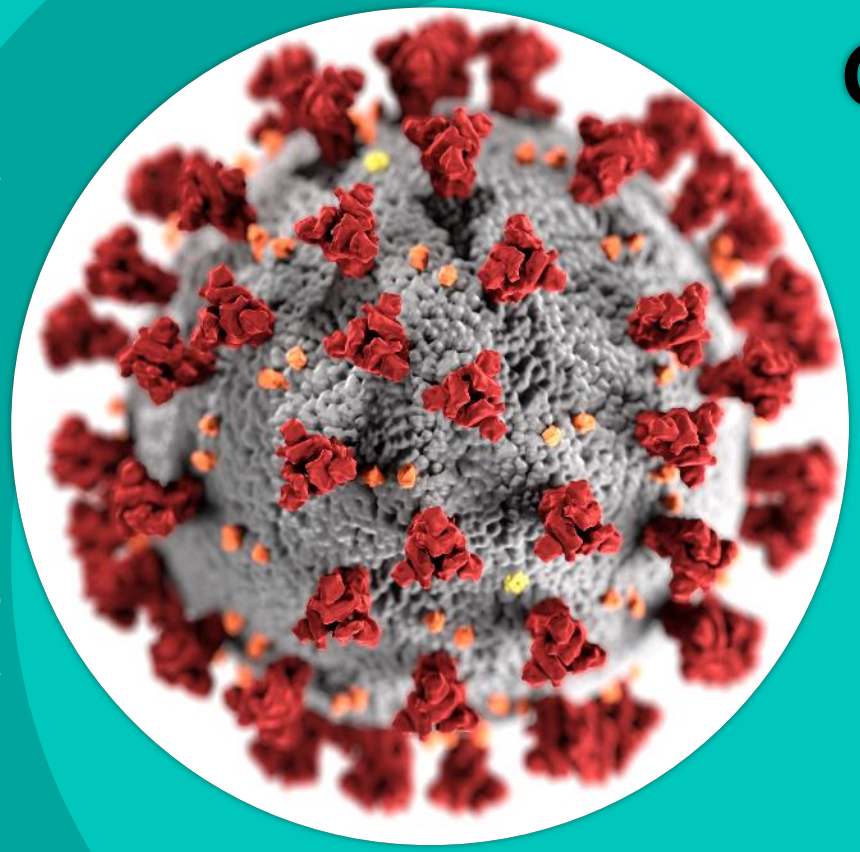


(Image credit: CDC on Unsplash)

GETTING GOVERNMENT MOVING DURING A GLOBAL PANDEMIC

DURING THE COVID-19 EMERGENCY

Philadelphia's pivot from in person to due process and open meetings law compliant virtual meetings

