. Although the Open Meetings Act allows municipalities, within certain parameters, to permit electronic attendance by members of public bodies, the Village may adopt or maintain stricter rules, and has done so.

The ordinance referenced in the orientation materials is the same section of the Village Code referenced during the April 28, 2020 Village Board meeting. The Village’s prohibition against electronic (including telephonic) attendance was a public policy determination to maintain stricter rules than what is otherwise allowed by the OMA. This restriction, as discussed above, is suspended by the Village’s Emergency Order and attendance by electronic means is now allowed for the duration of the emergency.

During the Village Board meeting, there was a request to amend the Village's Emergency Order to address the perceived conflict of Section 2-105 of the Village Code and having an electronic meeting. Upon review of the Village Code and the full text of the Village's Emergency Order, the Village is operating within the confines of the law and there is no need for any amendments to address this particular issue.

Finally, in addition to the above, it is important to note that the Village President expressly directed the Village Manager to schedule an electronic meeting for the next regularly scheduled meeting in each of the Village's Emergency Orders. As such, this clear language further supposed the lawfulness of the Village Board to convene and participate in the Village Board meetings through the electronic video/audio medium that has been used since the execution of the Village's Emergency Order.

### Conclusion

The Village Board meetings that have taken place electronically were done so within the confines of the law. The Governor has expressly authorized the ability of municipalities to meet without being "physically present." The Village's Emergency Order specifically authorizes electronic meetings and directed the Village Manager to hold such a meeting on the next regularly scheduled meeting date. That direction came from the authority of the Village President, pursuant to his emergency powers under the Village Code, to convene meetings.

As such, there is clear and direct authority to hold a Village Board meeting electronically from both state and local levels of government.

**QUESTION 2: When is a meeting "necessary and required" and what agenda items are considered "immediate" that may be on an agenda.**

**ANSWER: A meeting is considered necessary and required based upon the sole discretion of the Village Board. The same is true for the action items it may place upon agendas for those meetings.**

### *The Village has the Discretion to set its Own Meeting Calendars and Agendas*

The OMA requires public bodies to set their own calendar and agendas. 5 ILCS 120/2.02. The OMA also allows for public bodies to set any special meetings. 5 ILCS 120/2.02. As such, in the case of the Village Board, the Village Board has the discretion of when to hold a meeting and what can appear on the agendas for such meetings.

### *Governor's Executive Orders*

The Governor's Executive Orders state the following in relevant part:

Public bodies are encouraged to postpone consideration of public business where possible. When a meeting is *necessary*, public bodies are encouraged to provide video, audio, and/or telephonic access to meetings to ensure members of the public may monitor the meeting, and to update their websites and social media feeds to keep the public fully apprised of any modifications to their meeting schedules or the format of their meetings due to COVID-19, as well their activities relating to COVID-19. Section 6 of Executive Order 2020-07 (emphasis added).

Another set of the Governor’s Executive Orders state that:

Essential Government Functions means all services provided by the State or any municipal, township, county, subdivision or agency of government and needed to ensure the continuing operation of the government agencies or to provide for or support the health, safety and welfare of the public, and including contractors performing Essential Government Functions. *Each government body shall determine its Essential Governmental Functions* and identify employees and/or contractors necessary to the performance of those functions. Section 10 of Executive Order 2020-10 (emphasis added).

#### *AG Guidance Document*

The AG Guidance Document states that public bodies may choose to postpone or cancel public meetings and are encouraged to do so “when possible”. However, it continues that “where a public body does not have critical issues that must be addressed because time is of the essence, cancelling or postponing public meetings *may be prudent* during the COVID-19 outbreak, rather than holding meetings that could pose a risk of danger to the public.” AG Guidance Document pg. 4 (emphasis added).

#### *Village Code and Village Emergency Order*

In an emergency, the Village President has the emergency power to suspend, limit, cancel, convene, reschedule, postpone, continue or relocate all such meetings. Wilmette Village Code Section 2-1126.

The Village’s Emergency Orders directly reference the Governor’s Executive Orders and contemplates the AG’s guidance as follows:

Pursuant to the Executive Orders, all *necessary and required* meetings may be held electronically and shall only have *agenda items that require immediate action by the relevant board, committee or commission.* Village Emergency Orders dated March 17, 2020; April 7, 2020; April 17, 2020 (emphasis added).

The Village's Emergency Order also directs the Village Manager to schedule a Village Board meeting on the next regularly scheduled meeting day after the declaration was issued.

### *Court Ruling on Necessity of Meetings*

Since the Governor's Executive Order has been issued, there has been one lawsuit challenging the "necessity" of a meeting by a public body. The City of Joliet was sued by residents seeking a temporary restraining order by alleging that the City was to hold a meeting that was not "necessary." In that case, the City announced on April 8, 2020 that it was going to hold a special meeting (non-regularly scheduled meeting) on April 13, 2020. The plaintiffs in that case argued they had a specific interest in the matter on the agenda which was a "land deal" and it was controversial. Plaintiffs characterized the "land deal" agenda item as having "nothing to do with the pandemic."

