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CHECKLIST FOR MEETINGS BY ELECTRONIC COMMUNICATION MEANS

VIRGINIA CODE §2.2-3708.2(A)(3)

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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. 20-05, 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 20-05 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. 20-05 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. 20-05 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.
- 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.

² A “Public Entity” covered by Ord. 20-05 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 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 emailed notices of public meetings through the City's "Newsflash" service, by subscribing through the City's home page. (From the "Community" menu item, select "Meeting Notifications." Sign in with an email address to subscribe to Calendar Notices and Agenda Notices for the City Council or the board or commission for which you would like to receive notifications.)

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 20-05.
- 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. 20-05. 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 hearing 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 hearing 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 public hearing 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.