



LEGAL DIVISION
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Memorandum

DATE: December 13, 2006
TO: Mayor and Council
FROM: Jim Gitz
RE: Questions about Electronic Attendance Rules

This memorandum is in response to some questions which were raised during the Committee as a Whole meeting earlier this week.

First, Council Member Chynoweth raised the issue of the 2/3 vote requirement to bar a member from electronic participation. This provision comes from the Home Rule Attorneys' Committee draft rules for the Illinois Municipal League.

The draft IML rules have two sets of model provisions. One alternative is to allow electronic attendance upon a majority vote of the members present each time a member seeks to attend electronically, provided that member meets one of the three reasons for an absence. This version effectively makes participation contingent upon a request which is individually approved by the body each time a member requests electronic participation.

The second version of the draft IML rules allows a member to attend electronically upon submitting a request unless the body, by a 2/3 vote, votes to exclude participation. This is the version I relied upon in drafting our Council rules. In effect, a member has a right to participate electronically if the member submits a request in advance which meets one of the three criteria, the City has the technical capacity to handle the request, and the Council finds no reason to exclude the participation, such as the request is not truly based on valid criteria. Even if an issue is raised, 2/3 of the body must concur for the member to be barred from participation.

I do not find a specific reference in the new Public Act for the 2/3 requirement. There is a provision in Section 7(c) of the new Act which provides that, "a majority of the public body may allow a member to attend a meeting by other means only in accordance with and to the extent allowed by rules adopted by the public body." Please note Section that Section 7(c) seems to envision some form of approval for the member to participate; the process is not automatic.

I believe this is the section upon which the IML based the 2/3 vote, i.e. that the body must adopt rules. This version of the draft IML rules provides for participation unless there is a vote to the contrary, thus giving greater latitude for electronic participation than the other version (which requires a majority affirmative vote each time a request is made). The IML Committee's 2/3 rule is a way of providing a check.

Council Member Chynoweth also raised the question of whether the Council should have any right to vote on a member's request for electronic participation. I believe some check is needed for three reasons. First, Section 7(c) indicates that the right is not automatic and contingent upon at least a majority of the Council concurring. Second, if a member does not meet the criteria for electronic attendance, and the Council is in possession of information confirming that fact, there must be a method to dispose of the issue in order to be in compliance with the new legislation. Third, it is possible that a major issue, such as a bond ordinance, could be decided by a narrow margin in which the electronic vote of a member could affect an ordinance's validity. In this event, you would want to have a provision in place to deal with obvious participation problems that could affect the legality of an action.

Second, Council-member Chynoweth, raised the question of what constitutes City business as defined by the new Act. The answer is, as stated at the meeting, "we don't know." The new Act does not define what constitutes City business. For that matter, it does not define what constitutes an emergency, a family emergency, or reasons of employment. These are all issues which the courts will decide over time unless the General Assembly chooses to step in.

I believe a reasonable working definition is: how close is the nexus between the Council member's absence and his/her duties as a member of the Council? For example, if you are out of town for a National League of City's meeting, there can be little question that such a trip is directly related to your duties as a Council member. The same would be true if you were visiting another city to examine recycling programs because of possible changes and improvements to Urbana's program. The connection becomes more tenuous if you were working on a Habitat for Humanity project and contending that because of your interest in housing issues, the absence is Council related. I doubt whether this latter example would meet the "nexus" test of being directly related to "business of the public body."

The third question raised at the Committee of Whole involves whether members of City of boards and commissions could be allowed to participate electronically on an informal basis without voting. The new Act provides little guidance on how to answer this question. The provisions of the new Public Act address member participation rights for a public meeting. Distinctions between attendance and voting are not drawn.

There are two aspects of the idea of allowing participation, but not voting for boards and commissions. One aspect focuses on the consequences of distinguishing between a member who is physically present and voting and one who is participating remotely and not voting. Why the distinction? What if the inability to vote affects the outcome of an issue? Would a court disapprove of a rule which provides for such a distinction?

The other aspect focuses on whether such a rule would merely involve a member of the advisory body utilizing the right of access to a public meeting as defined by the Act. In other words, if the meetings of the advisory body are public (and in some cases televised), why should a member of the advisory body not be allowed to hear the proceedings and participate remotely, even when not being allowed to vote?

