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MARCH
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Legal Ethics & Zoom: Digital Participation in the Land Use Process



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**The 2021 Western Places | Western Spaces
conference, Bouncing Forward: Building Thriving,
Healthy & Equitable Communities**

**Legal Ethics & Zoom:
Digital Participation in the Land Use Process
Thursday, 3/4/2021, 1:30-3 PM**



Panel:

Eli Wald, University of Denver Sturm College of Law

Carolynne White, Brownstein Hyatt Farber Schreck

Susan Daggett, Director, Rocky Mountain Land Use Institute



Strategies for Ensuring Public Participation

- Citizens may provide testimony by calling in ahead of the hearing and leaving a voice mail. Voice mails are played live during the hearing.
- Citizens may dial in via telephone, with or without video, during the hearing and provide testimony.
- Citizens may provide testimony or ask questions using an on-screen “chat” function.

Zoom Meeting

Audio only



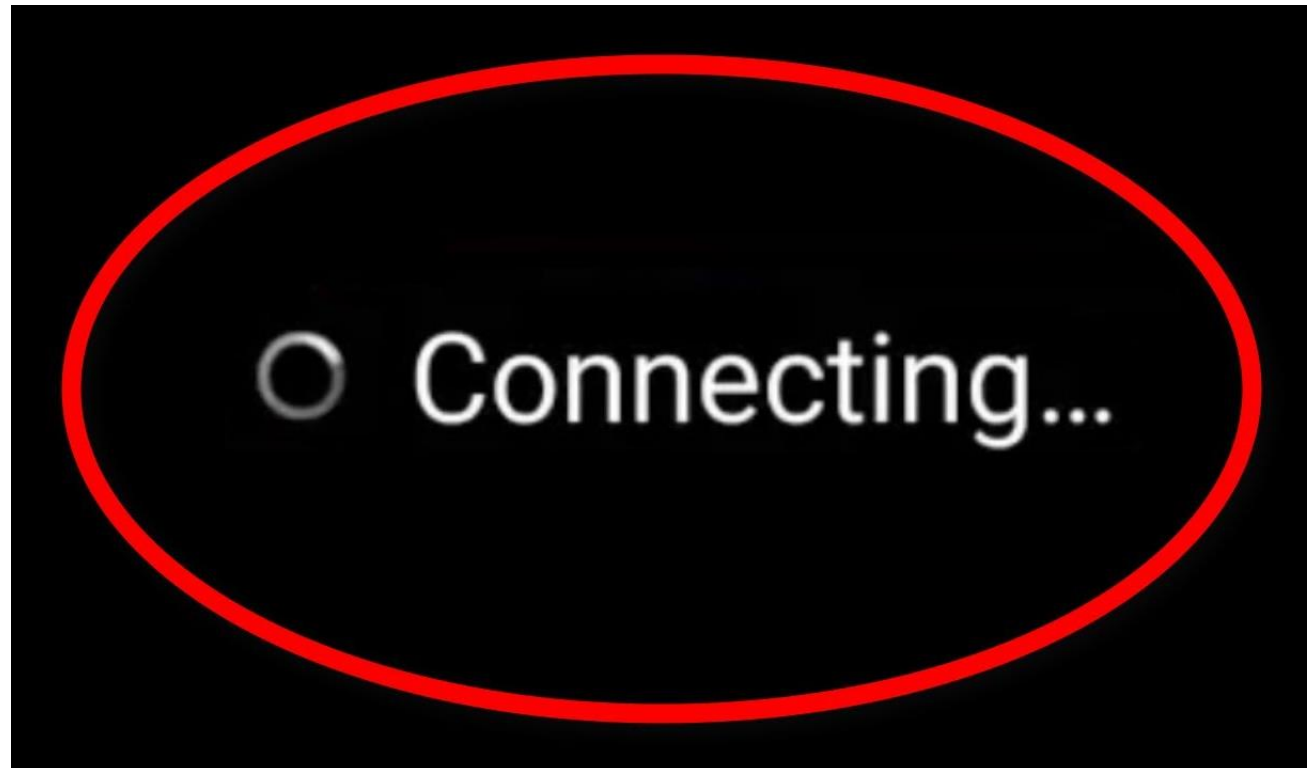
With video



Strategies for Ensuring Public Participation

- As we are only just beginning to understand, frequently, the citizens who have attended public meetings in the past may have disproportionately represented a narrow segment of the population, such that decision makers have not had the benefit of a more representative sampling of voices in making their decisions.
- As local governments begin to understand this phenomenon, as this article notes, some local governments are considering retaining some aspects of digital participation and advance evidence submission even after the pandemic no longer requires it.

