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To Tim Swadley, Mayor
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From Matthew Dregne
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Re Recommendations Regarding Rules Authorizing Virtual Meetings

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INTRODUCTION

Public health concerns and meeting restrictions due to the COVID-19 pandemic in 2020 led municipal governments to use emergency powers to transition quickly from in-person meetings to virtual meetings. As much of the State and the Nation return to pre-pandemic "normalcy," many municipalities are considering whether to retain the virtual attendance options they offered through most of 2020. As there are advantages to both in-person and virtual attendance, municipalities may wish to take advantage of both options, to make meetings more accessible to government officials and the public.

It is our understanding that Stoughton is considering whether and how to allow City officials and the public to attend meetings either in person or virtually, by telephone or internet audio/video. There are two legal issues that need to be considered in connection with hybrid meetings – the Open Meetings Law, and the City's own ordinances and rules of procedure. We believe hybrid meetings can be structured to comply with and further the underlying purposes of the Open Meetings Law. Some adjustments to current City rules would be needed to implement virtual or hybrid meetings on a permanent basis. We recommend adopting additional rules to address certain issues that are particular to virtual meetings. We have prepared the enclosed procedural rules for the City's consideration. We have also enclosed the most recent copy of the procedural rules adopted by the common council. Once the City has decided how it wants to proceed, and what rules it wants to adopt, we recommend incorporating the rules relating to virtual meetings in the City's rules of procedure.

These issues are discussed in greater detail below.

DISCUSSION

1. *Virtual Meetings Can Be Made Reasonably Accessible To Comply With the Open Meetings Law.*

In March 2020, there was an immediate need for guidance on the applicability of Wisconsin's Open Meetings Law, Wis. Stat. §§ 19.81 to 19.98, as a result of public health concerns and public gathering restrictions due to the COVID-19 pandemic. At this time, the Wisconsin Department of Justice ("DOJ") released guidance on two occasions addressing these concerns. Per the DOJ, governmental bodies could meet the open meetings requirements while still adhering to social distancing practices.

The primary concern was meeting the "reasonably accessible" requirement under Wis. Stat. § 19.81(2). All meetings of all state and local governmental bodies must be held publically in places reasonably accessible to the public, and open to all citizens unless otherwise expressly required by law.

The Open Meetings Law "does not require that all meetings be held in publicly owned places but rather in places 'reasonably accessible to members of the public.'" 69 Op. Att'y Gen. 143, 144 (1980) (quoting 47 Op. Att'y Gen. 126 (1978)). As such, per the DOJ, telephone conference calls are an acceptable method of convening a meeting of a governmental body. *Id*. at 146. DOJ guidance further stated that video conference calls are acceptable as well. Wis. Dep't of Justice, *Wisconsin Open Meetings Law Compliance Guide* 11 (May 2019).[1]

To meet the requirement that the public must have accessibility to the meeting as well, the DOJ concluded that a governmental body could meet this obligation by providing the public with information (in accordance with notice requirements) to join the meeting remotely, even if there is no central location for the meeting. Wis. Dep't of Justice, *Office of Open Government Advisory: Coronavirus Disease 2019 (COVID-19) and Open Meetings* 2 (March 16, 2020).

A primary concern for the DOJ in March 2020 was the potential burden on individuals to meet the technological requirements of attending meetings remotely. People without a telephone or internet access, or those with disabilities that affect hearing, may not be able to attend telephonic or audio only meetings. The DOJ advised governmental bodies to plan ahead and make accommodations for such individuals. *Office of Open Government Advisory: Coronavirus Disease 2019 (COVID-19) and Open Meetings* at 2.

[1] https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/OML-GUIDE.pdf

Another concern of the DOJ was the accessibility of meetings that require visual aids or a determination of the credibility of a witness. Again, in these instances telephonic or audio only meetings place unreasonable restrictions on the ability of attendees to participate in the meeting fully. 69 Op. Att'y Gen. at 145. Considering these limitations, the DOJ advised that determining whether a meeting is "reasonably accessible" would need to be decided on a case-by-case basis. *Id*.

