CLIENT ALERT

GOVERNOR PRITZKER'S OPEN MEETINGS ACT SUSPENSION AUTHORIZED UNDER STATE LAW DURING COVID-19 EMERGENCY

By

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On March 13, 2020, Governor Pritzker issued Executive Order 2020-07 pursuant to the Illinois Emergency Management Act (***"IEMA"***). The Executive Order suspends (for the duration of the Gubernatorial Disaster Declaration) the one procedural requirement in the Illinois Open Meetings Act (***"OMA"***) that a quorum of a public body be physically present to conduct a public meeting. No other OMA provision has been suspended. In the face of the public health hazards posed by the COVID-19 pandemic, the logic and legal justification of the Governor's Order is clear.

In reliance on the Governor's Executive Order, thousands of public bodies throughout Illinois have rightly conducted public meetings and public hearings by telephone or web conferencing technologies to avoid putting elected officials, staff, and the public at risk of contracting COVID-19. In doing so, these public bodies have maintained essential government operations and decision-making capabilities, while adhering to the social distancing requirements and other public health imperatives set forth in the Governor's March 20 Stay at Home Executive Order.

Some attorneys and advocacy groups have questioned the Governor's authority to suspend the OMA's physical presence requirement, claiming that the IEMA does not grant the Governor the power to suspend any part of the OMA, and going so far as to contend that the OMA suspension is an unconstitutional executive overreach. They also claim that Illinois courts may void final action taken by a public body at a virtual public meeting held in reliance on the Governor's Executive Order.

It is our opinion that these positions are not well-grounded in fact or law. The Governor's limited suspension of a procedural OMA requirement is proper and clearly authorized, and the risk of judicial nullification of the acts of a public body under present circumstances is virtually non-existent.

The Governor Is Authorized to Suspend the OMA Physical Presence Requirement

Recognizing the need for swift action in the face of various types of man-made and natural disasters, the General Assembly adopted the IEMA, in part, to confer upon the Governor a number of extraordinary powers. One of the Governor's powers is, upon the issuance of a disaster declaration:

> *To suspend the provisions of any regulatory statute prescribing procedures for conduct of State business*, or the orders, rules and regulations of any State agency, if strict compliance with the provisions of any statute, order, rule, or regulation

> would in any way prevent, hinder or delay necessary action, including emergency purchases, by the Illinois Emergency Management Agency, in coping with the disaster.

20 ILCS 3305/7 (emphasis added).

Those that question the Governor's OMA suspension focus on the IEMA language above authorizing the Governor to suspend the "orders, rules and regulations of any ***state agency***." They posit that the Governor exceeded his authority because local bodies such as cities and villages cannot be categorized as "State agencies." In doing so they ignore the Governor's explicit authority to "suspend the provisions of any regulatory statute prescribing procedures for conduct of ***State business***," which is far broader, and provides the Governor the authority to suspend OMA's physical presence procedural requirement as it applies to all public bodies in the State.

1. The Business of Local Public Bodies is State Business

Given the fundamental nature of Illinois local governments and their relationship under the Illinois Constitution to the State government, OMA procedures that apply to public meetings *are* State business. The drafters of the Illinois Constitution did not divide the sovereign powers of the State into a two-part, static government system of (i) State government and (ii) local governments. Rather, the drafters entrusted the complete sovereign power to the State. Municipal corporations have no inherent powers and are wholly subordinate to the state government. *Arlington Heights v. County of Cook*, 133 Ill. App. 2d 673, 675, (1st Dist. 1971); *People ex rel. Mortell v. Bergman, 253 Ill. 469 (1912)*. "Municipal corporations are creatures of the state that are, absent constitutional restrictions, subject to the legislature's will and discretion*." JR Investments, Inc. v. Barrington Hills,* 355 Ill. App.3d 661, 667 (2d Dist. 2005). Even home rule units are not sovereign governments - home rule powers (established by and exercised only in accordance with the Illinois Constitution) extend only to matters of local concern and only to the extent that the State has not preempted the exercise of such power. *See* Ill. Const. 1970, art. VII, sec. 6.