I confess, I am not sure how a court would rule in the event of a challenge to such a procedure. However, I am troubled by the idea that a member can participate electronically, but cannot vote. I think a court might be troubled by that aspect as well. In this line of analysis, I think it ends up being a black and white issue. You either can participate fully by remote access, or you cannot. I don't think the new Act is intended to draw subtle distinctions and gradations between attendance and voting, (but it doesn't directly prohibit them either).

I think one way to resolve this issue, is to concentrate on developing the means for video conferencing for both the Council and its advisory boards and commissions. Video conferencing would allow a member not only to hear the proceedings, but presumably view public exhibits and testimony which might be a part of the proceeding. Likewise, the public (and other members) will be able to see as well as hear the member participating remotely. This would address some of my concerns about the validity of proceedings which are "quasi-adjudicatory" in nature. It would also provide a superior method of participation by electronic attendance.

If you have any questions, feel free to contact me.



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Memorandum

DATE: December 7, 2006
TO: Bruce Walden
FROM: Jim Gitz
CC: Mayor and Council Members
RE: Electronic Attendance at Public Meetings

Pursuant to Senate Bill 585 (Public Act 94-1058), the Council must adopt rules of electronic attendance and participation in order to comply with the Open Meetings Act definition of a “public meeting.” The Act is optional. A municipality can adopt rules; such adoption is not mandatory.

The new State law restricts the reasons for electronic attendance to: (1) personal illness or disability; (2) employment purposes or the business of a public body; or (3) a family or other emergency. A copy of the Public Act is attached.

Please note that while the new law restricts the reasons considered valid for electronic participation, it does not specify what kinds of events fall within each category. Personally, I am unsure what constitutes a “family or other emergency.” However, rather than attempt to give definition to such terms, I think the best course of action is to leave interpretation to the Mayor and Council and see whether any real problems arise. My hope is that everyone will use good judgment, but if that fails to be the case, we can amend the rules at a future date.

I have reviewed our City Code and the Council Rules of Procedure. I believe it is appropriate to amend our Code in Article II, Chapter 2, in regard to electronic attendance to provide for general authority. I have then reviewed and modified the Illinois Municipal League draft rules to implement the provisions of the new Section 2-31.

One of the changes I have made in the IML draft rules relates to the public’s ability to hear the member’s communication and votes. I have massaged this language to provide that this is a part of the ground rules, but that the Council is the sole judge of adequacy. My fear is that absent such qualifying language, a member of the public who is disappointed with the result of a particular vote could challenge the validity of the Council’s action citing this rule. I would like to limit the opportunity for mischief while retaining the spirit of the draft IML rules. I have also made other minor changes throughout.

Some members of the Council have expressed an interest in changing or adding to other Council rules and procedures. While there may be good reason to do so, I believe the electronic attendance and participation issue is best handled as a stand alone provision.

Although Public Act 94-1058 permits any public body to utilize electronic voting as provided therein, the attached Ordinance and suggested rules setting out a procedure governing electronic voting are tailored to city council members only because at this time I do not recommend that the various boards and commissions utilize electronic voting. Before considering extending electronic voting to boards and commissions, we need some experience with the electronic voting procedures set forth in the attached Ordinance and Rules to discover where the unintended consequences are lurking. Furthermore, I have concerns regarding due process considerations about "absentee voting" when the body involved is making an adjudicative decision affecting only one person (or a small number of persons) as opposed to legislating affecting everyone. Most of what our boards and commissions do are adjudicative hearings. In adjudicative type hearings, if electronic voting were allowed, while the absent member and interested party could hear each other, the visual element would be absent. Naturally at this time, there are no cases discussing this point.

Feel free to call me if there are any questions.

AMENDMENT TO ORDINANCE NO. 2006-12-148

Amend Section 2-31(a) by inserting before the last sentence in subsection (a) the following:

“Sec. 2-31 Electronic Attendance at Meetings.

(a) A member of the City Council may participate and vote electronically at public meetings, including Council meetings and Committees of the Whole, if the member is unable to physically attend because of: (1) personal illness or disability; (2) employment purposes or business related to the City of Urbana; (3) family or other major emergency. In order for such participation to be valid, the member must provide notice sufficiently in advance of the meeting for the City to be able to provide the technical means necessary to fulfill such a request. The Council may deny a member’s electronic attendance request by a 2/3 vote if the request does not meet one of the above criteria. A member may vote on motions and issues coming before the body, but his or her vote shall not count towards a quorum.

