

**BOARD OF SUPERVISORS
PUBLIC HEARING
STAFF REPORT**

SUBJECT: **Proposed Ordinance to Suspend Certain Deadlines and to Modify Public Meeting and Public Hearing Practices and Procedures to Address Continuity of Operations During COVID-19 Pandemic Disaster**

ELECTION DISTRICT(S): Countywide

CRITICAL ACTION DATE: At the pleasure of the Board

STAFF CONTACT(S): Tim Hemstreet, County Administrator
Leo Rogers, County Attorney

PURPOSE: To consider adoption of an ordinance that will allow the Board of Supervisors (“Board”) and other public bodies within the County, including their respective officers and staff, to maintain continuity of government and operations during the pendency of the COVID-19 pandemic disaster (“Continuity Ordinance”). This proposed ordinance would supersede and replace an emergency ordinance adopted by the Board during an emergency meeting held on March 25, 2020 (“Emergency Ordinance”), and would be in effect for no longer than six months.

RECOMMENDATION(S):

Staff recommends that the Board adopt the proposed Continuity Ordinance included as Attachment 1.

BACKGROUND: On March 12, 2020, Governor Ralph S. Northam issued Executive Order Fifty-One declaring a state of emergency for the Commonwealth of Virginia raising from the novel Coronavirus (COVID-19) pandemic. In Executive Order Fifty-One, the Governor expressly acknowledged that the anticipated effects of COVID-19 constitute a “disaster” as defined in Virginia Code § 44-146.16. In recent weeks, federal, state and local governmental and health officials have issued guidance advising or directing that in-person gatherings of 10 or persons should be avoided or prohibited, and advising individuals to maintain “social distancing” of at least 6 feet. On March 23, 2020, the Governor issued Executive Order Fifty-Three, which expressly prohibits “public and private in person gatherings of 10 or more individuals.”

On March 16, 2020, the County Administrator, acting as the Director of Emergency Management, declared a local emergency due to the COVID-19 Pandemic. At the Board Business Meeting on

March 17, 2020, the Board adopted a Resolution Confirming Declaration of Local Emergency, specifically finding that the COVID-19 Pandemic constitutes a “disaster” as defined in Virginia Code § 44-146.16, being a “communicable disease of public health threat.”

Virginia Code § 15.2-1413 provides that notwithstanding any contrary provision of law, a locality may, by ordinance, provide a method to assure continuity of government in the event of a disaster for a period not to exceed six months after the disaster. On March 20, 2020, Attorney General Mark R. Herring issued an opinion confirming that localities have authority to adopt ordinances to assure continuity in government during the current disaster, and that such ordinances may authorize departures from otherwise-governing state law.

During an emergency meeting conducted on March 25, 2020, the Board adopted the Emergency Ordinance, acknowledging that the COVID-19 Pandemic makes it unsafe for public bodies to assemble a quorum in one location, or to conduct meetings in accordance with normal practices and procedures. Therefore, the Emergency Ordinance prescribed procedures for the conduct of public meetings and public hearings during the COVID-19 Pandemic, which would be applicable to the Board, School Board, Planning Commission and all local and regional bodies, commissions, committees and authorities created by the Board or to which the Board appoints all or a portion of the members (collectively, “Public Entities”). The procedures prescribed in the Emergency Ordinance are as follows:

- a. 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; and
- b. Prior to holding any such electronic meeting, the Public Entity shall provide public notice of at least three days in advance of the electronic meeting identifying how the public may participate or otherwise offer comment; and
- c. Any such electronic meeting of Public Entities shall state on its agenda and at the beginning of such 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; and identify notice of the opportunities for the public to access and participate in such electronic meeting; and
- d. Any such electronic meeting of the Public Entities shall be open to electronic participation by the public and closed to in-person participation by the public; and
- e. For any matters requiring a public hearing, public comment may be solicited by electronic means in advance and shall also be solicited through telephonic or other electronic means during the course of the electronic 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;
and

- f. The minutes of all electronic meeting shall conform to the requirements of law, identify how the meeting was conducted, members participating, and specify what actions were taken at the meeting. 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 emergency and disaster has ended.