KELLY DIFFILY, SENIOR ATTORNEY, APPEALS UNIT

PHILADELPHIA LAW DEPARTMENT

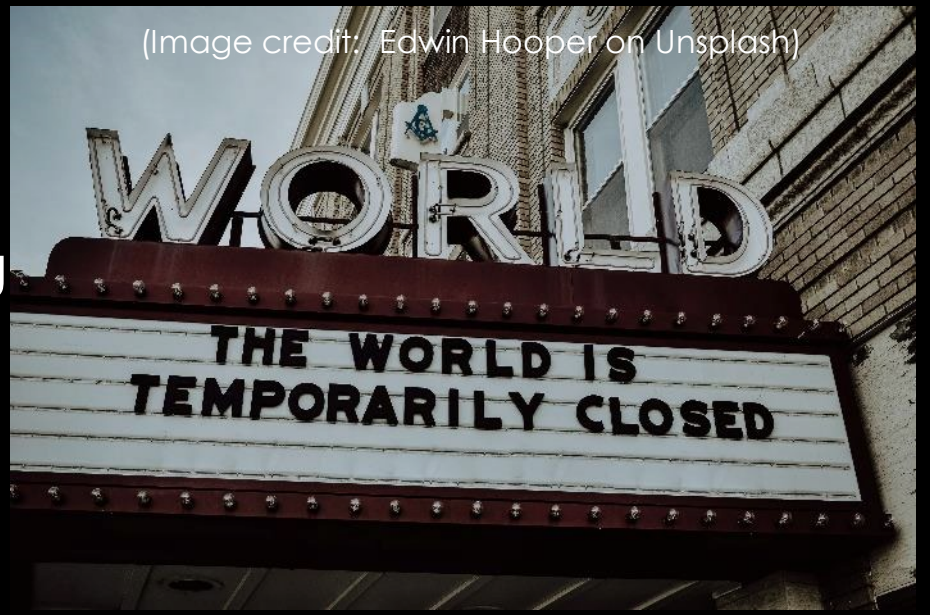
2021 IMLA MID-YEAR SEMINAR

APRIL 22, 2021

City of Philadelphia

OVERVIEW

- Pennsylvania Act 15 of 2020, 35 Pa. C.S. § 5741, went into effect on April 20, 2020, shortly after the COVID emergency started.
- Act 15 explicitly authorizes local government entities to hold "virtual" public meetings via telephone conference call or a web-based platform (e.g., Webex, Microsoft Teams, Google Hangouts, Zoom, Skype).
- This authorization is temporary and limited to the duration of the COVID-19 emergency.
- Philadelphia had to quickly figure out *how* to conduct virtual meetings, including navigating the mechanics of using new technology and making sure meetings are conducted in compliance with due process and Pennsylvania's open meetings law.



(Image credit: Edwin Hooper on Unsplash)

MECHANICS OF VIRTUAL PUBLIC MEETINGS
DURING THE COVID-19 EMERGENCY

- We advise our departments, boards and commissions that whatever virtual technology is used, the following is still required:
  - a quorum;
  - **agency members** must be able to **contemporaneously communicate** with each other;
  - the **public** must be able to **contemporaneously listen** to the meeting; and
  - The agency must "**allow for public participation**" "to the extent practicable" by doing at least one of the following:
    - allowing public participation via the platform used to hold the meeting;
    - accepting written comments from the public (via email, postal mail, or both).

MECHANICS, CONTINUED

- We also recommend:
  - **recording the meeting and posting the recording online**, to enable the public to access a full and complete meeting record.
    - Indeed, in February 2021, our City Council passed an Ordinance which now requires boards and commissions to either transcribe or record all meetings and to post the recording or transcript online within 10 days.
  - That meeting hosts **turn off private chat functionality**.
    - Members of the public and attorneys should not be able to privately message/chat with individual board/commission members; due process and Pa's rules of professional conduct prohibit ex *parte* contacts with adjudicators.
    - Individual board/commission members should not chat with one another privately during a hearing (unless in authorized executive session); all agency business should only discussed on the record.

NOTICE OF VIRTUAL PUBLIC MEETINGS
DURING THE COVID-19 EMERGENCY

- Pennsylvania's open meetings law, the Sunshine Act, requires agencies to give advance public notice of all meetings.
- Act 15 **relaxes the notice requirements** for virtual meetings, allowing agencies for the first time to post notice **online**.
- We advise agencies to keep records of online notices (i.e., a screen shot that includes a time-stamp or some indication of when the posting was made).

OPEN MEETING LAW APPLICABILITY
DURING THE COVID-19 EMERGENCY

- Unless specifically exempted, we advise agencies to **abide by the other requirements of Pa.'s open meeting law to the best extent possible**, given the exigencies and practicalities of the COVID-19 emergency, including:
  - taking written meeting minutes;
  - deliberating and conducting agency business only at open, public (albeit "virtual") meetings; and
  - publicly casting votes at open, public (albeit "virtual") meetings.
- When City officials are unable to comply with the Act, they **should try to comply with the spirit** of the law. **Common-sense should apply**.

(Image credit: James Day on Unsplash)



(Image credit: Charles Deluvio on Unsplash)

VIRTUAL ADMINISTRATIVE HEARINGS

Special additional considerations are present for boards that conduct *administrative* hearings that are **adjudicatory** in nature.

VIRTUAL ADMINISTRATIVE HEARINGS
DURING THE COVID-19 EMERGENCY

Even in a virtual setting, administrative boards must satisfy **due process** and abide by Pennsylvania's **Local Agency Law**, 2 Pa. C.S. § 751, *et seq.*, a statute that establishes minimum due process and other requirements for local administrative agencies.

