



MEMORANDUM

TO: Fredericksburg City Council

FROM: Kathleen Dooley, City Attorney
Dori Martin, Assistant City Attorney

DATE: April 2, 2020

RE: Continuity of Government during the COVID-19 Pandemic

Issue:

Should the City Council adopt an ordinance to assure continuity of government during the COVID-19 pandemic?

Recommendation:

Yes. COVID-19 presents a threat to public health unlike any the City has experienced in recent history. During the current state of emergency, it is crucial to take all necessary steps to ensure that City government can continue to conduct business, perform its essential functions, and provide quality services to the public.

The existing framework for conducting government business in physical, in-person meetings that are open to public attendance does not contemplate a pandemic like the one we are experiencing. The directives that have been issued by the Governor in recent weeks limiting gatherings of people have presented a challenge for local government to figure out a way to operate with transparency and openness, while respecting the restrictions the Governor has put in place to slow the spread of the virus within our community.

This ordinance provides a solution by setting up a temporary framework that would allow the City Council and other City and regional bodies to continue to function in these special circumstances by holding electronic meetings and hearings when they deem it necessary to ensure the continuity of government.

Background:

On March 12, 2020, Governor Ralph S. Northam issued Executive Order 51 declaring a state of emergency for the Commonwealth of Virginia in response to the novel coronavirus (COVID-19) pandemic. The City Manager, as the City's Director of Emergency Management, pursuant to City Code § 26-36 and Virginia Code § 44-146.21, issued a Declaration of Local Emergency on March 16, 2020

ITEM #4B

in response to the imminent threat of disaster and danger to public health posed by the spread of the disease. This declaration was affirmed by City Council at a special meeting on Friday, March 20, 2020.

COVID-19 spreads from person-to-person, transmitted via respiratory droplets, and can be spread from an infected person who does not have symptoms to another person. No current vaccine or known treatment options exist at this time. On March 23, 2020, in response to the ongoing spread of the virus, Governor Ralph S. Northam issued Executive Order #53, which significantly limits person-to-person contact to prevent community spread. On March 29, 2020, President Trump announced that federal social distancing guidelines limiting in-person gatherings to no more than 10 people assembled in a single location would be in place until April 30, 2020. Most recently, on March 30, 2020, the governor issued a stay-at-home order for all individuals in the Commonwealth, effective until June 10, 2020.

The Virginia Freedom of Information Act requires meetings of public bodies to be conducted in public and in person. This requirement is at odds with the safety directives that have been issued at the state and federal levels to limit in-person contact, particularly in confined spaces. Accordingly, while conditions make it unsafe to gather in one location, special procedures should be considered to allow for public meetings to be held remotely, using electronic communications technology to connect public bodies with the community.

Additionally, the disaster caused by the spread of COVID-19 may make it impracticable for City government to meet all regular deadlines and comport with some time-consuming rules, formalities, and procedures. However, government must take measures to ensure it can continue to perform essential functions and provide services to the public to the extent possible.

This ordinance uses the authority provided by Virginia Code § 15.2-1413 to craft methods and special procedures that will ensure the continuity of City government through the end of this disaster. To that end, it includes provisions for remote meetings and suspends certain deadlines and procedures. This approach was endorsed in a March 20 opinion from Attorney General Mark Herring, which states that local actions can be taken under that statute “in light of the ongoing emergency, ‘[n]otwithstanding any contrary provision of law, general or special,’ including VFOIA.”

The City values transparency in government and robust public participation. However, the emergency measures put in place by the Governor to mitigate the spread of COVID-19 are needed to protect the health and safety of our community. By enabling public meetings to continue remotely, Council can take responsible measures to protect the public, while incorporating openness and public input, and keeping our City government working through this emergency.

Fiscal Impact: None



April 7, 2020
Special Meeting
Ordinance No. 20-__

MOTION:

SECOND:

RE: An Ordinance to Address Continuity of City Government During the Pendency of a Pandemic Disaster

ACTION: APPROVED; Ayes: 0; Nays: 0

FIRST READ: _____ **SECOND READ:** _____

IT IS HEREBY ORDAINED by the Fredericksburg City Council:

Article I. Purpose.

