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MEMORANDUM

TO: UTR Municipal Clients – PLEASE NOTE THAT IF YOU ARE NOT A CLIENT OF THIS LAW FIRM THEN THIS MEMO DOES NOT CONSTITUTE LEGAL ADVICE. YOU SHOULD CONSULT YOUR OWN SOLICITOR FOR LEGAL ADVICE

FROM: Andrew M. Teitz, Amy H Goins, Peter F. Skwirz, and Michael A. Ursillo

DATE: Updated July 23, 2021

SUBJECT: Municipal Public Meetings guidance in light of expiration of executive orders and failure of General Assembly to enact amendments to the Open Meetings Act.

Questions Presented:

- (1) What, if any, Rhode Island regulations, such as DOH/DBR guidance or Governor's Emergency Orders, are still in effect for masks and social distancing at municipal meetings such as those of the Town Council?
- (2) What is the status of the executive orders regarding remote public meetings?
- (3) What are the due process implications of hybrid participation at public hearings?

Short Answers:

- (1) None of the executive orders/regulations related to masks and social distancing remain in effect at this time. However, U.S. CDC and RI DOH guidance recommend that unvaccinated individuals either wear a mask or socially distance. Therefore, municipalities may wish to adopt their own policies to either inquire of the public as to their vaccination status, or provide room for social distancing, or require masking.
- (2) The executive order regarding remote public meetings expires on July 23, 2021, and it will not be renewed. Therefore, all meetings subject to the Open Meetings Act (the "OMA") taking place after this date must be in person, and there will no longer be a legal requirement to also provide for remote public access and/or participation.

- (3) A court would likely not find a due process violation by allowing remote participation by members of the public at public hearings.

Analysis:

1 - Status of Executive Orders re: Masks/Social Distancing

As you know, since former Governor Raimondo declared the existence of a disaster emergency due to COVID-19 by issuing Executive Order 20-02 on March 9, 2020, both she and her successor, Governor McKee, issued a number of executive orders that either waived certain laws or regulations or imposed new legal requirements, all aimed at responding to the emergency situation caused by the pandemic. All of these executive orders were issued pursuant to the authority of the Governor set forth in Title 30, Chapter 15 of the General Laws, known as the Rhode Island Emergency Management Act (the “Act”).

On July 6, 2021, Governor McKee signed into law legislation known as H 6122 Sub A, as amended, commonly known as the budget bill, into law. A copy is attached to this memo. As in past years, the budget bill not only makes appropriations for the next fiscal year, but also contains a number of other substantive changes to the law. Article 3, Section 3 contains significant amendments to the Act. (See pages 56-60 of the PDF.) The amendments to Sec. 30-15-9 of the Act include the addition of subsections (f), (g), and (h). Subsection (f) relates to the General Assembly’s authority to appropriate federal funds received for COVID relief. Subsection (g) states as follows:

(g) Powers conferred upon the governor pursuant to the provisions of subsection (e) of this section for disaster emergency response shall not exceed a period of one hundred eighty (180) days from the date of the emergency order or proclamation of a state of disaster emergency, unless and until the general assembly extends the one hundred eighty (180) day period by concurrent resolution.

Subsection (h) states as follows (note: brackets with short titles of the referenced executive orders have been added for ease of reference):

(h) Nothing contained in subsection (g) of this section shall be construed to apply to the following executive orders issued by the governor which shall remain in effect and may be extended by further executive order up to, but not beyond, September 1, 2021:

- (1) 20-06 [Expanding Access to Telemedicine Services];
- (2) 20-19 [Increasing Access to Unemployment Insurance];
- (3) 20-37 [Increasing State COVID-19 Response Capacity];
- (4) 20-46 [Public Meeting and Public Records Requests] as amended by 21-60 [First Amendment to Executive Order 20-46];
- (5) 20-72 [COVID-19 Emergency Regulations];
- (6) 21-26 [Amended and Restated Quarantine and Isolation Order];
- (7) 21-67 [Hospital and Community Based Health Care]; and

(8) 21-68 [Reopening Order], limited to paragraph 8 [Restaurants and Bars – Indoor and Outdoor Dining].