We advise that this requires:

- **Notice** and a meaningful **opportunity to be heard** (*i.e.*, adversarial hearing)
- The ability to **call witnesses, conduct direct examination** and **cross-examination**, and the ability to **present evidence**.
- A **full and complete record** of the proceeding must be preserved, including oral testimony and documents presented.

NOTICE TO PARTICIPANTS PRIOR TO HEARING

- Boards must provide **advanced notice of virtual hearings to parties** that will be affected by the hearing.
- This is **separate and apart from the public notice required under Pa's open meetings law.**
- Confirm with the applicable ordinance and regulations, if any, to determine if email is sufficient or if regular mail is required to provide proper notice.

(Image credit: Nelly Antoniadou on Unsplash)

CONTINUANCE REQUESTS

- Accommodations should be considered for parties who do not have access to required technology or are otherwise legitimately unable to participate in a virtual hearing.
- Notify all with an interest in the matter and consider objections raised to continuance requests.
- Boards should determine if the request to continue is appropriate and whether an accommodation is reasonable or must be provided to meet legal mandates (e.g., ADA).
- If the request is not reasonable, or a continuance will have an adverse impact on public health, welfare, and safety, or the rights of another party, the hearing may proceed.

ADDITIONAL TIPS



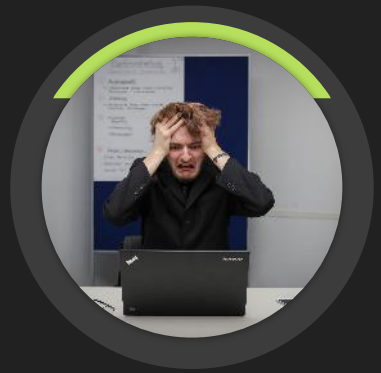
Boards should determine in advance whether **interpreters** will be needed



Board members should have **video cameras on** at all times, and should announce if, and when, they step away from the screen.



It is important that all board members and assisting staff are **familiar and comfortable** with the virtual meeting platform. The public should also be given instructions in advance.



A failure of the software or network during a hearing can lead to due process violations. If **tech problems persists, hearings should be continued**.

(Image credits: Nathaniel Shuman, visuals, Compare Fibre and Sebastian Herrmann on Unsplash)

USE OF EVIDENCE
DURING VIRTUAL ADMINISTRATIVE HEARINGS

Remind parties that it **may not be possible to redact or revise a document** once it has been presented over the internet, and that **some information may lose confidential status** once disclosed, even in error, due to the permanent nature of internet communications.

Parties have a **right to cross-examine** opposing witnesses; therefore, **attorneys should not be permitted to attest** to facts on behalf of their clients.

If the **Board cannot see a witness**, because they **don't have access to a camera**, the board should **support any credibility findings** with specific reasoning and/or by pointing to other objective evidence.

(Image credit: Unsplash)

USE OF EVIDENCE CONTINUED

In addition to testimony, boards must permit parties to **present evidence** in the form of documents, including photographs.

In most instances, boards should **require parties to submit evidence in advance** of a hearing, which **may be pre-marked**, and have a **single administrator** or staff member control the presentation of documents.

A process should be created to allow parties to **submit new evidence** if the need arises during the hearing to rebut testimony, or to submit **revised materials** (if allowed by the board).

(Image credit: Dmitrij Paskevic on Unsplash)

BOARD DELIBERATIONS AND THE DECISION

- Under Pa. law, quasi-judicial administrative boards may deliberate in private "executive sessions" but the final vote must be cast at an open, public meeting.
- We had to think through **how our boards would accomplish this virtually** (i.e., making a break-out room to deliberate, but maintain the ability to come back on the record to publicly vote on the same day or at the beginning of the next meeting).
- Decisions **should be written and served** upon all parties and/or their counsel.
- Confirm with applicable ordinances and regulations, if any, to determine if decisions can be served by electronic mail or if regular mail is required; consider asking parties to waive personal or mail service in favor of email notice.





(Image credit: Leo SERRAT on Unsplash)

City of Philadelphia

THANK YOU

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QUESTIONS? CONTACT KELLY DIFFILY, SENIOR ATTORNEY, APPEALS UNIT