On March 12, 2020, Governor Ralph S. Northam issued Executive Order 51 declaring a state of emergency for the Commonwealth of Virginia in response to the novel coronavirus (COVID-19) pandemic. The City Manager, as the City's Director of Emergency Management, pursuant to City Code § 26-36 and Virginia Code § 44-146.21, issued a Declaration of Local Emergency on March 16, 2020 in response to the imminent threat of disaster and danger to public health posed by the spread of the disease. This declaration was affirmed by City Council at a special meeting on Friday, March 20, 2020.

On March 23, 2020, Governor Ralph S. Northam issued Executive Order #53, which acknowledged the ongoing threat COVID-19 presents to our communities, prompting the need to significantly limit person-to-person contact to slow the spread of the virus. Consequently, this order limits in-person gatherings to no more than 10 people assembled in a single location. The Governor expanded on this directive by issuing Executive Order #55, a "stay-at-home order," on March 30, which will remain in effect until June 10, 2020.

City Council, in Resolution 20-21 confirming the Declaration of Local Emergency, acknowledged that COVID-19 is a communicable disease that presents a real and substantial threat to public health. The Council finds that the severity of this threat constitutes a "disaster" as defined by Virginia Code § 44.1-146.16.

Virginia Code § 15.2-1413 provides that a locality may, by ordinance, provide a method to assure continuity of government in the event of a disaster, notwithstanding any contrary provision of law, for a period not to exceed six months after any such disaster. The Attorney General of Virginia confirmed this authority in an opinion issued March 20, 2020. This emergency ordinance, which is enacted pursuant to Virginia Code § 15.2-1413, and which City Council deems necessary to ensure continuity of City government during the disaster caused by the COVID-19 pandemic, promotes public health, safety, and welfare and is consistent with the laws of the Commonwealth of Virginia, the Constitution of Virginia, and the Constitution of the United States of the America.

Article II. Rules and Procedures.

Section 1. Succession to Preside over Meetings. In the event that both the Mayor and Vice-Mayor are unavailable to participate in a meeting of City Council due to any reason, including illness, isolation, or quarantine, the participating members of Council shall elect a presiding officer *pro tem* to execute the duties of presiding at that meeting.

Section 2. Quorum. Notwithstanding any other provision of law, if a number of members of Council are unavailable to participate in a meeting due to reasons associated with COVID-19, including illness, isolation, or quarantine, and the absence of those members leaves fewer members than the number required by law to act, the remaining member or members shall constitute a quorum for the conduct of business and have authority to act by majority vote.

Section 3. Suspension of City Code Chapter 2, Article II Rules and Procedures. The following sections in Chapter 2 (Administration), Article II (City Council), of the Fredericksburg City Code are hereby suspended.

3-1. Section 2-39, Order of Business at Regular Meetings. Requirements that the format of Council agendas shall be set by resolution and shall include a consent agenda are hereby suspended to allow for modifications of the agenda format as needed by the City Clerk.

3-2. Section 2-44, Procedure for Adoption of Ordinances and Resolutions. Requirements for second readings of ordinances and certain resolutions are hereby suspended to allow the second readings of those ordinances and resolutions to be held on the same day and at the same meeting as their introductions.

3-3. Section 2-52 Members Leaving before Adjournment. Requirement that members entered as present shall not, without leave of the presiding officer leave a meeting until the meeting is

adjourned is hereby suspended to permit unannounced absences due to emergency, or, in the case of an electronic meeting, due to technical difficulty.

Section 4. Suspension of Deadlines. City personnel are encouraged to take action as is practical and appropriate to meet deadlines established under state law or city ordinance; however, notwithstanding any provision of law, regulation, or policy to the contrary, any deadlines requiring action by the City, its officers, including the Commissioner of Revenue and Treasurer, City employees, or any Public Entity as defined in Article III, below, are suspended. Time frames for review or expedited reviews are also suspended. Failure to meet any deadline or time frame will not constitute a default, violation, approval, ratification, or recommendation.

Section 5. Suspension of Inconsistent Policies. Any other rules, bylaws, or policies adopted by the City Council or any other Public Entity are hereby suspended to the extent they are inconsistent with this ordinance and its authorizations.

Article III. Remote Public Meetings.