(b) For the purpose of this section, electronic participation means participation by telephone, video, or internet connection as provided by rules adopted by the council consistent with the provisions of Public Act 94-1058 amending the Illinois Open Meetings Act, ILCS 120/7. The electronic participation shall not be valid unless it provides means for the member to hear and participate in the discussion preceding any action of the council.

(c) For the purposes of this section, the mayor shall be treated as a member of the council and accorded the same rights of electronic participation.”

Amend the proposed Council rules by inserting a new sentence in Section 3(c), the additional phrase to read as follows:

(c) The member will be deemed authorized to attend the meeting electronically unless a motion objecting to the member's electronic attendance is made, seconded, and approved by two-thirds of the members of the City Council physically present at the meeting. Any motion of objection shall cite the basis for the objection. If no such motion is made and seconded, or if any such motion fails to achieve the required vote by the members of the City Council physically present at the meeting, then the request by the member to attend the meeting electronically shall be deemed approved by the City Council and the presiding officer shall declare the requesting member present. After such declaration by the presiding officer, the question of a member's electronic attendance may not be reconsidered.

ORDINANCE NO. 2006-12-148

AN ORDINANCE CODIFYING CITY COUNCIL VOTING PROCEDURES FOR ELECTRONIC ATTENDANCE AND ADOPTING RULES OF PARTICIPATION

WHEREAS, Public Act 94-1058, amends the Open Meetings Act and provides for electronic participation in lieu of physical presence at a public meeting as defined by the Act, provided that there is a quorum physically present at the meeting;

WHEREAS, to permit attendance by a means other than physical presence, the City of Urbana must adopt procedures that conform to the requirements and restrictions of the Open Meetings Act, 5 ILCS 120/7, as amended by Public Act 94-1058;

WHEREAS, the corporate authorities of the City of Urbana believe the public interest is served by allowing council members to attend public meetings other than by physical presence in compliance with the Open Meetings Act;

WHEREAS, the purpose of this Ordinance is to amend the Urbana City Code to conform with the intent expressed in these recitals by amending Article II, Chapter 2. Administration of the Urbana City Code to include electronic participation within “meetings” as defined in Section 120/1.02 of the Open Meetings Act, and to adopt rules for such participation;

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF URBANA as follows:

Section 1. Recitals. The preliminary paragraphs set forth above are incorporated herein as part of this Ordinance.

Section 2. City Code Amendment. Article II. Elected Officials of Chapter 2. Administration of the Urbana City Code is hereby amended by inserting a new Section 2-31, which shall read as follows:

“Sec. 2-31 Electronic Attendance at Meetings.

(a) A member of the City Council may participate and vote electronically at public meetings, including Council meetings and Committees of the Whole, if the member is unable to physically attend because of: (1) personal illness or disability; (2) employment purposes or business related to the City of Urbana; (3) family or other major emergency. In order for such participation to be valid, the member must provide notice sufficiently in advance of the meeting for the City to be able to provide the technical means necessary to fulfill such a request. A member may vote on motions and issues coming before the body, but his or her vote shall not count towards a quorum.

(b) For the purpose of this section, electronic participation means participation by telephone, video, or internet connection as provided by rules adopted by the council consistent with the provisions of Public Act 94-1058 amending the Illinois Open Meetings Act, ILCS 120/7. The electronic participation shall not be valid unless it provides means for the member to hear and participate in the discussion preceding any action of the council.

(c) For the purposes of this section, the mayor shall be treated as a member of the council and accorded the same rights of electronic participation.”

Section 3. Electronic Participation Rules. The corporate authorities hereby adopt the Electronic Attendance at Meetings Rules attached hereto. The mayor and council retain the right to change or modify these rules at their discretion, provided such changes are in accordance with the Public Act 94-1058, or as hereafter amended. Upon adoption, the attached rules shall become a part of the Urbana City Council Procedures.

Section 4. Severability. In the event that any section, clause, provision, or part of this Ordinance shall be found and determined to be invalid by a court of competent jurisdiction, all valid parts that are severable from the invalid parts shall remain in full force and effect.

Section 5. Effective Date. This Ordinance shall be in full force and effect after its passage and approval and publication according to law.

This Ordinance is hereby passed by the affirmative vote, the “ayes” and “nays” being called, of a majority of the members of the Council of the City of Urbana, Illinois, at a meeting of said Council.

PASSED by the corporate authorities this _____ day of _____,
_____.

AYES:

NAYS:

ABSTAINS:

Phyllis D. Clark, City Clerk

APPROVED by the Mayor this _____ day of _____,
_____.