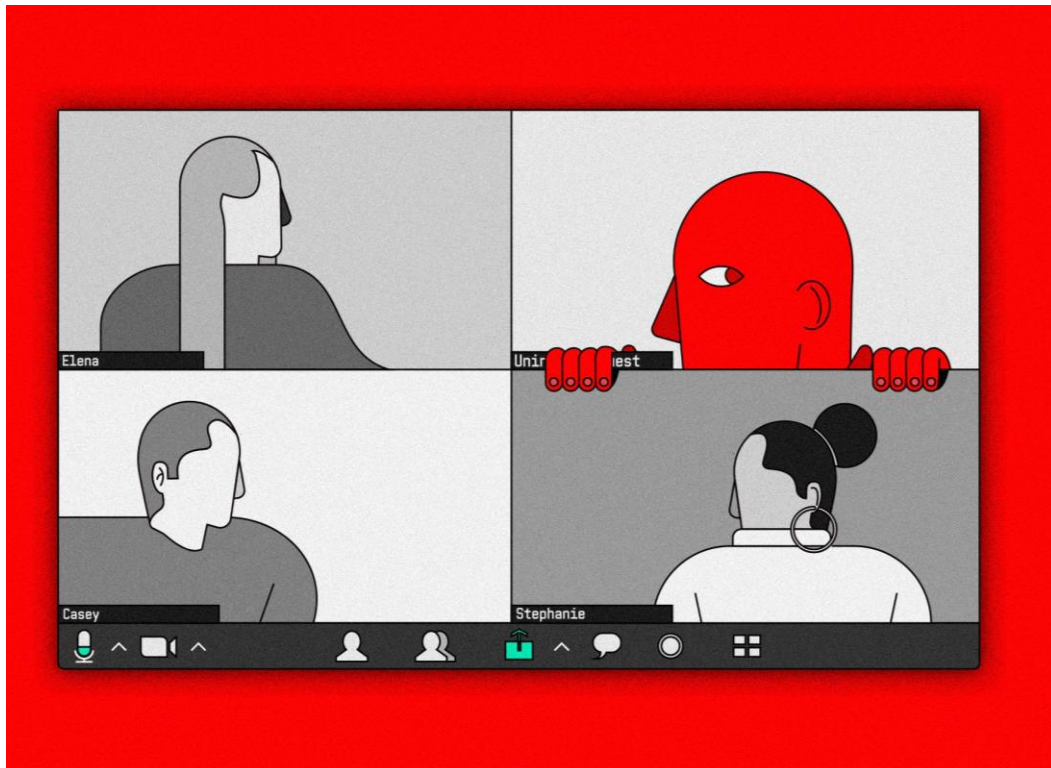
Digital Participation in Land Use Process and the Rules of Professional Conduct



Competence and Diligence, CRPC 1.1 & 1.3

- What if power goes out and you lose internet connection?
- What if you can't access your documents to answer questions from the tribunal (city council/planning commission)
- Your key witness, the traffic engineer, loses his internet connection.