Section 1. Purpose and Findings. Council finds that the COVID-19 pandemic makes it unsafe to physically assemble in one location a quorum for public bodies, including the Council, the School Board, the Planning Commission, Board of Zoning Appeals, Architectural Review Board, Economic Development Authority, the Rappahannock Regional Solid Waste Management Board, and all other local and regional boards, commissions, committees and authorities created by the Council or to which the Council appoints all or a portion of its members (collectively “Public Entities” and individually “Public Entity”), or for such Public Entities to conduct meetings in accordance with normal practices and procedures.

Section 2. Remote Meetings Authorized.

2-1. Any regularly scheduled or regular meeting of any Public Entity may be canceled by the chair if there is no essential business that needs to occur or if conditions otherwise make it impractical to meet. Notice of the cancellation must be provided to the Public Entity’s members and the public as soon as practicable.

2-2. Any meeting or activities which require the physical presence of members of the Public Entities may be held through real-time electronic means, including audio, telephonic, video, or other practical electronic medium, without a quorum physically present in one location.

2-3. Prior to holding a remote meeting in accordance with this Article, the Public Entity shall provide public notice at least 3 days in advance of the remote meeting, or, in the case of a special or emergency meeting, in accordance with applicable special notice requirements. Such notice shall include a statement that the meeting is being held through electronic means, and identify how the public may access the meeting and, if applicable, offer comment.

2-4. Any such remote meeting shall be closed to in-person public attendance and open to electronic public access. Public access for City Council meetings shall, when feasible, include live broadcast available on all City public access television channels, the City website, and the City Government Facebook page. Additional methods may be used. Other Public Entities shall require public access consistent with their capabilities.

2-5. Any remote meeting held pursuant to this Article shall state on its agenda and at the beginning of the meeting that it is being held pursuant to and in compliance with this Ordinance; identify Public Entity members physically and/or electronically present; identify the persons responsible for receiving public comment, if applicable; and identify notice of the opportunities for the public to access such electronic meeting.

2-6. Any Public Entity holding a meeting remotely pursuant to this Article, for which a public comment period would be provided if that meeting were held in person, may provide a method for soliciting public comment in advance of or during the meeting. All such public comments will be provided to members of the Public Entity at or before the electronic meeting and made part of the record for such meeting.

Section 3. Remote Public Hearings Authorized.

3-1. Non-emergency public hearings may be postponed to a future date, when a regular meeting can be held with a quorum of the Public Entity physically present. The Clerk of Council is authorized to reschedule public hearings and provide notice as appropriate.

3-2. Public hearings on essential business that needs to occur, may be held in accordance with the requirements of this section.

3-3. The Public Entity shall open the public hearing comment period, receive any comments that may have been submitted in advance, and continue the matter to its next meeting.

3-4. Public comments may be received in writing up to 1 hour prior to the next meeting, addressed to the Clerk of Council or other official designated by the Public Entity, by U.S. Mail, e-mail, or hand delivery to the drop box located by the front door of City Hall; and by additional methods identified by the Public Entity and included in the meeting notice in accordance with Section 2 of this Article.

3-5. Public Comments shall be compiled by the Clerk of Council, or other official designated by the Public Entity to receive comments, and delivered to each member of the Public Entity for review at or before the meeting at which the matter is scheduled to be concluded. All comments shall be made part of the meeting record.

Section 4. Minutes of Meetings.

4-1. Minutes of all remote meetings held pursuant to this Article shall (1) state that it is being held pursuant to and in compliance with this Ordinance, (2) identify the specific electronic means by which the meeting was conducted and which members participated, and (3) specify the methods by which the public was given the opportunity to access the meeting and provide comment.

4-2. Minutes shall otherwise conform to the requirements of law.

4-3. The Public Entities may approve minutes of an electronic meeting at a subsequent electronic meeting and shall later approve all such minutes at a regular or special meeting after the disaster has ended.

Article IV. Effective date; Expiration.

This ordinance is effective immediately and shall remain in full force and effect, unless amended, readopted, or repealed by City Council, for a period not exceeding 6 months after the end of the COVID-19 disaster.

Votes:

Ayes:

Nays:

Absent from Vote:

Absent from Meeting:

Approved as to form:

Kathleen Dooley, City Attorney

Clerk's Certificate

I, the undersigned, certify that I am Clerk of Council of the City of Fredericksburg, Virginia, and that the foregoing is a true copy of Ordinance No. 20- duly adopted at a meeting of the City Council meeting held April 7, 2020 at which a quorum was present and voted.