That court issued an opinion within four (4) hours of receiving the complaint and without a written response from the City (this would equate to "warp speed" in the context of litigation). The order stated "the City does not have unfettered discretion to determine 'necessity' in this context, but it is certainly entitled to reasonable deference. Generally speaking, it would be judicial activism for this Court to tell Joliet what is, and is not, important to Joliet. That is (again, generally speaking) for Joliet's elected officials to decide". Bishop Steven Evans, et.al v. City of Joliet, 20-CH-526, pg.1 (April 13, 2020). Moreover, the Plaintiffs argue that the City "has not shown" necessity but the Plaintiff, according to the court, bears that burden. Bishop Steven Evans, et.al 20-CH-526 at pg. 1. The Court continued in its ruling and admonished the City. The court stated that having the meeting the way Joliet did was "shady" but not illegal. Bishop Steven Evans, et.al 20-CH-526 at pg. 2.

### **Analysis**

The Governor's Orders, as well as the AG's Guidance encourage (but do not mandate) public bodies to cancel meetings when such meetings are not necessary. However, when meetings are necessary, they also encourage that only contain matters that have a need to be addressed. The Governor's Orders further state "each government body shall determine its Essential Governmental Functions." As such, there is no state level limitation as to what a public body can put on their agenda as long as the government body deems the matter an Essential Governmental Function, which it may do so without any other conditions or qualifications and simply under its own discretion. As such, the "necessity" of a meeting and what is on its agenda is left to the public body.

Accordingly, and in keeping with the spirit of both the Governor's Orders and the AG's guidance, the Village has imposed its own limitations on meetings to be held by the Village Board and its subsidiaries. Pursuant to the Village President's powers during an emergency, the Village President may convene or cancel a meeting. That is exactly what the Village President has done, under his authority found in the Village Code. The



Village President directed the Village Manager to cancel or postpone all meetings of the Village “to the extent possible and feasible.” This was needed because there were scheduled meetings of subsidiary bodies that could not have or should not have been held electronically. These include meetings where public hearings were to be held at the Plan Commission and the Zoning Board of Appeals. A process to hold a public hearing (which is significantly different than “public comment”) was not possible electronically at that time and therefore “not feasible.”

However, under that same grant of authority, the Village President can convene a meeting and did so expressly in the Village’s Emergency Order. It is presumed that a meeting called to be convened in an emergency order is “necessary and required” and essential as there are not standards or prerequisites in doing so. Despite any reasonable presumptions made, that discretion does ultimately lie with the Village Board and a motion to adjourn would always be in order if there was a belief by members of the Village Board that such a meeting was not necessary and required. As a practical note, every meeting held since March 17, 2020 could very strongly be considered necessary and required based upon the emergency orders, purchasing, grant programs and budgeting considerations discussed and/or voted upon.

The other limitation self-imposed by the Village, is that the agenda items will only be those items that require immediate action by the relevant board. This determination also lies within the discretion of the Village Board. In an attempt to solidify the reasoning that such agenda items require immediate action and based upon a direct response to concerns raised by a Trustee prior to the April 28, 2020 meeting, the Village Staff has been inserting language into the Village staff memoranda indicating the reasoning for the immediate need and the critical nature to the operations of the Village. These statements in the staff memoranda submitted to the Village Board clearly give a reason (there is no black and white guidance as to what is an immediate need or not as each item has its own distinct set of circumstances) as to why such action could be considered critical and an immediate need; however, despite such opinions from staff, the Village Board is the sole arbiter as to whether the items before them require immediate action. If the Village Board believes that there is no immediate need for such an item, then a motion to table that item is warranted.

The discretion lying with the elected officials of a municipality was what was discussed and confirmed in the City of Joliet case. That court ruling, although not precedential, is enlightening. In that case, a judge ruled that Joliet may have acted “shady,” but that court still deferred to the judgment of the elected officials as to what is “important” to its governmental functions and ruled the meeting, including the action to vote on the “land deal,” was not illegal. While that court stated that a public body does not have “unfettered” discretion as to what it can place on an agenda, it did not give any guidance or examples of when such discretion would not be followed. As such, there are times where a Village Board could not have a vote on or hear an item (e.g. matters not on a written agenda, matters that require a public hearing from a subsidiary body),

but there is nothing specifically addressed in the court's ruling on this subject.

Instead, the court's admonishment to Joliet highlights the low threshold of what is legal or illegal in this context. That judge, in his opinion, did not like the method of Joliet calling a special meeting to hear and vote upon a controversial land deal for the first time before its City Council, but also did not rule those actions to be illegal. That shows that even in circumstances of controversy to be heard at a special meeting announced only five days before it is to take place, the public body has a great amount of deference to conduct its own affairs.

### Conclusion

The Village Board has the discretion to determine when to hold its electronic meetings and what agenda items it should vote on during those meetings. Having no black or white letter of the law as to what is an immediate need and given the wide discretion the Village Board has in determining its own affairs, the actions the Village Board has taken and is proposed to take at future meetings is lawful.

As stated within the Governor's Executive Orders and as ruled by one court already, the Village Board is given great latitude in determining the needs of its own governmental functions. As the Village staff contains the language and the reasoning in its memoranda to the Village Board why such items are necessary and there is an immediate need for action on those items, the Village is making a determination that the action was essential and was voted upon at the proper time. Furthermore, if the Village Board felt that such materials do not possess an immediate need for action, tabling the action to a future "normal" meeting would also be lawful.