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LEGAL ALERT**Guidance on Conducting Public Hearings
During the COVID-19 Pandemic**

THE BACKGROUND: Executive Order 2020-07, issued by Governor Pritzker on March 16, 2020, as most recently extended by Executive Order 2020-33, dated April 30, 2020, and Executive Order 2020-32 issued by Governor Pritzker on April 30, 2020 encouraged municipalities to postpone consideration of public business where possible, limited public gatherings and suspended the Open Meetings Act physical presence requirement, allowing public meetings to be conducted electronically.

THE CHALLENGE: While local governments now have a fair amount of collective experience with conducting some business meetings electronically, public hearings are somewhat different. There are a number of unsettled issues related to how to best conduct an electronic public hearing given that the State's Executive Orders relax Open Meetings Act physical presence requirements, but not the due process rights associated with a public hearing. Public hearings on zoning applications, for example, must follow the "principles of substantive and procedural due process," which includes opportunities for the public to meaningfully participate in the hearing, such as by offering testimony, exhibits and engaging in cross-examination. 65 ILCS 5/11-13-25(b). Conducting a public hearing using non-traditional or remote means of public participation raises a number of potential logistical and legal challenges and issues, several of which are discussed below.

While we continue to recommend that municipalities defer non-essential public hearings where possible until after the current restrictions on public gatherings are lifted, we also understand that many municipalities may be faced with statutory deadlines relative to pending applications, or pressure from applicants or their own officials or the public to move forward with pending matters. While it is possible the State will issue some guidance or relax certain public hearing requirements via an Executive Order, we must, for now, do our best to consider how to proceed in the absence of such guidance or Executive Order. What follows is our guidance on some of the issues a local government may face in conducting a public hearing during the current emergency.

For any questions or comments you might have regarding this newsletter, please feel free to contact:

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LOGISTICAL CHALLENGES OF MEETING AND PUBLIC HEARING SET-UP: The municipality will need to consider various aspects related to the physical meeting and public hearing set-up, including whether physical access to the meeting and public hearing location will be allowed at all. If there will be persons present at a physical location, who will be allowed and how many will be allowed at any one time, in order to comply with current State directives and Executive Orders? Other considerations include mask requirements, instructional and directional signage, municipal staffing and monitoring at entrances to ensure room limitations and social distancing requirements are met, and how persons who may want to attend will be managed outside the meeting and public hearing room while waiting to enter.

SWEARING IN WITNESSES: Swearing in witnesses presents an obvious challenge when they are not physically present. Where live electronic voice or video participation is taking place, we recommend that all persons who desire to testify should be asked to raise their right hands and be sworn in at the outset of the hearing. Then, when each speaker begins their individual comments, the chairperson should have them verbally confirm they have previously been sworn in.

FACILITATING PRESENTATIONS: Applicants in most zoning or other land use public hearings will want to make a presentation to the public body before which they are appearing. Such presentations will in most cases include visual elements. A municipality choosing to proceed with a public hearing under the current conditions must consider how best to make presentations and/or accompanying visual elements available to both members of the public body and to the public. Because it is important to be able to follow and view a presentation live, Zoom, Facebook, YouTube, or some other video-based conferencing platform will likely provide the most appropriate forum for public hearings.

In addition, every effort should be made to gather an applicant's presentation materials and proposed exhibits in advance to ensure, where possible, that the materials are posted and accessible to members of the public body and the public no less than two days in advance of the hearing. The staff of the public body should coordinate with the applicant and their presentation team as to how their presentation will proceed and how it will interact with the meeting platform. Such advance coordination will help to facilitate a smooth hearing.

PUBLIC TESTIMONY: Public testimony is a requirement for all public hearings, and how to effectively allow public participation is one of the biggest obstacles to conducting an electronic public hearing. It is critical to allow the opportunity for live public testimony during an electronic public hearing. Public testimony concerning non-controversial matters can be easily managed, but additional planning is required for more controversial matters.

1. Written Comments and Questions. Encouraging the submission of written comments and questions in advance of the public hearing in lieu of live comments and questions is one way to create some order to the proceedings. The agenda and public hearing notice can specify the manner in which written or emailed questions can be submitted, and the deadline for submission (we recommend the cutoff be no less than 2 hours prior to the meeting during which the public hearing will be held). The written comments and questions received can be read by the chairperson or other designated person at the appropriate point in the public hearing. Questions should be responded to, and the written comments should be made a part of the record of the public hearing.