Tonya B. Lacey, CMC
Clerk of Council

Kathleen Dooley
City Attorney

Dori Martin
Assistant City Attorney



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CHECKLIST FOR MEETINGS BY ELECTRONIC COMMUNICATION MEANS

VIRGINIA CODE §2.2-3708.2(A)(3)

(draft) April 7, 2020 v.2¹

The COVID-19 public health emergency may require Fredericksburg boards, commissions, authorities and other public bodies to meet “by electronic communication means,” without a quorum physically present, either by conference call or video meeting software. Meeting by electronic communication means is generally prohibited by the Virginia Freedom of Information Act, but it is permitted in an emergency, so long as certain requirements are met.

This legal checklist will assist meeting organizers and participants meet the requirements of FOIA for meetings “by electronic communication means.” This guidance is prepared for the public bodies of the City of Fredericksburg; members should also feel free to email the City Attorney or Clerk of Council for additional advice or guidance.

In convening an electronic meeting, or participating in one, members of the public body must bear in mind the importance of maintaining a high level of public trust and confidence in local government. As stated in FOIA: “The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. . . . every meeting shall be open to the public . . . [t]he provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government.”

¹ Va. Code §15.2-1413 authorizes City Council to adopt an ordinance to provide a method to assure continuity in government. Ordinances adopted under this authority, particularly if they authorize departures from otherwise-governing state law – must be carefully limited in scope to allow the locality to assure continuity in its government. They are limited in effect to a period not exceeding six months. City Council adopted such an ordinance, Ord. 20-___, at a special meeting on April 7, 2020. **This updated guidance reflects the authority granted in that ordinance, and supersedes the guidance provided on March 25, 2020.**

1. DEFINE “MEETING BY ELECTRONIC COMMUNICATION MEANS.”

- A meeting “by electronic communication means” under §2.2-3708.2(A)(3) is one without a quorum of the public body physically assembled at one location.

If a quorum of the public body is physically assembled at one location, but one or more members call in to the meeting, then other provisions of FOIA apply (e.g. the “remote participation” rules in 2.2-3708.2(A)(1) and (2).)

2. THREE CONDITIONS FOR A MEETING BY ELECTRONIC COMMUNICATION MEANS:

- ✓ **Governor has declared a state of emergency.**

Governor Northam issued Executive Order Number Fifty-One, “Declaration of State of Emergency due to Novel Coronavirus (COVID-19) on March 12, 2020.

Governor directs “state and local governments to render appropriate assistance to prepare for this event, to alleviate any conditions resulting from the situation, and to implement recovery and mitigation operations and activities so as to return impacted area to pre-event conditions as much as possible.”

- ✓ **The catastrophic nature of the declared emergency makes it impracticable or unsafe to assemble a quorum in a single location.**

Coronavirus is a “communicable disease of public health threat.” COVID-19 spreads from person-to-person, transmitted via respiratory droplets, and can be spread from an infected person who does not have symptoms to another person. No current vaccine or known treatment options exist at this time.

In the press release accompanying EO 51, Governor Northam “is also urging localities and non-profits to limit large public events, effective immediately.” Governor Northam’s Executive Order #55, issued on March 30, 2020, directs Virginians to “stay at home.” This stay at home order is consistent with advice by the President of the United States, the World Health Organization, the Centers for Disease Control, and the Virginia Department of Health that social distancing is critical to stopping the spread of COVID-19.

City Council Ordinance 20-__ includes a finding that the COVID-19 pandemic makes it unsafe to physically assemble in one location a quorum for public bodies.

- **The purpose of the meeting is to conduct the essential business of the public body, for continuity in government.**

Ord. 20-__ authorizes any Public Entity, as defined in the ordinance,² to cancel any regularly scheduled or regular meeting if there is no essential business that needs to occur or if conditions otherwise make it impractical to meet.

Ord. 20-__ then authorizes any Public Entity to hold any meeting through real-time electronic means, including audio, telephonic, video, or other practical electronic medium, without a quorum physically present in one location.

City Council Resolution 20-21, Confirming the City Manager’s Declaration of a Local Emergency Due to COVID-19, recited several of the threats of COVID-19 to the safety, health, welfare, convenience, and prosperity of the City and its residents, including a substantial threat to the viability of existing and new local businesses, commercial activity, and economic development in the City, with detrimental impacts on local residents, business owners, business and development prospects, and local tax revenue generation, in addition to the required annual budget process. This resolution may be referred to in determining the “essential business” of the public body.