Further, the General Assembly has expressly declared in the text of the OMA that local governments undertake state business. The first sentence of the OMA declares: "[i]t is the *public policy of this State* that public bodies exist to aid in the conduct of the people's business […]" 5 ILCS 120/1 (emphasis added). Section 1 of the OMA also provides that "[t]he General Assembly further declares it to be the public *policy of this State* that its citizens shall be given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way." *Id.* (emphasis added). The General Assembly made certain that the OMA's requirements remain the business of the State because it used its constitutional authority to preempt home rule and declare that home rule units must comply with the OMA's requirements. *See* 5 ILCS 120/6.

In short, local government operations and the related OMA procedural requirements constitute State business, and the OMA physical presence requirement is exactly the type of

regulatory procedural requirement that the General Assembly in the IEMA statute specifically authorized the Governor to suspend in times of emergency.

2. The IEMA Should Not be Interpreted to Produce Absurd Results

Support for IEMA's grant of authority to the Governor encompassing suspension of the OMA's physical presence requirement is also found in the cannons of statutory construction. Courts have long held that when a "reading of a statute would lead to inconvenient, unjust or absurd results, the literal reading should yield." *Kelly v. Village of Kenilworth*, 2019 IL App (1st) 170780, ¶ 29. Further, "[t]he process of statutory interpretation should not be divorced from a consideration of the 'real-world activity' that the statute is intended to regulate." *People v. Hanna*, 207 Ill.2d 486, 502 (2003). Construing the IEMA to prohibit the Governor from suspending just one of the many procedural requirements of the OMA would be divorced from the "real-world" activity of government and produce absurd results in the context of the COVID-19 emergency.

The purpose of the IEMA is to "insure that this State will be prepared to and will adequately deal with any disasters, preserve the lives and property of the people of this State and protect the public peace, health, and safety in the event of a disaster." 20 ILCS 3305/2(a). To this end, the Governor was provided the authority to suspend the procedural requirements governing State business presumably because the General Assembly may not be able to convene fast enough, or at all, to adopt legislation needed during a disaster. In fact, of course, the Illinois General Assembly has not met since March 5, 2020 due to the COVID-19 pandemic.

It would produce an absurd result to read the Governor's powers under Section 7 of the IEMA to be so narrow as to not encompass the power to suspend the OMA's physical presence requirement as applied to local public bodies. It makes no sense to permit the Governor to suspend the OMA's physical presence requirement as it applies to the State's legislative, executive, administrative or advisory public bodies of the State when a disaster makes it too dangerous for a quorum of the State's public bodies to physically convene, while not providing analogous authority to the Governor to suspend that same requirement as it applies to local public bodies that area also subject to the same OMA requirements. It is illogical to conclude that the General Assembly would give the Governor the power to protect State public officials, but to leave local public officials unprotected in times of disaster.

The absurdity of such a narrow reading of the IEMA is also apparent when one considers that public bodies may not be able to legally postpone their public meetings indefinitely during a disaster. Aside from the need for local public bodies to meet to act in response to the emergency itself, numerous statutes require public bodies to hold public meetings for a variety of reasons regardless of whether a disaster exists. To name just two:

- Municipalities are required to adopt an annual budget by a certain deadline each year (65 ILCS 5/8-2-2); and
- Townships are required to hold an annual township meeting on the second Tuesday of April in each year (60 ILCS 1/30-5(a)).

It would be irrational to construe the Governor's IEMA authority so narrowly as to force local public officials to choose between (i) violating their statutory obligations by cancelling meetings; and (ii) putting their own health, the health of their families, and the health of the public at risk by convening in-person public meetings, and violating a Gubernatorial Stay at Home Executive Order in the process. Such a construction of the IEMA does not fulfill the stated purpose of the statute or the exigencies of State-wide disasters.

3. The Public Access Counselor Has Upheld the Governor's Suspension Authority

While no court has ruled on this specific issue, the Illinois Attorney General's Public Access Counselor (PAC) has issued at least two non-binding opinions finding no issue with a public body meeting by teleconference during the COVID-19 emergency. First, in PAC opinion 2020 PAC 62246, an individual claimed that the Chicago Executive Airport Board of Directors violated the OMA by holding a meeting without a quorum being physically present. The PAC determined that no violation of the OMA occurred because the Governor had suspended the OMA's physical presence requirement during the COVID-19 emergency.