If structured properly, however, virtual meetings can meet the reasonably accessible requirement. To address the many concerns posed by virtual attendance, the DOJ issued follow up guidance on March 20, 2020, with a list of suggested actions governmental bodies could take to alleviate technological and practical issues raised by virtual meetings. Wis. Dep't of Justice, *Office of Open Government Advisory: Additional Information Regarding Coronavirus Disease 2019 (COVID-19) and Open Meetings* 1 (March 20, 2020). This guidance included suggestions on providing proper notice and alternative options for those with technological and physical limitations. It also provided guidance on procedural practices that would help make meetings more accessible. *Id*.

Allowing both in-person and virtual attendance of meetings would likely address these concerns. Appearing telephonically or through internet means gives government officials and public attendees more options. It allows those with distance, childcare, or other limitations to still attend meetings. Returning to in-person meetings, however, also provides an alternative to those who faced attendance limitations through the virtual options. In March 2021, the DOJ encouraged governmental bodies to retain practices adopted during the COVID-19 pandemic permitting remote attendance, as they advance the purpose of the Open Meetings Law to ensure government openness and transparency. Wis. Dep't of Justice, *Office of Open Government Advisory: Sunshine Week and the Continued Importance of Ensuring that Open Meetings are Reasonably Accessible During the COVID-19 Pandemic* 2 (March 15, 2021). Further, there are concerns that in-person meetings are not still fully accessible to all individuals given continued concerns regarding heightened health risks for many individuals as the pandemic continues. *Id.* at 1-2.

2. *Transitioning to Virtual or Hybrid Meetings Requires Amendments to the City's Ordinances, and Adoption of Procedural Rules to Manage Issues Particular to Virtual Meetings.*

Stoughton has chosen to conduct its meetings in accordance with certain rules adopted by the council, and by *Robert's Rules*. *Robert's Rules* requires a meeting to be conducted in-person, unless the organization's by-laws authorize electronic attendance. RONR (12th ed.) 9:30. Robert's Rules also states that if a body wishes to allow members to participate by electronic means, it should establish rules of conduct for electronic meetings, including methods for determining the presence of a quorum. RONR (12th ed.)

9:30-36.*Id*. 9:36. In the appendix to the 12th Edition, *Sample Rules for Electronic Meetings*, *Robert's Rules* provides sample rules for four types of virtual meetings that a body may conduct.

We note that the City has also prepared a short policy regarding attending meetings via remote access, which provides as follows:

> Attendance or participation by an elected City official or appointed citizen member via telephone, conference call, video conference call or any other electronic media shall be permitted for standing/non-standing committees and the City Council if reasonable arrangements can be made. If a member is unable to attend a City meeting, they must contact the City Clerk or the Chariperson of the committee to notify him/her of the absence by noon on the day of the meeting.

We have a number of concerns with this as a policy. First, it permits virtual attendance by elected or appointed officials only "if reasonable arrangements can be made." It says nothing about how such arrangements might be made, what would be reasonable, who would decides whether to allow virtual participation, and when such a decision would be made. It says nothing about virtual attendance by the public. And it does not address any of the issues particular to virtual meetings that are addressed in the enclosed draft policy.

We have prepared the enclosed draft procedural rules authorizing and regulating hybrid meetings for the City's consideration. We note that we have highlighted a few specific issues in the draft rules that the City may want to consider adjusting. Once the City decides how it would like to proceed, we can help incorporate the rules for virtual meetings in the City's existing procedural rules.

CONCLUSION

The DOJ's interpretation and guidance on the Wisconsin Open Meetings Law not only permits, but encourages the use of virtual meetings, even as Wisconsin transitions out of COVID-19 pandemic restrictions. Offering the public the option to attend in person or virtually further advances the purpose of the Open Meetings Law, which is to ensure the openness and transparency of governmental procedures.

To continue providing virtual options, Stoughton should look to the guidance from the DOJ on how to ensure virtual meetings are reasonably accessible to those with technological and physical limitations. While reopening meetings to in person attendance may alleviate some of these concerns, continuing to provide the most accessible options is in the spirit of the Open Meetings Law, and is most compliant with the "reasonable accessibility" requirement.

Stoughton's next step is to authorize and set clear and complete rules regarding the conduct of electronic meetings, as required by section 9:36 of *Robert's Rules*. The enclosed draft procedural rules, crafted with guidance from the most recent edition of *Robert's Rules*, provides a path forward to hybrid meetings for the City's consideration.