3. PUBLIC NOTICE OF THE MEETING:

- Prior to holding a remote meeting in accordance, the Public Entity shall provide public notice at least 3 days in advance of the remote meeting, or, in the case of a special or emergency meeting, in accordance with applicable special notice requirements. Such notice shall include a statement that the meeting is being held through electronic means, and identify how the public may access the meeting and, if applicable, offer comment.
- The notice contains the date and time of the meeting, and identify how the public may access the meeting and, if applicable, offer comment.

² A “Public Entity” covered by Ord. 20-__ is defined as: the Council, the School Board, the Planning Commission, Board of Zoning Appeals, Architectural Review Board, Economic Development Authority, the Rappahannock Regional Solid Waste Management Board, and all other local and regional boards, commissions, committees and authorities created by the Council or to which the Council appoints all or a portion of its members (collectively “Public Entities” and individually “Public Entity”).

- The Public Entity will give notice of the date and time of meetings by posting the notice on the City's and/or its own official public government website.
- The Public Entity will send a copy of the meeting notice to the Clerk of Council, who will arrange to post the notice at the bulletin board at Hurkamp Park, a prominent public location.
- Any person may subscribe to receive notices of public meetings through the City's _____ service.

4. MEETING AGENDA AND AGENDA PACKET:

- The meeting agenda shall state that the meeting is being held pursuant to and in compliance with City Council Ordinance 20-__.
- At least one copy of the agenda and all agenda packets and, unless exempt, all materials furnished to members of the Public Entity for the meeting shall be made available for public inspection through the City's or Public Entity's official governmental website at the same time such documents are furnished to members of the Public Entity.
- Upon request, the Public Entity will mail a hard copy of the agenda and agenda packet to the requester via U.S. Mail at no cost for the first copy of each for each meeting.

5. PUBLIC ACCESS TO THE MEETING:

- The public body shall make arrangements for public access to such meeting. Here are some examples for providing public access:

When the EDA met on Monday, March 23, the Chair was in City Council Chambers, along with City staff. Other members attended via conference call, so that their voices were audible. Public attendance was limited to 10 persons in Chambers. The Clerk of Council arranged for the City's video provider to live stream the meeting on the City's website and Governmental television channel, and the meeting was also live-streamed over Facebook Live. In addition, the meeting was audio-recorded by the secretary of the EDA. The meeting is still available through the City's website and Facebook page, and any member of the public may obtain a copy of the audio recording through a FOIA records request.

City Council met by Go To Meeting on March 20th. Again, the Clerk of Council was located in the Council Chambers, where she made arrangements with the City's video provider to

live-stream the meeting over the City's website and Governmental television channel. The meeting was also live-streamed over Facebook Live.

6. PUBLIC COMMENTS:

- Public comment time is not required by FOIA but is an important and traditional element of the meeting agendas of several Public Entities.
- Public comments may be received in writing up to 1 hour prior to the next meeting, addressed to the Clerk of Council or other official designated by the Public Entity, by U.S. Mail, e-mail, or hand delivery to the drop box located by the front door of City Hall; and by additional methods identified by the Public Entity and included in the meeting notice.

7. PUBLIC HEARINGS:

- Public hearings on certain matters, which are deemed by the Public Entity to be essential business, may be held in accordance with the requirements of Ord. 20-__. Other public hearings may be postponed to a future date, when a regular meeting can be held with a quorum of the Public Entity physically present.
- The Public Entity shall open the public hearing comment period, receive any comments that may have been submitted in advance, and continue the matter to its next meeting.
- Public comments may be received in writing up to 1 hour prior to the next meeting, addressed to the Clerk of Council or other official designated by the Public Entity, by U.S. Mail, e-mail, or hand delivery to the drop box located by the front door of City Hall; and by additional methods identified by the Public Entity and included in the meeting notice in accordance with Section 2 of this Article.
- Public Comments shall be compiled by the Clerk of Council, or other official designated by the Public Entity to receive comments, and delivered to each member of the Public Entity for review at or before the meeting at which the matter is scheduled to be concluded. All comments shall be made part of the meeting record.

8. OTHER REQUIREMENTS:

- A quorum of the public body must be assembled electronically – electronic meeting authority does not dispense with the need for a quorum.