In addition, the Emergency Ordinance suspended deadlines applicable to a Public Entity and its officers (including constitutional officers) and staff during the COVID-19 disaster.

ISSUES: Pursuant to Virginia Code § 15.2-1427(F), the Emergency Ordinance is valid for no longer than sixty days unless readopted in conformity with the notice provisions of the Code of Virginia. The proposed Continuity Ordinance would supersede and replace the Emergency Ordinance and, in accordance with Virginia Code § 15.2-1413, would remain in effect for no longer than six months.

Following the adoption of the Emergency Ordinance, staff has continued to investigate methods for conducting public meetings and hearings in an electronic format, including methods for facilitating electronic public comment. The proposed Continuity Ordinance is substantially similar to the Emergency Ordinance. However, the provisions regarding the conduct of electronic meetings, including public comment, have been updated to allow flexibility as staff continue to investigate, implement and improve the electronic resources used over the course of the disaster. Other non-substantive edits have been made for purposes of clarity. The updated electronic meeting procedures as reflected in the proposed Continuity Ordinance are as follows:

- a. Any meeting or activities which require the physical presence of members of a Public Entity 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 (“Electronic Meeting”); and
- b. Prior to holding an Electronic Meeting, the Public Entity shall provide public notice at least three days in advance of the Electronic Meeting, except for emergency meetings, identifying how the public may participate or otherwise offer comment; and
- c. The agenda for any Electronic Meeting of a Public Entity shall state that the meeting is being held pursuant to and in compliance with this Ordinance; identify the persons responsible for receiving public comment; and identify opportunities for the public to access and to participate in the Electronic Meeting. This information shall be restated at the beginning of an Electronic Meeting, and the members of the Public Entity who are physically and/or electronically present shall be identified; and

- d. An Electronic meeting of a Public Entity shall be open to electronic participation by the public and may be closed to in-person participation by the public; and
- e. For any matters requiring a public hearing, public comment may be solicited by electronic or other means in advance and through telephonic or other electronic means during the course of the Electronic 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 through incorporation into the minutes or otherwise; and
- f. The minutes of all Electronic Meetings shall conform to the requirements of law, identify how the meeting was conducted, identify members participating, and specify what actions were taken at the meeting. A Public Entity 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 emergency and disaster has ended; and
- g. Notwithstanding any existing rules of order or bylaws, each Public Entity may authorize or adopt temporary procedures as necessary and appropriate to implement the provisions of this Ordinance.

Staff has prepared a template resolution that could be adopted by individual Public Entities to avail themselves of the modified procedures prescribed in the proposed ordinance. (Attachment 2). If the Continuity Ordinance is adopted by the Board, the offices of the County Administrator and County Attorney can work with the appropriate staff liaisons for each Public Entity to adapt the template resolution as necessary.

FISCAL IMPACT: There is no fiscal impact associated with this item.

ALTERNATIVES: The Board may adopt the proposed Continuity Ordinance, modifying procedures for public meetings and hearings during the COVID-19 disaster and suspending deadlines applicable to County government and Public Entities and their respective officers, and employees. If the Board chooses not to adopt the Continuity Ordinance, then the Emergency Ordinance will expire on May 24, 2020.

DRAFT MOTIONS:

1a. I move that the Board of Supervisors suspend the rules.

AND

1b. I move that the Board of Supervisors adopt the Proposed Ordinance to Suspend Certain Deadlines and to Modify Public Meeting and Public Hearing Practices and Procedures to Address Continuity of Operations during the COVID-19 Pandemic Disaster, included as Attachment 1 to the Board of Supervisors April 15, 2020 Public Hearing Staff Report.

OR

2. I move an alternate motion.

ATTACHMENT(S):

1. Proposed Ordinance to Suspend Certain Deadlines and to Modify Public Meeting and Public Hearing Practices and Procedures to Address Continuity of Operations during the COVID-19 Pandemic Disaster
2. Template Resolution for Public Entities

ORDINANCE TO SUSPEND CERTAIN DEADLINES AND TO MODIFY PUBLIC MEETING AND PUBLIC HEARING PRACTICES AND PROCEDURES TO ADDRESS CONTINUITY OF OPERATIONS DURING COVID-19 PANDEMIC DISASTER.

