

Implications of the Pending Termination of the State of Emergency June 7, 2021

As you have all heard by now, the COVID-19 State of Emergency will be formally rescinded at 12:01 a.m. on June 15, 2021. Almost all of the COVID-19 related executive orders, Department of Public Health mandates, sector-specific workplace safety protocols, and gatherings and capacity limits will have expired as of May 29, 2021. Any such orders that were not rescinded as of May 29th will expire on June 15th, although certain school-related requirements remain in place. We have received several questions in the days since Governor Baker announced the pending termination of the State of Emergency, most commonly involving: the ability of public bodies to hold remote meetings after the State of Emergency ends; whether locally-declared states of emergency and associated orders should be rescinded; and, whether communities are required to re-open town offices and programs in light of the lifting of the State of Emergency. While there are certainly other questions, we wanted to address these most time sensitive issues.

Ability of Public Bodies to Meet “Virtually” as of June 15, 2021

Absent further action by the Legislature, the temporary authorization for public bodies to hold entirely “virtual” meetings will **expire** as of 12:01 a.m. on June 15th. It is critical to keep this issue in mind when posting public meetings, and posting and advertising public hearings, that will occur after, or be continued to a date after, the State of Emergency expires. The Governor has proposed a legislative extension to temporarily allow remote meetings to continue to occur after the State of Emergency expires, which would afford more time to transition from virtual to in-person meetings. However, given that June 15th is rapidly approaching, it is not clear that such legislative action will occur before the State of Emergency expires. Public bodies, therefore, should be prepared to resume fully in-person meetings as of June 15th. Note that there are no longer any state-imposed limitations on the number of people that may gather in a single indoor location, either with or without social distancing.

If you have already posted and/or advertised a “virtual only” public meeting or hearing that will occur June 15th or later, we recommend that:

- In the case of public meetings, where only 48 hours advanced notice is required (not counting Saturdays, Sundays, or legal holidays), you amend your meeting notices to reflect that the meeting will be held in-person, and specify the meeting’s physical location;
- In the case of public hearings, where statutory, regulatory, or local requirements mandate publication or other notice more than 48 hours in advance, you should consult with your counsel to determine what steps are necessary and permissible to update those notices to reflect a new meeting location;

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- If the meeting/hearing will be held both virtually and in person (see “Hybrid Meetings”, below), you should double check meeting/hearing notices to ensure that it is clear that the public’s in-person attendance is permitted and not prohibited.

Rules for Remote Participation

Assuming no further action by the Legislature before June 15th, the rules regarding remote participation that existed prior to the pandemic will again apply. Pursuant to 940 CMR 29.10, remote participation by less than a quorum of the public body is permitted, if adopted by the municipality’s Chief Executive Officer (usually the Mayor or Select Board, unless otherwise established by Charter or special act). Should the Select Board vote or the Mayor authorize the use of remote participation, that authorization will apply to all governmental public bodies in the municipality. Notably, local Commissions on Disabilities have independent authority to adopt remote participation rules for their meetings, either on a meeting-by-meeting basis or for all future meetings. The Chief Executive Officer and/or local Commission on Disabilities may adopt more stringent rules on remote participation than those set forth in 940 CMR 29.10, so long as those rules are consistent with and do not violate state or federal law.

As a refresher to the pre-pandemic remote participation rules, at the end of this eUpdate, you will find a bullet-point summary of the minimum requirements for remote participation under 940 CMR 29.10.

“Hybrid” Meetings

There is nothing in the Open Meeting Law that precludes the simultaneous broadcasting of an in-person public meeting or public hearing via technological means (such as live broadcast via local cable access, “Facebook Live”, Zoom, or other platform). Similarly, there is nothing in the Open Meeting Law that precludes a public body from accepting public comment or allowing public participation via virtual means. As a reminder, public bodies are not statutorily required to allow any public comment or participation in their meetings, unless there is a Charter provision, special act, or local ordinance or by-law mandating public comment or participation. Public hearings are a different matter, however, since the public’s right to participate is inherent in the hearing process.

While the lifting of the State of Emergency means that members of the public body will be limited in their ability to remotely participate in public meetings or hearings, the same is not true of members of the public. Now that there are no longer any state-imposed gathering limitations and the State of Emergency will shortly be lifted, the public must be allowed to attend open meetings in person, but they may also be afforded the opportunity to attend remotely. Whether or not to afford this additional opportunity for remote attendance and participation is a policy decision for each community.

If you do choose to offer both in-person and virtual attendance options, you should consider the impacts if a technology disruption occurs during the meeting. Must the meeting be recessed while the technological issues are attempted to be resolved, or must the meeting be terminated in the event that those technological issues cannot be resolved? The answer to this question likely depends upon how the meeting/hearing was noticed. If you offer both in-person and virtual attendance options, to avoid having to suspend or cancel a meeting due to technical difficulties you may wish to include on your meeting notices language such as:

“This meeting/hearing of [insert name of public body] will be held in-person at the location provided on this notice. Members of the public are welcome to attend this in-person meeting. Please note that while an option for remote attendance and/or participation is being provided as a courtesy to the public, the meeting/hearing will not be suspended or terminated if technological problems interrupt the virtual broadcast, unless otherwise required by law. Members of the public with particular interest in any specific item on this agenda should make plans for in-person vs. virtual attendance accordingly.”

