

# Better Board & Commission Meetings: Roles, Procedures & Open Government

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*January 25, 2015*

  
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## About the Author

Alan represents cities across the state as City Attorney or Special Counsel. Before going into private practice, he was a staff attorney for the Texas Municipal League. Alan graduated from Texas Tech University with his Bachelor of Arts in English, Master of Public Administration, and Doctor of Jurisprudence. He is on the Board of Directors of the Texas City Attorneys Association, and is Texas Chairperson for the International Municipal Lawyers Association. Alan is the 2015 Chairperson of the University of Texas School of Law's annual *Land Use Planning Conference*. He authors the TEXAS MUNICIPAL LAW & PROCEDURE MANUAL (6<sup>th</sup> Ed.).

## A. BOARDS

The business of municipal corporations (cities, towns and villages) is often managed with the input and decisions of multiple groups. Central and preeminent among these groups is the city council (aka, governing body, board of aldermen, city commission). Other boards, commissions, committees, and task forces can be created by resolution of the city council, executive order of the mayor, or through voter approval of charter language (in home-rule cities). Many boards are purely advisory and do not exercise any rule-making, adjudication, or sovereign functions.

## B. OPEN GOVERNMENT

- 1. Open Meetings Act.** The Texas Open Meetings Act (OMA) applies to meetings of governing bodies.<sup>1</sup> Some boards are specifically made subject to the OMA by its own terms (e.g., city councils), and others are subjected to the act through their enabling legislation (e.g., planning and zoning commissions<sup>2</sup>). Still, other boards are required to comply with OMA because when creating the board, the city council expressly made it subject to the Act, or the voters made that choice when approving a home-rules city's charter.
- 2. Agendas.** In order for a board subject to the act to meet, the board must first make an agenda available for public viewing at least 72 hours in advance. The agenda must be posted at the city hall, at the meeting place (if different), and on the city's website. The agenda must address *Who, What, Where, When, and Why?* (who is gathering, what are they talking about, where will they be, when will it start, and why are they doing this?) A reasonable person must be able to look at the agenda and understand what topics (issues, subjects) will be addressed.
- 3. Public Participation.** The Open Meetings Act guarantees the public (citizens at large) the right to observe the decision-making process of boards at meetings. OMA allows the public the ability to look and listen. It does not assure citizens the right to speak. However, courts have recognized a general Constitutional right to address and petition a governing body.<sup>3</sup> Also, a home-rule city's charter might require public comment sessions. Regardless, cities often set aside time for public comment at regular meetings. Cities can limit the number of persons who may speak on a topic and the length and frequency of their presentations. In imposing limitations, the board must act reasonably and may not discriminate on the basis of the particular views expressed, nor arbitrarily deny citizens their right to apply to the government for redress of grievances as guaranteed by the Texas Constitution.<sup>4</sup> Any limitations must be administered in an even-handed fashion.

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<sup>1</sup> Tex. Gov't Code Chapter 551.

<sup>2</sup> Tex. Loc. Gov't Code Chapter 211.

<sup>3</sup> *Prof. Assn. Of College Educators v. El Paso County Community Dist.*, 678 S.W.2d 94 (El Paso Civ.App. 1984, writ ref'd n.r.e.): Op. Tex. Att'y Gen. No. H-188.

<sup>4</sup> Tex. Att'y Gen. LO 96-111.

4. **Minutes.** Boards must keep a record of their meetings. In terms of specificity, the minutes must state the date and time of the meeting, the names of those present, the subject of each deliberation and indicate each vote, order, decision, or other actions taken.<sup>5</sup> Although minutes do not have to be a verbatim transcript of the meeting, they must provide a brief summary of each deliberation.<sup>6</sup>
5. **Social Media.** Board members should use caution when commenting on city business through social media. The definition of “public information” is to be liberally construed to favor disclosure of the information, which is why cities should be cautious about what information goes on a social media website.<sup>7</sup> The Florida Attorney General warned the City of Coral Springs that if it creates a Facebook page, it must operate the site in a way that keeps all records accessible and all virtual meetings open to the public.<sup>8</sup> The Florida Attorney General’s opinion is worth mentioning because Florida’s Public Information and Sunshine laws are worded similarly to their Texas counter-parts, the Texas Public Information Act (PIA) and the Texas Open Meetings Act (OMA).<sup>9</sup>

(a) **Records Retention:** The Texas State Library and Archives Commission (TSLAC) establishes the general records retention schedules. City councils then set their own retention schedules provided that whatever schedule they set is in conformity with the minimum requirements established by TSLAC.<sup>10</sup> For emails, the retention period depends on the information and content within the email. For example, under the TSLAC’s own *internal* schedules, most emails must be kept for two years.