The PAC went one step further in a non-binding opinion issued on April 6, 2020. In 2020 PAC 62329, the PAC ruled that the McHenry Board of Health did not violate the OMA when it hosted a virtual meeting on the internet in accordance with the Governor's Order, and required that anybody desiring to provide public comment submit comments via email to the Board at least two hours prior to the meeting so that the Board could read the public comments during the virtual meeting. The PAC reasoned: "It would be illogical to construe OMA as prohibiting a public body from meeting remotely during public health emergencies because the limitations of meeting in such a format may necessitate a temporary change in the public body's method of allowing public comment." 2020 PAC 62329, p. 2.

While neither PAC decision is legally binding or has precedential value, the decisions carry significant weight. The PAC is tasked with administering the OMA and Illinois courts give deference to its decisions. *Abrahamson v. Illinois Dept. of Prof. Regulation*, 153 Ill.2d 76, 98 (1992) ("courts will give substantial weight and deference to an interpretation of an ambiguous statute by the agency charged with the administration and enforcement of the statute.").

Public Bodies Are Not at Significant Legal Risk for Hosting Remote Meetings

The critics of the Governor's suspension of the OMA's physical presence requirement also significantly inflate the risk that public bodies that conduct virtual meetings may have their final actions overturned. Even in the unlikely event that an Illinois court somehow rules that the Governor does not have authority to suspend the OMA's requirement that a quorum of a public body be physically present at all meetings, the risk that a court would then void the public body's actions taken during a virtual meeting is negligible at best. Such a ruling would unnecessarily threaten the thousands of final actions that have been taken by public bodies throughout the state during the COVID-19 emergency.

Judicial authority to address violations of the OMA is set forth in Section 3 of the OMA, which provides in part:

> The court, having due regard for orderly administration and the public interest, as well as for the interests of the parties, may grant such relief as it deems appropriate, including granting a relief by mandamus requiring that a meeting be open to the public, granting an injunction against future violations of this Act, ordering the public body to make available to the public such portion of the minutes of a meeting as is not authorized to be kept confidential under this Act, or declaring null and void any final action taken at a closed meeting in violation of this Act.

5 ILCS 120/3(c).

While, to our knowledge, no court has taken up the precise issue of whether a public body's action during a virtual meeting is voidable, courts have repeatedly held that the power to void a public body's action for violating the procedural requirements of the OMA is limited only to action taken in closed session. *Bd. of Educ. of Waukegan Comm. Unit Sch. Dist. 60 v. Ill. State Charter Sch.* Comm'n, 2018 IL App (1st) 162084, ¶ 125 (the OMA "expressly states that the circuit court may only declare 'null and void any final action taken at a closed meeting in violation of this Act.'"); *see also Chicago Sch. Reform Bd. of Trustees v. Martin*, 309 Ill. App. 3d 924, 936 (1st Dist. 1999). In refusing to void an action taken in an open meeting for procedural violations of the OMA, the Appellate Court of the First District relied on the House debate when the General Assembly amended the OMA, explaining:

> Representative Reilly stated that the bill "clarifies that action taken in closed session and only that action taken in closed session can be voided. […] [t]he intent is to invalidate only final action improperly taken in secret" and "only the action that takes place in the closed meeting can be voided not action that takes place in the open meeting."

Bd. of Educ. of Waukegan Comm. Unit Sch. Dist. 60, at ¶ 127, *citing* 82nd Ill. Gen. Assem., House Proceedings, May 20, 1981, at 31 (statements of Representative Reilly). Thus, even if a court somehow finds that a public body was not permitted to meet in a virtual fashion and must have a quorum physically present, the court cannot invalidate action taken at a virtual meeting while the Governor's Order is in effect.[1]

Please contact any Elrod Friedman attorney with questions or concerns regarding your community's obligations under the OMA, or any other questions regarding the COVID-19 emergency.

[1] Section 4 of the OMA provides that violations of the OMA may be a Class C misdemeanor. Reliance on the Governor's Order and the PAC opinions holding that Governor is authorized to suspend the OMA's physical presence requirement almost certainly eliminates the risk of being charged with a crime for participating in a virtual meeting during the COVID-19 emergency.