Laurel Lunt Prussing, Mayor

**CITY OF URBANA COUNCIL RULES
ELECTRONIC ATTENDANCE AT MEETING RULES**

Section 1. **Rules Statement.** It is the policy of the City of Urbana corporate authorities that any member of the City Council may attend any open or closed meeting of the Urbana City Council via electronic means (such as by telephone, video or internet connection) provided that such attendance is in compliance with these rules and any applicable laws.

Section 2. **Prerequisites.** A member of the City Council may attend a meeting electronically if the member meets the following conditions:

(a) The member shall notify the City Clerk at least six (6) hours before the meeting, unless impractical, so that necessary communications equipment can be arranged. Inability to make the necessary technical arrangements shall result in denial of a request for remote attendance.

(b) The member must assert one of the following three reasons why he or she is unable to physically attend the meeting.

(1) The member cannot attend because of personal illness or disability; or

(2) The member cannot attend because of employment purposes or the business related to their duties with the City of Urbana; or

(3) The member cannot attend because of a family or other major emergency.

(c) Personal trips, vacations, or personal convenience shall not constitute a valid reason for electronic attendance, such actions being at variance with the intent of Public Act 94-1058.

Section 3. **Authorization to Participate.**

(a) The City Clerk, after receiving the electronic attendance request, shall promptly inform the mayor or person expected to be the presiding officer at such meeting of the request for electronic attendance.

(b) After establishing that there is a quorum physically present at a meeting where a member of the City Council desires to attend electronically, the presiding officer shall state and the minutes shall record that a notice was received by a member of the City Council in accordance with these Rules.

- (c) The member will be deemed authorized to attend the meeting electronically unless a motion objecting to the member’s electronic attendance is made, seconded, and approved by two-thirds of the members of the City Council physically present at the meeting. If no such motion is made and seconded, or if any such motion fails to achieve the required vote by the members of the City Council physically present at the meeting, then the request by the member to attend the meeting electronically shall be deemed approved by the City Council and the presiding officer shall declare the requesting member present. After such declaration by the presiding officer, the question of a member’s electronic attendance may not be reconsidered.

Section 4. **Adequate Equipment Required.** The member participating electronically and other members of the City Council must be able to communicate effectively. Further, the City shall make a reasonable effort to insure that members of the audience are able to hear all communication and votes of the member. Before allowing electronic attendance at any meeting, the council shall provide equipment adequate to accomplish this objective at the meeting site, but the City Council shall be the sole judge of such adequacy.

Section 5. **Minutes.** Any member attending electronically shall be considered an off-site attendee and counted as present electronically for that meeting, if the member is allowed to attend. The meeting minutes shall also reflect and state specifically whether each member is physically present or present by electronic means. In accordance Sec. 2-31 of the Urbana City Code, a member actually attending electronically, shall not count towards a quorum.

Section 6. **Rights of Remote Member.** A member permitted to attend electronically shall be entitled to express his or her comments during the meeting and participate in the same capacity as those members physically present, subject to all general meeting guidelines and procedures previously adopted and adhered to. The member attending electronically shall be heard, considered, and counted as to any vote taken. Accordingly, the name of any member attending electronically shall be called during any vote taken, and his or her vote counted and recorded by the City Clerk and placed in the minutes for the corresponding meeting. A member attending electronically may leave a meeting and return as in the case of any member, provided the member attending electronically shall announce his or her leaving and returning.

Section 7. **Application to the Mayor.** To avoid any ambiguity in interpretation, these rules shall apply to the mayor as well as to members of the City Council, regardless of whether the section in these rules uses the term “corporate authorities” “City Council,” “Council,” or “member.”

Section 8. **Attendance Form.** The council hereby adopts the attached Attendance Form for use as a request for Electronic Participation and/or for a record of the member's e-mail, telefax, or telephone request.

These rules are effective this _____ day of
_____, 2007.

ATTEST:

City Clerk

ELECTRONIC ATTENDANCE REQUEST

I hereby request to electronically attend the meeting of the City of Urbana Council or Committee on _____, 200_____, at _____ p.m.

I am eligible to participate electronically because of [check one]:

- _____ (1) personal illness or disability
- _____ (2) employment purposes or business of the public body
- _____ (3) a family or other emergency

During the meeting, I will be at the following location:

And reachable at the following phone number: _____

Signature of Member

Date

OR

Request received by _____ phone _____ e-mail _____ fax _____ other

Signature of City Clerk

Date