Digital Participation in Land Use Process and the Rules of Professional Conduct



Impartiality and Decorum of the Tribunal, CRPC 3.5

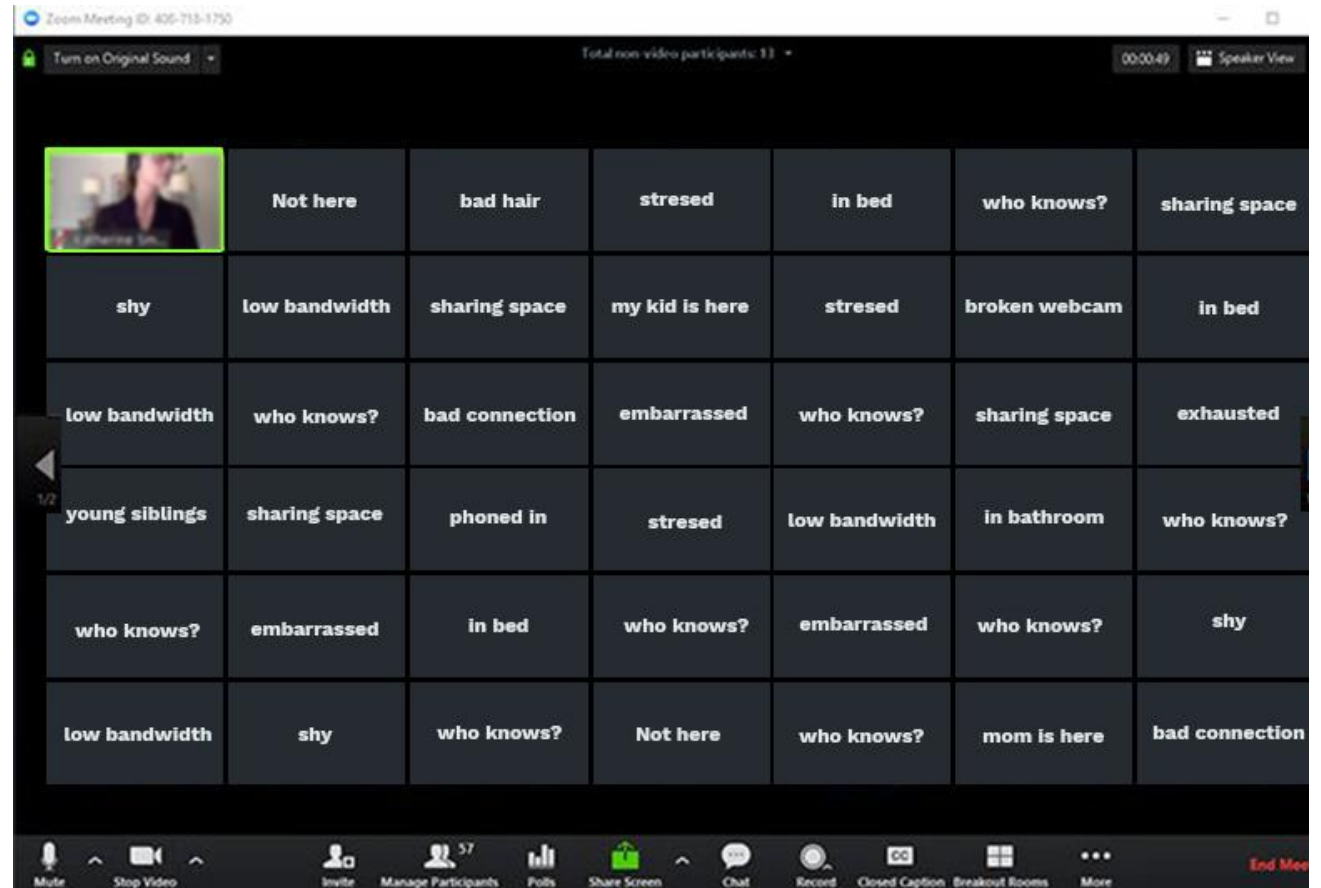
- A member of the tribunal – city council member – sends you a direct message question in the chat box, that is not part of the record. What is your responsibility?

Maintaining the Integrity of the Profession, CRPC 8.4

- The tribunal adjourns into executive session to receive legal advice from the city attorney. One of the decision makers inadvertently leaves their speaker/audio on and you can hear their deliberations. What is your responsibility?
- What if a governing body purports to permit both in-person and Zoom comments for a public hearing, and then forgets (or otherwise fails) to permit the Zoom comments?

Due Process Issues in Quasi-Judicial Land Use Hearings

- Some cities require that, in order to proceed with a virtual land use hearing, that applicants sign a waiver of the right to challenge the process based on due process grounds.
- Some procedures or formats do not allow the presenter/applicant to see the videos of all the decision makers while they are presenting. Sometimes, individual commissioners or city council members may turn their cameras off. Oral advocacy skills are obviously optimal when the presenter can see the reactions of the people to whom they are speaking.





Due Process Issues in Quasi-Judicial Land Use Hearings

- At times, decision makers have their cameras on, and you can see that they have stepped away, or are distracted by a crying child, or a barking dog. Does not your client have the right to have the decision makers be listening and fully informed about the process?
- What about the people testifying? Many digital platforms or land use processes allow members of the public testifying to do so only via audio. Are your client's due process rights limited if you can't see the people testifying only hear them?

Due Process Issues in Quasi-Judicial Land Use Hearings

- What if your materials in support of your project don't present in the most advantageous light over the screen compared to in person (poster boards). Is your client's due process violated because they didn't have the opportunity to present their case fairly? What is your obligation as a lawyer to ensure that your client gets a fair opportunity/due process?
- What if your traffic simulation video, which clearly illustrates the project's compliance with regulatory requirements, doesn't work because of insufficient bandwidth?



Post-Pandemic Continuation of Hybrid/Virtual Land Use Hearings

CRPC Preamble, 8.4(g) and 8.4(i)

- The City and County of Denver has formed a task force to seek input from industry practitioners regarding whether and how they might continue using digital options for community input even when the pandemic no longer requires it.
- The City of Centennial has adopted a policy that would front load the land use decision making process with on-line presentations of the case and public comment, so that the final public hearing is limited in scope to certain unresolved issues.

Legal Ethics & Zoom:

Digital Participation in the Land Use Process

- Q&A

- **Resources:**

- Henry Grabar, *Zoom Is the Best Thing to Happen to Local Government in Years*, Slate.com (Feb. 17, 2021), <https://slate.com/business/2021/02/local-government-zoom-community-meeting-housing-racism.html>
- City of Centennial, Colorado, Administrative Directive No. 2020-AD-02, Advance Evidence Quasi-Judicial Public Hearings (effective as of December 31, 2020).
- Laura Morgan Roberts & Courtney L. McCluney, *Working from Home While Black*, Harvard Business Review (June 17, 2020), available at <https://hbr.org/2020/06/working-from-home-while-black>