(b) **Open Records:** The Texas Attorney General (AG) has stated that “if information maintained on a privately-owned medium is actually used in connection with the transaction of official business, it is subject to the PIA.” Also, a state district court has held that any responsive emails sent or received by privately-owned personal computers (or any other personal electronic device belonging to municipal officials) were “public information.” The Court’s ruling disregarded whether the emails were processed by municipal email servers (i.e., the Court concluded that the emails related to official city business to or from the mayor were public even if they were transmitted through private email accounts on a privately-owned device). The district court was overturned on appeal, but the risk that private emails could become public information still remains.<sup>11</sup>

(c) **Open Meetings:** Members of boards must be particularly careful to avoid deliberating through *e-mail*. The term “deliberation” is not limited to “spoken communications.” Discussing public business via written notes or electronic mail

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<sup>5</sup> TEX. GOV’T CODE ANN. § 551.021.

<sup>6</sup> Op. Tex. Att’y Gen. No. JM-840 (1988).

<sup>7</sup> See Tex. Gov’t Code § 552.001(b).

<sup>8</sup> Fla. Att’y Gen. Op. 09-19.

<sup>9</sup> See Fla. Stat. §§ 119.011(12) and 286.011.

<sup>10</sup> Tex. Loc. Gov’t Code § 203.042.

<sup>11</sup> See *City of Dallas v. The Dallas Morning News*, 281 S.W.3d 708 (Tex.App.--Dallas 2009).

may constitute a “deliberation” that is subject to the OMA.<sup>12</sup> A Washington court held that e-mail communications among a majority of the members of a school board constituted a “meeting” under the state’s open meetings law.<sup>13</sup> The City of San Antonio violated the OMA when its city council, via several small meetings in the City Manager’s office, each containing less than a quorum, agreed to strip a pro-gay/lesbian group of its funding from the city’s budget. The Court held that if a quorum of a governmental body agrees on a joint statement on a matter of governmental business or policy, the deliberation by which that agreement is reached is subject to the requirements of the OMA, and those requirements are not necessarily avoided by avoiding the physical gathering of a quorum in one place at one time. In other words, if board members are holding their discussion of public business in numbers less than a quorum in order to avoid having to meet the requirements of the OMA, criminal prosecution can be pursued against such officials for such discussions.<sup>14</sup>

### C. ROLES

- 1. Chair.** The chairperson (presiding officer) delegates who may speak at any given time, and sees that the discussion narrows to specific, precisely-worded proposals. It is the chair’s responsibility to enforce the rules and maintain order. The chair’s job is to guide the board through the process to a successful completion of the meeting.
- 2. Members.** Board members attend meetings to make decisions. As part of the decision-making process, members may receive and share information. Deliberations include talking and voting.
- 3. Staff.** City staff (employees, consultants) attend meetings as resources that empower the board to make decisions.
- 4. Applicants.** Applicants are those seeking something from the city (in general), and the board (in particular). They may be asking for adoption of a resolution, enactment of an ordinance, or approval of a contract. An applicant may be seeking employment with the city, and thus wants a vote to be hired. Other applicants want their property to be rezoned. The role of applicants at a board meeting is to provide information.
- 5. Audience.** In most instances, the audience’s role is rather passive – to watch and listen. Not every agenda items requires (or warrants) a public hearing. The extent of audience participation on a matter depends on the matter, including the political, legal, and policy implications. Mostly, board meetings have the purpose of enabling the board to take

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<sup>12</sup> See Op. Tex. Att’y Gen. No. JC-0307 (2000).

<sup>13</sup> *Wood v. Battle Ground School District* (25332-111), June 27, 2001.

<sup>14</sup> *Esperanza Peace & Justice Ctr. v. City of San Antonio*, 316 F. Supp. 2d 433, 474 (W.D. Tex. 2001) , citing as authority a previous version of this paper by Bojorquez.

action. However, there is often a component of these meetings inform the public of issues.

#### D. RULES OF ORDER

1. **Purpose.** The purpose of meetings (generally) is to conduct business and resolve issues. The primary object of a meeting is to make decisions.
2. **Maintenance of Decorum.** Meetings should be conducted in a manner that is fair to everyone taking part in the process.<sup>15</sup> It is vital to the effectiveness, efficiency, and integrity of a city's process that order be maintained during board meetings. Absent a sense of order and decorum, it can take too long to complete the meeting, and there might not be a sense of completion when the meeting is done. Furthermore, some attendees might feel as though they were railroaded. Common problems include:
  - Too many people speaking at once.
  - The conversation wanders off the topic.
  - Feelings are hurt.
  - A matter is concluded with too many people having different understandings of the outcome.
3. **Procedural Rules.** Parliamentary Procedure is the name of the tradition of rules and customs that has developed in the civilized world to deal with the problems associated with the process of conducting board meetings. Aspects of parliamentary procedure date back to ancient Greece, but its content was mainly formed by centuries of trial and error in the English Parliament.<sup>16</sup> These rules are commonly used in deliberative assemblies. Some law-making bodies develop their own particular rules (e.g., the Texas Legislature).