WHEREAS, on March 12, 2020, Governor Ralph S. Northam issued Executive Order Fifty-One declaring a state of emergency for the Commonwealth of Virginia arising from the novel Coronavirus (COVID-19) pandemic; and

WHEREAS, Executive Order Fifty-One acknowledged the existence of a public health emergency which constitutes a disaster as defined by Virginia Code § 44-146.16 arising from the public health threat presented by a communicable disease anticipated to spread; and

WHEREAS, Executive Order Fifty-One ordered implementation of the Commonwealth of Virginia Emergency Operations Plan, activation of the Virginia Emergency Operations Center to provide assistance to local governments, and authorization for executive branch agencies to waive “any state requirement or regulation” as appropriate; and

WHEREAS, on March 13, 2020, the President of the United States declared a national emergency, beginning March 1, 2020, in response to the spread of COVID-19; and

WHEREAS, on March 11, 2020, the World Health Organization declared the COVID-19 outbreak a pandemic; and

WHEREAS, on March 17, 2020, the Board of Supervisors of Loudoun County, Virginia (“Board”) confirmed the declaration of local emergency made by the County Administrator acting as the director of emergency management on March 16, 2020; and

WHEREAS, the Board finds that COVID-19 constitutes a real and substantial threat to public health and safety and constitutes a “disaster” as defined by Virginia Code §44-146.16, being a “communicable disease of public health threat;” and

WHEREAS, Virginia Code § 15.2-1413 provides that, notwithstanding any contrary provision of law, a locality may, by ordinance, provide a method to assure continuity of government in the event of a disaster for a period not to exceed six months; and

WHEREAS, Virginia Code § 44-146.21(C) further provides that a local director of emergency management or any member of a governing body in his absence may upon the declaration of a local emergency “proceed without regard to time-consuming procedures and formalities prescribed by law (except mandatory constitutional requirements) pertaining to performance of public work;” and

WHEREAS, Virginia Code § 2.2-3708.2(A)(3) allows, under certain procedural requirements including public notice and access, that members of the Board may convene solely by electronic means “to address the emergency;” and

WHEREAS, the open public meeting requirements of the Virginia Freedom of Information Act (“FOIA”) are limited only by a properly claimed exemption provided under that Act or “any other statute;” and

WHEREAS, the Governor and Health Commissioner of the Commonwealth of Virginia and the President of the United States have recommended suspension of public gatherings of more than ten attendees; and

WHEREAS, the Attorney General of Virginia issued an opinion dated March 20, 2020, stating that localities have the authority during disasters to adopt ordinances to ensure the continuity of government; and

WHEREAS, on March 30, 2020, the Governor issued Executive Order Fifty-Five, prohibiting public and private in person gatherings of more than ten individuals through June 10,

2020, and directing all Virginians to remain at their place of residence during that same time period, subject to certain enumerated exceptions; and

WHEREAS, on March 25, 2020, the Board adopted an Emergency Ordinance to Effectuate Temporary Changes in Certain Deadlines and to Modify Public Meeting and Public Hearing Practices and Procedures to Address Continuity of Operations Associated with Pandemic Disaster (“Emergency Ordinance”) pursuant to Virginia Code § 15.2-1413, which ordinance was adopted without prior notice and, therefore, in accordance with Virginia Code § 15.2-1427(F) is effective for no longer than sixty days; and

WHEREAS, this Ordinance in response to the disaster caused by the COVID-19 pandemic promotes public health, safety and welfare and is consistent with the law of the Commonwealth of Virginia, the Constitution of Virginia and the Constitution of the United States of America.

NOW, THEREFORE, BE IT ORDAINED by the Board of Supervisors of Loudoun County, Virginia, following notice and public hearing in accordance with Virginia Code § 15.2-1427(F):

1. That the COVID-19 pandemic makes it unsafe to assemble in one location a quorum for public bodies including the Board; the School Board; the Planning Commission; and all local and regional boards, commissions, committees and authorities created by the Board or, on which the Board has a member, or to which the Board 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.