To summarize, in subsection (g), the General Assembly has limited the Governor's power significantly by providing that emergency powers are only valid for 180 days after the initial emergency declaration, unless the General Assembly specifically extends that deadline by concurrent resolution. In subsection (h), the General Assembly has set forth a specific list of the executive orders issued by Governors Raimondo and McKee that are not subject to that 180-day deadline.

On the same day that Governor McKee signed the budget bill into law, he issued Executive Order 21-76 (copy attached), which terminated the following executive orders:

- 20-06, Expanding Access to Telemedicine Services
- 20-16, Authorizing Waiver and Medicaid State Plan Amendments and Adjustments to Essential Provider Rates
- 20-17, Testing, Critical Supplies and Hospital Capacity Reporting
- 20-39, Authorizing Adjustments to Child Care Subsidies and Reimbursement Rates
- 21-68, Reopening Order
- 21-69, Requiring Masks or Cloth Face Coverings in Public
- 21-75, First Amendment To Executive Order 21-68

Therefore, the Rhode Island restrictions related to masks and social distancing, which were contained in executive orders 21-68 and 21-69, are no longer in effect, as they have been expressly terminated by the Governor. Further, due to the enactment of the budget bill, the only executive orders that remain in effect are the following (this list represents the list of specified executive orders in the budget bill, not including those executive orders that have been expressly terminated):

- 20-19 [Increasing Access to Unemployment Insurance];
- 20-46 [Public Meeting and Public Records Requests] as amended by 21-60 [First Amendment to Executive Order 20-46];
- 20-72 [COVID-19 Emergency Regulations];
- 21-26 [Amended and Restated Quarantine and Isolation Order]; and
- 21-67 [Hospital and Community Based Health Care]

2 – Executive Order regarding the OMA

With regard to Executive Order 20-46, as amended by 21-60, it should be noted that when the budget bill was enacted, those executive orders had been superseded by 21-72, which was issued on June 24, 2021. So the second bullet on the list above should be read to include 21-72, which expires on July 23, 2021. After this date, the provisions permitting remote access to public meetings by members of public bodies, and requiring remote access for members of the public at all public meetings, will no longer be in effect, and the state of the OMA will be as it was before the pandemic. **This means that ALL members of EVERY public body, such as the councilors, zoning board members, conservation commission members, etc, MUST be**

present in person in the room to count as part of the quorum and participate and vote in the meeting.

The only exceptions are the previously existing ones for active duty military members and for a member who has a disability as defined in chapter 87 of title 42, and cannot otherwise participate by reason of the disability. It should be noted that this exception for a disability cannot be exercised by the member on his or her own. He or she must first apply for and be granted a waiver from the Governor's Commission on Disabilities, and the Commission's procedures require a decision of a Hearing Board following a hearing. For more information, interested parties should contact Bob Cooper, Executive Secretary of the RI Governor's Commission on Disabilities.

As you know, among the various cities and towns in Rhode Island, and even within the same town, there were certain meetings that allowed public access, i.e., livestreaming, without any ability to participate, before the pandemic. Those council or board/commission meetings that were televised/livestreamed before the pandemic may continue to be made available by means such as YouTube, streaming through ClerkBase, etc., or even Zoom by use of its Webinar function without promoting any public members to the panel. As before COVID, such remote public access goes above and beyond the requirements of the OMA and is not required.

3 – Remote Participation by Members of the Public at Public Hearings

Finally, we've been asked whether hybrid participation (meaning, some members of the public attending in person and some attending and participating via remote means) at public hearings, whether before a city/town council, zoning board, or planning board, would present any due process issues. To our knowledge, no public meetings in Rhode Island before the pandemic offered a remote option for participation. It is our understanding and advice, based on our research and on the document entitled "Guidance on Public Bodies Returning to In-Person Meetings and Remote Public Participation in Open Meetings" issued by the Office of the Attorney General on July 23, 2021, that nothing in the Open Meetings Act prohibits participation via remote means for members of the public (as opposed to council/board members). Therefore, just as it was before the pandemic, this option would be at the discretion of each municipality.