*Robert's Rules of Order* were developed in 1876 by Henry Martyn Robert, a distinguished engineer and retired brigadier general. Robert's Rules are meant to make meetings run smoothly when everyone is in agreement, and to allow groups to come to decisions fairly when issues are bitterly contested.

In the opinion of the author, Alan Bojorquez, it is rare for a board to formally adopt Robert's Rules and make its meetings strictly subject to those procedures. In Texas, cities have the right to regulate their own proceedings, and they may adopt reasonable rules in order to maintain order at a meeting. Rules may govern the making of motions, adjournment, the tabling or reconsideration of matters, and similar issues. The enactment of rules and the effect of their violations are not prescribed by state statute, and violation of these will not invalidate board action unless a majority of that body has adopted a rule specifically providing for such invalidation.<sup>17</sup>

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<sup>15</sup> Robert, Honemann and Balch, *Robert's Rules of Order Newly Revised In Brief* (2<sup>nd</sup>) (2011).

<sup>16</sup> Id.

<sup>17</sup> See TEX. LOC. GOV'T CODE ANN. § 22.038 (1996), TEX. GOV'T CODE ANN. § (1994), and Op. Tex.

The typical sequence of a meeting is:

- Establishment of a Quorum.
- Call to Order.
- Approval of Minutes.
- Reading of Reports.
- Unfinished Business (items that weren't completed or addressed during prior meeting due to adjournment)
- New Business (not on the agenda, which isn't allowed in Texas due to the OMA)
- Stand at Ease (brief pause while members remain in their seats)
- Recess (a short break)
- Adjournment (ending the meeting)

**4. Criminal Offenses.** Those who purposefully disrupt government meetings in Texas are at risk of criminal prosecution. A person commits an offense if, with intent to prevent or disrupt a lawful meeting, procession, or gathering, the person obstructs or interferes with the meeting, procession, or gathering by physical action or verbal utterance. Such an offense is a Class B misdemeanor.<sup>18</sup> With a narrowing construction, this section prohibits only speech that is not protected by the First Amendment of the U.S. Constitution.<sup>19</sup> Given the competing First Amendment freedoms at stake, the Texas Penal Code §42.05 can be rendered constitutional if it is construed to criminalize only physical acts or verbal utterances that *substantially impair* the ordinary conduct of lawful meetings, and thereby curtail the exercise of others' First Amendment rights.<sup>20</sup> Section 42.05 reaches only the disorderly physical or verbal conduct of individuals who are acting with the *specific intent* to prevent or disrupt a meeting. A person of ordinary intelligence knows the type of conduct that is likely to cause an impairment to the ordinary conduct of a meeting.<sup>21</sup>

A person also commits an offense if the person intentionally hinders an official proceeding by noise or violent behavior and continues after explicit official request to desist. Such an offense is a Class A misdemeanor.<sup>22</sup>

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Att'y Gen. No. DM-228 (1993). Note that the charter in a home-rule city might prescribe procedural rules.

<sup>18</sup> TEX. PEN. CODE ANN. § 42.05.

<sup>19</sup> *Morehead v. State*, 746 S.W.2d 830 (App. 5 Dist. 1988 review granted, reversed), 807 S.W.2d 577, rehearing on p.d.r. denied.

<sup>20</sup> *Morehead*, 807 S.W.2d at 581 [emphasis in original].

<sup>21</sup> *State v. Markovich*, No. 179-00 (Tex. Crim. App. May 29, 2002) (UT student was arrested by DPS troopers for heckling former President George Bush from the upper gallery of the House Chamber).

<sup>22</sup> TEX. PEN. CODE ANN. § 38.13.

## E. BEST PRACTICES

1. Chair should attempt to be neutral and objective.
2. Chair focuses on *process* (*Not outcome*).
3. Meetings are for board members 1st and foremost (*The audience is usually secondary*).
4. Stick to the agenda.
5. Be respectful (*An upset applicant today, is a council candidate tomorrow*).
6. Be fair (*Don't play favorites*).
7. Be consistent (*Similar situations should be treated similarly*).
8. If not ready don't act (*If it ain't cooked, don't consume it*).
9. Resist pressure to draft from the dais.
10. Be strong but professional (*You can be firm without being a jerk*).
11. Meetings are not free-for-all (*Avoid back-n-forth, cross-conversations*).
12. Take serious issues seriously (*A sense of humor can ease tension, but it can also be seen as disrespectful or making light of a situation*).

