

## Flattening the COVID-19 Approval Delay Curve: Public Hearings in a Socially Distanced Virtual Universe

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As the government adapts to virtual hearings and meetings to maintain functioning of the courts and government while protecting the health of its employees and the public, lawyers and their clients find themselves needing to address traditional procedural due process issues in light of new technological tools and challenges. Because hearings and public meetings are the lifeblood of a law firm, we have been working on mastering the tools and challenges presented by the technologies upon which we now often depend to continue to move matters forward for clients across a wide spectrum of practice despite COVID-19 restrictions. This article shares the experience of our attorneys as we address the challenges of moving legal matters forward in this densely populated state which will continue to address health concerns well beyond the present state of emergency.

The courts and municipal and other governmental bodies have begun to embrace the new tools to continue operations. The Federal District Court of New Jersey acted early to encourage all judicial officers to "... conduct proceedings by telephone or videoconferencing where practicable and as permitted by law[...]"<sup>[i]</sup> State courts have followed suit, with Chief Justice Rabner's April 24 Order recognizing that "the effects of the COVID-19 crisis appear likely to continue..." and determining that because video and phone options are available, "suspensions and extensions do not need to be continued across the board in those matters and will conclude on May 11, 2020."<sup>[ii]</sup> The New Jersey Administrative Office of the Courts reported that "... the Judiciary went from having 21 pre-COVID virtual courtrooms . . . to 230 virtual courtrooms for routine court matters that can be streamed live to the public simultaneously"<sup>[iii]</sup> and "[s]ince transitioning to virtual operations, the courts have conducted more than 12,000 remote court events involving more than 80,000 participants."<sup>[iv]</sup> The Office of Administrative Law has also been conducting virtual proceedings.<sup>[v]</sup> Municipal Court sessions are also permitted to resume in a virtual (video or phone) format effective May 11, 2020.<sup>[vi]</sup>

Likewise, with respect to local government proceedings, the Division of Local Government Services within the New Jersey Department of Community Affairs (DLGS) recognized that "...hearings will likely need to be conducted by alternative electronic means. Given the visual nature of the materials used in planning and zoning meetings...video-conferencing technology will provide the most appropriate forum for hearings."<sup>[vii]</sup> The New Jersey Legislature also acted to enable local land use boards to keep things moving by allowing public bodies to provide notice of, and conduct meetings and public business by, electronic means during a state of emergency.<sup>[viii]</sup> Although legislation is pending that would extend deadlines for action on certain land use applications,<sup>[ix]</sup> very recently DLGS has exhorted local governmental units to recognize that:

Government is not closed. Due to the unknown duration of the current crisis, a government shutdown would harm our communities. Local units must continue to provide services, and access to services, in any manner not prohibited by executive order. . . . [I]t is imperative that local governments avoid backlogs in building permits and land use applications in order to facilitate economic recovery as we weather and emerge from the crisis."<sup>[x]</sup>

### Land Use & Redevelopment

Our Land Use and Redevelopment attorneys have found themselves addressing traditional due process questions in a whole new way as they prepare for conducting virtual meetings by municipal Planning and Zoning Boards and Governing Bodies which continue to move forward to address issues important to their communities, including redeveloper designations, site plan approvals and affordable housing compliance. For example, regarding notices of public hearings, P.L. 2020, c.11 permits notice to be provided by electronic means<sup>[xi]</sup> and provides for inclusion of information about web-meeting access as well as dial-in information for individuals without computer access. However, Wilentz attorneys Steve Tripp and Donna Jennings report hearing of concerns being expressed by board attorneys about whether objector's counsel will claim a violation of due process if, for example, an application hearing is interrupted by a poor internet connection at a critical point in the hearing. Consequently, we are finding that attorneys are willing to go forward with straightforward matters that are not likely to meet with resistance and are shying away from virtual meetings where significant objection is anticipated if a postponement of the application is an option.

Virtual meeting technology can provide positive features for hearings. It allows one to present and use exhibits that all participants can see either on computers or on flat screen televisions for those locations that are so equipped. However, we are considering whether/to what extent recommendations beyond those in the Municipal Land Use Law in an early (April 2) DLGS Guidance document can or should be followed, such as the recommendation that municipalities "consider posting [plans] for public review on and through the municipal website, dropbox, or some other online service that is accessible to the public, free of charge so that the ten day public access period is maintained," and the recommendation that "[m]embers of the public should be advised that they may contact the Board Secretary to receive a hard copy of the plans and application materials by mail or via an exchange site such as a drop/pick up box by appointment at a secure, public location such as the police station or at the municipal building, subject to any standard fees or charges."<sup>[xii]</sup> Whether and/or how hard copies of plans can be made available in the face of the Executive Order's social distancing requirements is a matter of local practice and circumstances.

A good feature of the virtual meeting technology allows the Chair to ensure that witnesses are prevented from talking over one another through use of muting and selection of a primary speaker. Similarly, the Chair can also control the much reported problem of disruptive interruptions in meetings that are open to the public by using a waiting room feature and technical tools to identify speakers. However, Steve Tripp and Donna Jennings have anticipated the need to weigh in on judgment calls regarding whether such means afford a sufficient opportunity for public comment.