2. That in accordance with Virginia Code § 15.2-1413, and notwithstanding any contrary provision of law, general or special, the following emergency procedures are adopted to ensure the continuity of government during this emergency and disaster:
 - a. Any meeting or activities which require the physical presence of members of a Public Entity 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 (“Electronic Meeting”); and
 - b. Prior to holding an Electronic Meeting, the Public Entity shall provide public notice at least three days in advance of the Electronic Meeting, except for emergency meetings, identifying how the public may participate or otherwise offer comment; and
 - c. The agenda for any Electronic Meeting of a Public Entity shall state that the meeting is being held pursuant to and in compliance with this Ordinance; identify the persons responsible for receiving public comment; and identify opportunities for the public to access and to participate in the Electronic Meeting. This information shall be restated at the beginning of an Electronic Meeting, and the members of the Public Entity who are physically and/or electronically present shall be identified; and
 - d. An Electronic meeting of a Public Entity shall be open to electronic participation by the public and may be closed to in-person participation by the public; and
 - e. For any matters requiring a public hearing, public comment may be solicited by electronic or other means in advance and through telephonic or other electronic means during the course of the Electronic 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 through incorporation into the minutes or otherwise; and

- f. The minutes of all Electronic Meetings shall conform to the requirements of law, identify how the meeting was conducted, identify members participating, and specify what actions were taken at the meeting. A Public Entity 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 emergency and disaster has ended; and
- g. Notwithstanding any existing rules of order or bylaws, each Public Entity may authorize or adopt temporary procedures as necessary and appropriate to implement the provisions of this Ordinance.

IT IS FURTHER ORDAINED that notwithstanding any provision of law, regulation or policy to the contrary, any deadlines requiring action by the County, a Public Entity, or their respective officers (including Constitutional Officers) and employees shall be suspended during this emergency and disaster; however, the County, the Public Entities, and their respective officers and employees are encouraged to take such action as is practical and appropriate to meet those deadlines. Failure to meet any such deadlines shall not constitute a default, violation, approval, ratification or recommendation, or result in any other automatic action or consequence.

IT IS FURTHER ORDAINED, that non-emergency public hearings and action items of Public Entities may be postponed to a date certain provided that public notice is given so that the public are aware of how and when to present their views.

IT IS FURTHER ORDAINED, that each incorporated town within the boundaries of Loudoun County, Virginia is encouraged, authorized and/or directed to declare its own state of

local emergency and disaster or incorporate by reference the County's local state of emergency and disaster and to adopt an ordinance for the continuity of town government.

IT IS FURTHER ORDAINED that this Ordinance shall supersede and replace the Emergency Ordinance adopted by the Board on March 25, 2020, and that this Ordinance shall remain in full force and effect for a period of six months, unless otherwise rescinded, extended or readopted by the Board. Upon rescission by the Board or automatic expiration as described herein, this Ordinance shall terminate and normal practices and procedures of government shall resume.

Nothing in this Ordinance shall prohibit Public Entities from holding in-person public meetings, or from allowing in-person public comment, provided that public health and safety measures, as well as social distancing, are taken into consideration.

This Ordinance shall be effective upon its adoption and may be known as the Continuity Ordinance.

ADOPTED by the Board of Supervisors of Loudoun County, Virginia, this ___ day of April, 2020.

APPROVED

Phyllis J. Randall, Chairman

ATTEST:

APPROVED AS TO FORM:

Tim Hemstreet, Clerk to the Board of Supervisors

Leo P. Rogers, County Attorney

RESOLUTION OF [NAME OF PUBLIC ENTITY]

AUTHORIZING THE ADOPTION OF PROCEDURES FOR ELECTRONIC PUBLIC MEETINGS AND PUBLIC HEARINGS TO ENSURE THE CONTINUITY OF GOVERNMENT DURING THE COVID-19 PANDEMIC DISASTER