Rescinding Locally-Declared States of Emergency and COVID-19 related mandates

Many municipalities declared a local state of emergency, in parallel with the Governor’s declaration of a State of Emergency based on particular local public health concerns. Now, however, the question arises as to whether those locally-declared states of emergency should be rescinded. If your locally-declared state of emergency is worded such that it is tied to the state-wide State of Emergency, it may expire on its own as of June 15th, without further action by the Select Board/Mayor. If not, you may wish to consider rescinding a locally-declared state of emergency to align with the June 15th expiration of the state-wide State of Emergency to avoid confusion resulting from an inconsistency with state procedures.”

A separate but related question is whether or not locally-adopted Mayor/Select Board/Board of Health orders, such as mask mandates, survive the rescission of state-level mandates. The continued application and enforcement of such orders may be difficult to defend once the State of Emergency is lifted, absent specific articulated public health conditions that may exist in any particular municipality. Like locally-declared states of emergency, you will want to examine your local COVID-19 related orders to see if they are worded so as to naturally expire when the state-wide State of Emergency expires, or whether formal action to rescind such orders is necessary. Moreover, should your municipality experience conditions that warrant the re-adoption of COVID-19 related orders after the State of Emergency expires, such local orders must have a basis in existing statutory authorities. Further, the Mayor/Select Board and/or Board of Health should make specific public health and safety-related findings supporting the re-adoption of local COVID-19 orders, such as a new COVID-19 outbreak in the municipality or designation of the municipality as being in the “red zone.” Furthermore, these local orders should be narrowly tailored to limit the scope of restrictions imposed to only those reasonable and necessary to address particular local conditions and protect public health and safety. For reference, please see our Guidance for Boards of Health Re: COVID-19, available [here](#), which provides a comprehensive review of local authorities to address the spread of infectious diseases.

Re-Opening of Municipal Buildings and Facilities

The lifting of the State of Emergency does not immediately require every municipality to re-open every municipal building and facility to the public, although there may be significant public and political pressure to do so. It is certainly reasonable that additional time may be required to “ramp up” operations, in light of the unanticipated lifting of the State of Emergency much earlier than originally planned. Common questions that arise with the re-opening of municipal buildings and facilities to the public include:

- Can we still require the public to wear masks when in City/Town Hall?
- Can we still require social distancing and observance of safety protocols, for both staff and officials, and members of the public?
- Can we require “proof of vaccination” for people entering City/Town Hall?

Whether you can do any of these things, and whether you should do any of these things, are two separate considerations. As far as wearing masks, social distancing, and observance of other safety protocols, these are now recommended practices by the State (as opposed to mandates), and you may wish to treat them similarly at the local level.

In terms of requesting proof of vaccinations, that is likely to be a “hot button” issue for the public and staff alike. Given that you may have to accommodate those who have religious or medical reasons for not being vaccinated, requiring proof of vaccination does not ultimately ensure that only vaccinated persons are permitted in municipal buildings or facilities. With this in mind, municipalities should weigh asking for proof of vaccination against the difficulties in applying a vaccination requirement across-the-board, as well as the potential for confrontations with those who are unvaccinated or who believe it is an intrusion on personal privacy to be asked for proof of vaccination. These, of course, are questions that each municipality should consider individually, and we again suggest that you consult with counsel to ensure that you have fully considered the legal ramifications to such a requirement.

We will continue to keep you updated on additional developments in light of the impending expiration of the State of Emergency, as well as the Legislature’s consideration of possible amendments to the Open Meeting Law. A reminder that we have established a **Coronavirus “hotline,”** at coronavirusinfo@k-plaw.com. A dedicated team of our attorneys is available through this hotline e-mail address to answer the most frequently-asked legal questions arising from COVID-19. One of these designated attorneys will respond promptly to your inquiries.

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Summary of minimum requirements for remote participation under 940 CMR 29.10

1. Chief Executive Officer adopts remote participation for local public bodies.
2. A quorum of the public body, including the Chair or whichever member will be chairing the particular meeting, must be physically present at the meeting location. The remaining members of the public body may participate via remote means. In the case of Commissions on Disabilities, only the Chair or person chairing the meeting must be physically present at the meeting locations; all other members may participate remotely.
3. “As soon as reasonably possible” prior to the meeting, any member of the public body who wishes to participate remotely must notify the Chair (or whomever will be chairing that particular meeting), of the reasons why that member’s physical attendance would be “unreasonably difficult.”
4. Where feasible, the Chair or person who will be chairing the meeting should provide members who will be participating remotely with meeting packets or other documents to be used at the meeting, in advance of the meeting.
5. At the start of the meeting, the Chair is required to identify by name those member(s) participating remotely, and the meeting minutes should reflect this information as well. The reasons for the remote participation do not need to be announced publicly, and no vote of the public body itself is required to permit an individual member’s remote participation.
6. All members participating remotely must be clearly audible to the members of the public body attending the meeting in person. If a video platform (such as Zoom, Microsoft Teams, GoToMeeting) is used, all members must be clearly visible to each other as well (which means that when video conferencing technology is used, members participating remotely must leave their video feed “on” during the meeting).
7. If there are technological difficulties during the meeting, the meeting generally should be suspended until those difficulties can be resolved. If those technological difficulties result in the disconnection of a remotely participating member, the time of disconnection must be noted in the meeting minutes.
8. All votes taken during open or executive session meetings in which one or more members participate remotely, must be taken by roll call vote and recorded as such in the meeting minutes.
9. If members of the public body are participating remotely in an executive session, each such member must also state, at the start of the executive session, that no other person is present and/or able to hear the discussion at the remote location, unless the public body votes to approve that third party’s presence.

The full remote participation requirements can be found at 940 CMR 29.10. Any locally-adopted remote participation policies or rules should also be consulted.