A redevelopment lawyer on our team adapted quickly to obtain approvals of a comprehensive settlement of multiple pieces of litigation he was managing. As special redevelopment counsel, Robert Beckelman counseled a governing body regarding how to convene a "public" meeting to approve the settlement by ordinances right after the issuance of the Executive Order discouraging assemblages and unnecessary travel. He worked with the City Solicitor and Clerk to assure that the public meeting (which was conducted by telephone with only the Clerk and Council President in-person and City Hall open to the public) was in compliance with the Open Public Meetings Act and with the new requirements for notice by electronic access. The settlement also required a Planning Board meeting to review land uses ordinances the following week, pursuant to emergency amendments to facilitate electronic meetings, which meeting was conducted completely via video conferencing, as was the public hearing on the final adoption of the ordinances on April 7, 2020. He participated in each of the referenced meetings and was able to successfully discuss the ordinances and settlement and answer questions of the Board members, Council members and members of the public through the use of virtual meeting technology.

## **Litigation**

On the litigation side, virtual oral arguments in civil litigations have gone relatively smoothly. According to Wilentz Managing Partner Brian Molloy, "A video teleconference I had recently had technical difficulties, presumably because there were multiple attorneys participating. I believe the technical difficulties encountered were unique to the situation and the Court can hear multiple parties via video conferencing on the same

motion. In fact, I believe in the future many court appearances, such as case management conferences and non-dispositive motions, will all be virtual appearances.”

Early adapters to virtual hearing technology include Wilentz Criminal Law Shareholder, Darren Gelber who has shared his experience by collaborating within the Firm. He has had to develop the technical skills to address pressing legal matters through video-conferencing applications due to the Criminal Justice Reform Act which provided for first appearances before a court to be held on weekends and central judicial processing. While courts have yet to conduct full trials using video-conferencing, they have gained experience on motions, conferences and other court proceedings. While Gelber is aware of one instance in which a court has held a testimonial hearing via video-conferencing, this proceeding took place with the consent of all attorneys present without the court compelling it.

## Mediation & Arbitration

Another area of practice that has shown early success using video conferencing is mediation and arbitration. Our Employment Law Chair Maureen Binetti has served as the mediator on a dozen sessions since the Coronavirus shutdown as of the time of this article, noting that video-conferencing technology has offered significant advantages over standard conference calls. Mediations are often high-stakes, emotional endeavors, especially in the employment law practice. Using video conferencing, we can provide parties with the critical context that comes from looking someone in the eye during face-to-face interactions. In his work resolving a complex commercial dispute, Wilentz General Counsel and retired former Superior Court Judge Frank M. Ciuffani commented that “...the twelve participants in the recent mediation that I conducted enthusiastically engaged in the process and appreciated the opportunity to work through the complicated issues successfully without delay.”

## Administrative Agencies

The Office of Administrative Law has begun to use video conferencing successfully for both hearings and settlement conferences. Due to COVID-19, it is anticipated that in-person plenary hearings will not be conducted during May but emergent matters are being addressed either via telephone or virtual technology. Judges continue to seek parties’ participation in telephonic status conferences or oral arguments.

## Conclusion

Although some matters can wait until the current crisis is over, clients who need issues resolved in the near term future could be well served by employing these tools during the state of emergency. Also given the density of New Jersey, the return to “normal” will likely not be as quickly implemented as in other states, making implementation of effective digital meeting tools a critical tool for counsel for a longer term.

Lastly, although the present experience with video conferencing is not the perfect solution for all matters on a going forward basis, it has accelerated the use of technological advances in ways that could provide opportunities for cost savings, efficiency, information exchange, and potentially even improved access and greater due process and transparency.

## Endnotes

[i] *In re: Court Operations Under the Exigent Circumstances Created by COVID-19*, Standing Order 20-02, (D.N.J. March 16, 2020).

[ii] Omnibus Order issued by Chief Justice Rabner on April 24, 2020. In that Order, the Court repeated “its commitment to supporting court operations in a virtual format to the greatest extent practicable, subject to constitutional considerations and the limitations of our finite resources.”

[iii] Administrative Office of the Courts Press Release, April 14, 2020. <https://www.njcourts.gov/pressrel/2020/pr041420a.pdf>

[iv] Notice to the Bar, dated April 24, 2020.

[v] Message from Acting Director & Chief Administrative Law Judge Bass to the OAL Community dated April 21.

[vi] See Chief Justice Rabner’s Omnibus Order referenced in footnote 3 above. One municipality that has offered the opportunity for such virtual municipal court proceedings is Morristown: <https://www.townofmorristown.org/municipalcourt>

[\[vii\]](#) Planning Board and Zoning Board of Adjustments-Operational Guidance, issued by DLGS on April 2, 2020. See also DLGS Local Operational Guidance-COVID-19: Guidance for Remote Public Meetings in New Jersey.

[\[viii\]](#) P.L. 2020, c.11.

[\[ix\]](#) See S2346 and A3902.

[\[x\]](#) NJ Division of Local Government Services, Local Operational Guidance- COVID-19: Guidance to Facilitate Continuity of Operations, April 17, 2020.

[\[xi\]](#) When notice is provided only by electronic notice, “[t]o the extent practicable, a public body...shall limit public business discussed or effectuated thereat to matters necessary for the continuing operation of government and which relate to the applicable emergency declaration.” P.L. 2020, Chapter 11.

[\[xii\]](#) Planning Board and Zoning Board of Adjustments-Operational Guidance, issued by DLGS on April 2, 2020.

## **Attorney**

- Anne S. Babineau