WHEREAS, on March 12, 2020, Governor Ralph S. Northam issued Executive Order Fifty-One declaring a state of emergency for the Commonwealth of Virginia arising from the novel Coronavirus (COVID-19) pandemic; and

WHEREAS, Executive Order Fifty-One acknowledged the existence of a public health emergency which constitutes a disaster as defined by Virginia Code § 44-146.16 arising from the public health threat presented by a communicable disease anticipated to spread; and

WHEREAS, Executive Order Fifty-One ordered implementation of the Commonwealth of Virginia Emergency Operations Plan, activation of the Virginia Emergency Operations Center to provide assistance to local governments, and authorization for executive branch agencies to waive “any state requirement or regulation” as appropriate; and

WHEREAS, on March 13, 2020, the President of the United States declared a national emergency, beginning March 1, 2020, in response to the spread of COVID-19; and

WHEREAS, on March 11, 2020, the World Health Organization declared the COVID-19 outbreak a pandemic; and

WHEREAS, on March 17, 2020, the Board of Supervisors of Loudoun County, Virginia (“Board”) confirmed the declaration of local emergency made by the County Administrator acting as the local director of emergency management on March 16, 2020, specifically finding that the COVID-19 pandemic constitutes a “disaster” as defined in Virginia Code § 44-146.16, being a “communicable disease of public health threat”; and

WHEREAS, Virginia Code § 15.2-1413 provides that, notwithstanding any contrary provision of law, a locality may, by ordinance, provide a method to assure continuity of government in the event of a disaster for a period not to exceed six months; and

WHEREAS, on [DATE], the Board, pursuant to Virginia Code § 15.2-1413, adopted an Ordinance to Suspend Certain Deadlines and to Modify Public Meeting and Public Hearing Practices and Procedures to Address Continuity of Operations during the COVID-19 Pandemic Disaster (“Continuity Ordinance”); and

WHEREAS, through its Continuity Ordinance, the Board specifically found that COVID-19 constitutes a real and substantial threat to public health and safety and constitutes a “disaster” as defined by Virginia Code §44-146.16, being a “communicable disease of public health threat” and

WHEREAS, through its Continuity Ordinance, the Board further found that the COVID-19 pandemic makes it unsafe to assemble in one location a quorum for public bodies including the Board, the School Board, the Planning Commission and all local and regional boards, commissions, committees and authorities created by the Board or to which the Board 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; and

WHEREAS, through its Continuity Ordinance, the Board adopted certain procedures to ensure the continuity of government during the COVID-19 pandemic disaster (“Continuity Procedures”), suspended any deadlines applicable to Public Entities and their staff during the

COVID-19 disaster, and authorized Public Entities, at their discretion, to postpone non-emergency public hearings and action items during the disaster; and

WHEREAS, the [NAME OF LOCAL OR REGIONAL PUBLIC ENTITY], being a public body [CREATED BY THE BOARD PURSUANT TO (APPLICABLE CODE SECTION) AND/OR WHOSE MEMBERS ARE APPOINTED BY BOARD/COUNCIL] is a Public Entity included within the scope of the Continuity Ordinance.

NOW, THEREFORE, BE IT RESOLVED that the [NAME OF LOCAL OR REGIONAL PUBLIC ENTITY] hereby incorporates by reference and adopts the Continuity Procedures prescribed in the Continuity Ordinance, a copy of which is attached hereto; and

BE IT FURTHER RESOLVED that the [NAME OF LOCAL OR REGIONAL PUBLIC ENTITY] hereby authorizes and directs its officers and staff to take all steps reasonably necessary or appropriate to implement such Continuity Procedures and to develop any specific procedures as applicable and appropriate for the [NAME OF LOCAL OR REGIONAL PUBLIC ENTITY], provided that such specific procedures are consistent with the terms and conditions of the Continuity Ordinance; and

BE IT FURTHER RESOLVED that this Resolution shall take effect immediately upon adoption and shall remain in effect during the pendency of the Continuity Ordinance including for any applicable period upon the re-adoption or extension of such Ordinance by the Board.

ADOPTED by the _____.

APPROVED

ATTEST:

APPROVED AS TO FORM:
