

OPEN AND PUBLIC MEETINGS

1. **Overview.** The key to effective local government action is the participation by the governed. Government in the United States exists only by the consent of the governed. Meaningful citizen participation is imperative to a democratic institution.

2. **The Guarantee of Due Process.** The Fifth and Fourteenth Amendments to the U.S. Constitution guarantee to each citizen due process of law. This assures that the laws that affect individual lives and property will be reasonable in scope and will be adopted in an unbiased manner allowing proper citizen participation. The principle of due process has two components—substantive and procedural.

(a) **Substantive Due Process.** The concept of substantive due process provides that no person may be deprived of life, liberty or property by governmental actions that are unreasonable, arbitrary or capricious. The courts retain the authority to review language of the law in question to determine whether such law has a rational basis in the legitimate governmental purpose of the protection of the public health, safety and welfare. Consequently, substantive due process applies basically to the language or intent of the legislation in question.

(b) **Procedural Due Process.** The concept of procedural due process applies to the method by which due process is administered. If a governmental action impacts or restrains life, liberty or property of an individual or the public at large, then that government must grant sufficient notice of such action and an opportunity for all affected persons to participate in the process—which must be a fair, unbiased and orderly proceeding. In other words, procedural due process emphasizes fairness and openness, curtailing improper actions or practices similar to the following actual examples that have occurred in our state:

A town planning commission holds its regular meeting each month in a room in the town hall. No meeting schedule has been published announcing the meeting, and no agenda is made available at the door or any other public place prior to the meeting.

During a discussion of an agenda item at a regular county commission meeting, two members of the commission, lean over, away from their microphones, and whisper to each other.

The elected officials of a city, some administrators, and members of the planning commission, meet at a mountain cabin for a “retreat.” They have met to discuss important community issues “away from the phones and the interruptions.” The meeting was not announced publicly in advance.

During a public meeting, participants making a presentation to the commission stand in front of the commission with their backs to the audience. The presentation is neither visible nor audible to the audience.

3. **The Open and Public Meetings Act.** The requirement that meetings of public bodies at which public policy is deliberated be announced publicly in advance and conducted openly was first formalized by the Utah legislature in 1977 through its adoption of the “Open and Public Meetings Act,” UTAH CODE ANN. §§52-4-101 *et seq.* In order to understand the Open Meetings Act, it is only necessary to understand the public policy behind the Act:

The Legislature finds and declares that the state, its agencies and political subdivisions, exist to aid in the conduct of the people's business. It is the intent of the Legislature that the state, its agencies, and its political subdivisions: take their actions openly, and conduct their deliberations openly. UTAH CODE ANN. 52-4-102.

It is clear from this statement of policy that all meetings of official bodies of Utah's cities, towns and other political subdivisions, with very limited exceptions, are to be open to the public; that the deliberations of such bodies be conducted openly; and that the public be given advance notice of the time and place of the meeting, and of the items that will be under discussion.

(a) Noticing; Agendas. To assure the opportunity for public participation, the Open Meetings Act specifies the minimum notice for a public meeting.

(i) Annual Notice. The notice provisions require that any regular meeting (such as the regular council or board meetings) required by law are to be scheduled in advance over the course of a year and that public notice each year of the annual meetings is to be given by date, time and place of such meeting.

(ii) Meeting-Specific Notice. In addition to the annual notice of regular meetings, each meeting must have its own notice given at least twenty-four hours prior to the meeting. Such notice must include the agenda and the date, time and place of the meeting.

Generally, these public notices are satisfied by posting the written notice on the Utah Public Notice Website; on the public entity's official website; at the principal office of the public body or at the building where the meeting is to be held; and if the public entity is an interlocal entity, at the principal office of each member of that entity. It also is good practice to provide a copy of the notice to at least one newspaper of general circulation within the jurisdiction of the public body or to a local media correspondent.

The agenda must provide reasonable specificity to notify the public of the items that will be considered at the meeting. A topic not listed on the open meeting agenda that is raised during an open meeting may be discussed, but no final action may be taken by the public body during that meeting.

(iii) Emergencies. When there are unforeseen circumstances and it is necessary to hold an emergency meeting, the notice requirements can be disregarded, so long as the best notice practical is given.

(b) Open Meetings. The Open Meetings Act states that every meeting of a public body is open to the public unless it is properly closed. There are some key definitions in the Open Meetings Act. The Act defines a "meeting" as being a gathering of a "public body" with a "quorum" present that is convened by an authorized individual following the legal process for convening the public body for the express purpose of receiving public comment, deliberating or taking action on a "relevant matter." A "public body" means, with limited exceptions, any administrative, advisory, executive or legislative body of the state or its political subdivisions (a) that is created by the Utah constitution, statute, rule, ordinance or resolution, (b) which consists of two or more individuals, (c) expends, disburses or is supported in whole or in part by tax revenue, and (d) is vested with authority to make decisions regarding the public's business. A "quorum"

means a simple majority of the members of a public body. A “*relevant matter*” means a matter that is within the scope of the public body’s authority but doesn’t include, for a public body with both executive and legislative responsibilities, a managerial or operational matter. See UTAH CODE ANN. 52-4-103.

(i) Electronic Meetings. A public body may conduct a meeting that some or all of its members attend through an electronic video, audio, or both video and audio connection if (A) the body has adopted a resolution, rule, or ordinance governing the use of electronic meetings, (B) gives the public notice of the electronic meeting, (C) with limited exceptions, provides space and facilities at an anchor location for the public to attend the open portions of the meeting, (D) provides means by which the public may participate remotely through electronic means, and (E) otherwise complies with the electronic meetings requirements of the Act. See UTAH CODE ANN. 52-4-207.

(ii) Disruption. The Act does not prohibit removal of any person from the meeting if the person willfully disrupts the meeting to the extent that orderly conduct is seriously compromised.

(c) Closed Meetings. All meetings of a public body are to be open to the public with certain exceptions. The following exceptions seem particularly applicable to local governmental bodies such as municipalities and interlocal entities:

(i) Discussion of the character, professional competence, or physical or mental health of an individual.

(ii) Strategy sessions to discuss collective bargaining.

(iii) Strategy sessions to discuss pending or reasonably imminent litigation.

(iv) Strategy sessions to discuss the purchase, exchange, or lease of real property if public discussion of the transaction would disclose the appraisal or estimated value of the property under consideration or prevent the public body from completing the transaction on the best possible terms.

(v) Strategy session to discuss the sale of real property if (1) public discussion of the transaction would disclose the appraisal or estimated value of the property under consideration or prevent the public body from completing the transaction on the best possible terms, (2) the public body previously gave public notice that the property would be offered for sale, and (3) the terms of the sale are publicly disclosed before the public body approves the sale.

(vi) Discussion regarding deployment of security personnel, devices or systems.

(vii) Investigative proceedings regarding allegations of criminal misconduct.

(viii) Discussions concerning information that is designated as a trade secret under applicable law if the public body’s consideration of the information is necessary to

properly conduct a procurement under the Utah Procurement Code.

(ix) Consideration of a loan application if public discussion would disclose nonpublic personal financial information, a nonpublic trade secret, or nonpublic business financial information the disclosure of which would reasonably be expected to result in unfair competitive injury to the person submitting the information.

Before a meeting may be closed for one of these valid reasons, the public body must be called together in an open meeting. At least two-thirds of the members of the public body present must vote to close the meeting before it can be closed. No closed meeting is allowed except for the reasons specified in UTAH CODE ANN. 52-4-205, nor may any other items be discussed in the meeting. Interviews of candidates to fill elected positions and mid-term vacancies or absences, and discussions of their professional competence, etc., may not occur in a closed meeting. The reasons for holding the closed meeting and the vote either for or against the proposition to hold the closed meeting are to be publicly announced and entered into the minutes of the public portion of the meeting.

The Utah Supreme Court has carved out an exception to the open meeting requirements of the Act for the “decision making” or deliberation of a public body during a judicial or quasi-judicial process, so long as the “information gathering” phase of such proceeding is open to the public, and any final or formal action is announced or issued in open meeting. *Dairy Product Services, Inc. v. City of Wellsville*, 13 P.3d 581, 595 (Utah 2000). This exception seems to be applicable to a city’s appeal authority acting in its judicial or quasi-judicial capacity, although UTAH CODE ANN. §10-9a-103(28) could be construed as forcing a different conclusion.

(d) Minutes and Recordings. The Open Meetings Act requires that written minutes and recordings be kept. The written minutes must be available to the public within a reasonable time after the meeting. Written minutes made available to the public before approval by the public body shall be clearly identified as “awaiting formal approval” or “unapproved.”

(i) Minutes and Recordings of Open Meetings. Written minutes and a digital or tape recording must be kept of all open meetings. The minutes and recording shall include (1) the date, time and place of the meeting; (2) the names of the members present and absent (do a roll call); (3) the substance of all matters proposed, discussed or decided; (4) a record of votes taken; (5) the name of each person who provided testimony and the substance of such testimony; and (6) any other information that any member requests be entered in the minutes or the recording.

The recording must be a complete and unedited record of all open portions of the meeting and shall be available within a reasonable time after the meeting. Both written minutes and recordings of open meetings are public records under GRAMA, but written minutes are the official record of action taken at the meeting.

(ii) Minutes and Recordings of Closed Meetings. With limited exceptions, the Open Meetings Act requires that the closed meeting be recorded. Detailed written minutes are permissible but not mandatory. The recording and any written minutes of a closed meeting are subject to the same general requirements applicable to open meetings, but only to the extent that disclosure would infringe on the confidentiality necessary to fulfill the permitted purpose of the closed meeting. Minutes and recordings of closed meetings are protected records under GRAMA, which are subject to disclosure only pursuant to court order.

Notwithstanding the foregoing, closed meetings to discuss the character, professional competence, or physical or mental health of an individual or discussions regarding deployment of security personnel, devices or systems need not be recorded nor minutes taken. Instead, the presiding officer shall sign a sworn statement affirming that the sole reason for the closed meeting was one or both of those purposes.

(e) Predetermining Public Body Action Prohibited. Individuals constituting a quorum of a public body may not act together outside a public meeting in a concerted and deliberate way to predetermine an action to be taken by the public body at a meeting on a relevant matter. See UTAH CODE ANN. 52-4-208.

(f) Enforcement and Penalties. The attorney general and the county attorneys of the state are charged with enforcing the Open Meetings Act. Private individuals, however, can enforce these acts by bringing suit to enjoin or force compliance with provisions of the Act.

Certain final actions in violation of the Act are voidable by a court if the lawsuit is commenced within 90 days after the date of the action. If a private individual prevails on a suit alleging that a quorum of a public body have collaborated to effect a predetermined action under UTAH CODE ANN. 52-4-208 as explained above, the court may award reasonable attorneys fees and court costs to the successful plaintiff.

Further, a member of a public body who knowingly or intentionally violates, or who knowingly and intentionally abets or advises a violation of any of the closed meeting provisions of the Act, is guilty of a class B misdemeanor.

4. **Conduct of Meetings**. Watch out for the following in public meetings, any of which may result in a decision that is arbitrary or capricious:

(a) Public Clamor. While most public meetings may be friendly and courteous, there are occasions when issues arouse primate instincts and uncontrolled emotions. Be aware of the potential for such behavior and resist the potential of becoming unduly influenced by persuasive, but often irrational, comments or actions. Decisions of public bodies have been rejected by courts when it was apparent from the record that the body was influenced more by vocal participants at the meeting than by their responsibility to represent the public.

(b) The Straw Vote. Often, when a group at a meeting perceives that they outnumber those with the opposing point of view, they will call for a “straw vote” to convince the public body that they represent the majority. The public body should resist such requests—it must be made clear that such a vote would not represent an honest test of community public opinion.

(c) Petitions. Petitions signed by an impressive number of persons also are frequently presented as evidence of the correctness of the petitioners’ position. The public body can accept a petition and thank the bearers for their efforts and can agree to include the petition in the body’s deliberations. It should be made clear, however, that a petition again may not be an honest representation of the community.