The Attorney General goes on to note that "Nothing in the language of the OMA expressly prohibits members of the public from participating remotely. Additionally, offering remote participation to members of the public is consistent with the intent of the OMA, which is for government business to be performed in an open and transparent manner that is accessible to the public." The Attorney General also notes that "that any such remote participation by members of the public must be able to be heard/observed by everyone in attendance at the in-person meeting and carried out in a manner that conforms with any other requirements of the OMA or other applicable laws."

However, the Attorney General declines to answer the question of allowing remote testimony in a public hearing. "We also note that although nothing in the OMA prevents members of the public from providing remote testimony, it is outside this Office's purview under the OMA to address whether doing so would conform with other legal requirements." (Emphasis added.)

While there is no case law directly on this point, it is more likely than not that a court would not find a due process violation solely by allowing remote access in a public hearing. First, with regard to public hearings on legislative matters, there is no due process right to be heard as a member of the public. “The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy.” See Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271, 283 (1984). For instance, enactment of a “zoning ordinance [is] a legislative act” and therefore “procedural due process [does] not require . . . notice or an opportunity to be heard.” Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield, 719 F. Supp. 75, 83 (D.R.I. 1989); see also Narragansett 2100, Inc., et al., v. Town of Narragansett, et al., WC-2020-0353 (R.I. Super. Ct., Taft-Carter, J., 6/1/21) (holding objectors to zoning ordinance amendment did not have a constitutional due process right to be heard on zoning ordinance amendment). Therefore, to the extent that the public has the right to be heard on an ordinance or zoning ordinance enactment or amendment, it is a matter of charter or statute and not constitutionally required. State law, RIGL 45-24-53, and local charters are silent on whether the public may participate remotely during a public hearing regarding an ordinance enactment or amendment.

While due process is not triggered by legislative hearings, “notice and an opportunity to be heard are required in judicial or quasi-judicial proceedings where the rights of specific individuals are being determined.” Smithfield Concerned Citizens for Fair Zoning, 719 F. Supp. at 83 (quoting Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915)). Therefore, constitutional considerations must be weighed in making decisions about zoning board and planning board procedures. The question at issue here is whether in-person confrontation of witnesses is required at administrative hearings, so as to prohibit the discretionary use of remote access. Case law indicates that due process does not require in-person confrontation at administrative hearings and, therefore, there is no due process problem with remote access.

As a starting point, the constitution doesn’t require a full-fledged trial at administrative hearings. For instance, it is a “well-settled rule that zoning boards of review are not required to observe strictly rules of evidence and that in the conduct of hearings they are not obliged to act with formality.” Tuite v. Zoning Bd. of Rev. of City of Woonsocket, 191 A.2d 155, 157 (R.I. 1963). “Hearsay is quite acceptable in administrative hearings.” In re Cross, 617 A.2d 97, 102 (R.I. 1992); Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 648 (R.I. 1981) (zoning board allowed to consider hearsay evidence). The admission of hearsay evidence at quasi-judicial administrative hearings necessarily means that cross-examination at such hearings may be limited or denied in certain instances. “The principle that hearsay evidence is admissible in administrative proceedings would be vitiated if a party could object to its admission on the ground that he was denied his right to cross-examination. The right to cross-examination, although important and useful, is not absolute.” Beauchamp v. De Abadia, 779 F.2d 773, 775–76 (1st Cir. 1985).

Because, through the introduction of pure hearsay evidence, the right of cross-examination may be denied altogether at a quasi-judicial administrative hearing without violating due process, a fortiori it does not violate due process for a local board to allow remote participation. In other

words, if a written expert report or abutter letter may be properly admitted at a zoning or planning hearing, which provides no method of cross-examining the author, it is entirely acceptable to allow remote, real-time access, which allows for cross-examination by remote means. To the extent in-person participation at these meetings would be required at all, it would purely be a matter of statute and not of due process.

Therefore, municipalities likely may either allow or disallow remote participation by applicants, objectors and the public (remembering that councilors/board members MUST be present in person) as they see fit, without violating constitutional or statutory restrictions. Considerations of cost and practicality will be paramount, and based on our experience with hybrid meetings in multiple communities, they present technical challenges that will require some investment of limited resources.