2. Live Comments and Questions. Whatever video conferencing platform is used for the public hearing should be able to allow for live participation by members of the public who desire to make live statements or ask questions. Specifying on public hearing notices, agendas or the Village website how members of the public can access and participate in the public hearing is important. How best to manage the flow of public comment during the public hearing will be a function of how many people desire to participate. The chairperson may, as always, limit repetitious or inappropriate comments, and impose reasonable time limits in accordance with any rules of the public body. Whether questions are presented in writing or live in real-time, answers should come to all

attendees directly from the appropriate applicant, staff or elected or appointed committee or commission members.

3. Preventing “Zoom-Bombing.” Some local governments and other entities have experienced problems where people are “Zoom-bombing” their electronic meetings or public hearings by filling them with inappropriate content, or creating “bots” that use up all of the participant capacity in a Zoom or some other video conferencing platform to freeze out the people who are intended participants. One way to address that is to not include the actual meeting access code on the agenda, but instead state that it will be made available 2 hours prior to the meeting at which the public hearing will take place on the local government’s website, and to provide the website address. That approach gives Zoom-bombers very little time to write a program to freeze out the people who are intended participants. You do need to make the access code available though, if that is the only way for people to follow and participate in the public hearing live.

4. Participation by Persons with Disabilities. As with non-electronic meetings and public hearings, it is important to consider how to potentially accommodate participation by persons with disabilities. Providing telephone and email contact information on the agenda for a member of the municipal staff who can help facilitate such accommodations and participation is recommended. Here is some sample language:

“Any individual with a physical or mental condition that would be considered a disability under the Americans with Disabilities Act and who requires certain reasonable accommodations in order to allow them to observe and/or participate in this public hearing process, or who has questions regarding the accessibility of the public hearing, is requested to promptly contact [insert name] at [insert phone number/email] by [insert date and time] to inform him/her of the requested accommodation.”

CROSS-EXAMINATION: In addition to public comment, it is critical to allow the opportunity for cross-examination of witnesses during a public hearing. Members of the public may be required to pre-register, or should, at a minimum, be encouraged to advise the public body in advance, if possible, via email or phone call, of their intent to undertake cross-examination. Providing notice in advance of the meeting will help to ensure all of their technological needs may be accommodated and that any documents they will reference are available for review by members of the public body and the general public.

TRANSCRIPT: A record should be made of each public hearing. The video conferencing application being utilized may offer the creation of a recording as an option. Public bodies that would normally utilize a court reporter to transcribe the proceedings should contact their court reporter about options for transcribing the public hearing remotely. If none of the foregoing are options, we recommend that, at a minimum, an audio recording of the public hearing be created using a recorder or phone.

CHALLENGES BASED ON ACCESS TO TECHNOLOGY: Public hearings that proceed electronically utilizing video or other technology may be vulnerable to challenges from persons who assert they do not have the technology to follow the public hearing remotely, or to participate electronically. A Zoom or other electronic participation link and access code may mean little to an elderly adjacent neighbor who has no internet service, no smart phone, and no idea of how to electronically access or participate in a public hearing. Similarly, as with an in-person hearing, the local government must select an electronic public hearing format that, to the extent possible, provides for accessibility for persons with disabilities to participate. Such persons, or lawyers on their behalf, may assert that their rights have been compromised by not being able to participate in person. For this reason and others, a local government should proceed with caution in conducting electronic public hearings on controversial subjects. It is important to balance the necessity of moving forward with the public hearing now,

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versus the risk the subject of the public hearing could ultimately be tied up in court over public hearing issues that can be avoided once restrictions on public gatherings are eased.

ACKNOWLEDGEMENT FROM APPLICANTS: Applicants for zoning relief should be aware of the challenges and risks inherent in conducting an electronic public hearing, including the potential for objectors to raise alleged due process flaws to a court. We recommend that zoning applicants who desire to move forward with public hearings under the current conditions either acknowledge on the record at the public hearing that they are voluntarily choosing to go forward and that they waive any claims related to the procedures utilized to conduct the public hearing, or execute a written acknowledgement, assumption of risk and waiver of claims stating that they are voluntarily choosing to go forward, waive any claims related to procedures utilized to conduct the public hearing and assume the risk that the public hearing may later be found defective and the approvals given may ultimately be reversed by a court. Such an acknowledgment would help set expectations with an applicant who is pushing for a public hearing.

For further guidance on specific issues related to conducting a public hearing during the COVID-19 Pandemic, please contact your KTJ attorney.