Open and Public Meetings

APPENDIX B

To quote the statute, "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."[1]

Generally speaking, when public bodies meet to discuss and take action on public business, their deliberations are to be open and public. This does not mean that the public can participate; it only means that the meeting is to be observable by the public.

Fair enough, but what is a "public body" and when do we call their interaction a "meeting"? As you would expect, the devil is in the details.

What is a public body?

It is any administrative, advisory, executive, or legislative body of the state or a municipality, county, special district, school board, or other entity created by government action, if that body:

1. is created by the Utah Constitution, statute, rule, ordinance or resolution AND
2. has two or more members AND
3. expends, disburses, or is supported in whole or in part by tax dollars AND
4. is vested with the authority to make decisions about the public's business.

UNLESS the body is a political party or one of a few committees at the state legislature.[2]

City councils, county commissions, planning commissions, boards of adjustment, site plan review committees, historic district commissions, and similar land use bodies are all public bodies. Groups of staff who meet together and ad hoc committees

of self-appointed individuals who meet to propose changes in policy are not public bodies unless the local ordinance vests them with authority to make decisions. If the land use regulations appoint a staff committee to review site plan applications, for example, then that committee is a land use authority and also a public body.

What is a meeting?

A meeting is the convening of a quorum of a public body to discuss or act on business that the body does, unless the meeting is by chance. When a body charged with both legislative and administrative duties, such as a county commission, meets solely to discuss administrative or operational matters that is not a meeting unless some formal action is required or public funds are appropriated.[3]

Study sessions, workshops, executive sessions, field trips, and formal sessions held for the purpose of discussing or acting upon a matter over which the public body has jurisdiction or advisory power are all "meetings."[4]

A "meeting" also includes some electronic forms of communicating between and among the members of a public body. It is both a convenience and a potential pitfall for local officials to engage in conversations by Zoom or other online meeting application, and conference calls. Such exchanges are public meetings that are subject to the same formalities and public observation as in person meetings.[5]

How is public notice to be given of meetings?

It is done in several ways. Any public body like the planning commission or city council must give notice once a year of their normal meeting schedule. The notice must note the specific time, date, and place of each meeting planned for the year.[6] Any public body must also give a 24-hour advance notice of the agenda, date, time, and place of each of its meetings.[7] If this requirement is not met, the body is not to meet.

Public notice can be satisfied by:

1. written notice posted at the principal office of the body or at the meeting place, AND
2. online notice at the Utah Public Notice Website at *www.pmn.utah.gov* AND

3. notice to at least one newspaper of general circulation in the area or to a local correspondent.[8]

Emergency meetings can be held to handle urgent matters if the best notice practicable is given and an attempt is made to notify all members of the body and a majority votes to go ahead with the meeting.[9]

Public bodies are encouraged to use electronic means such as special cable TV channels, e-mail, social media or the internet to broaden the notice of public meetings.[10] Remember that there are some other notice requirements related to certain items on an agenda; for example, some ordinances require advance notice to neighbors before certain applications can be heard. Check the local ordinance and state statutes to be sure of the notice requirements for specific issues. Just because the meeting was noticed twenty-four hours in advance does not mean that the notice requirements for a specific land use decision or change in land use regulations were met.

What if items are discussed that are not on the agenda?

The duty to provide notice of a meeting includes a duty to provide an agenda for the meeting.[11] The courts have held that when a significant issue is to be discussed, it should be listed plainly on the agenda. Sometimes local officials get a little too "cute" by placing an item at the bottom of the agenda such as "other business" or "possible executive session" or the like and assume that that creates a blanket opportunity to discuss anything at all. This is clearly an abuse. The statute states that agenda items are to be identified with "reasonable specificity".[12]

In a recent case, the Utah Supreme Court said "it would clearly violate the public policy behind the Act to strategically hide sensitive public issues behind the rubric of 'other business.'" In that case, the city only escaped having its actions invalidated because the item discussed was re-advertised and heard again in a subsequent meeting that had been properly noticed.[13]

The Utah Supreme Court has held that no violation of the agenda requirements of the Open and Public Meetings Act occurred when the planning commission discussed in its meeting items that were not on its agenda and the matters were not within the jurisdiction of the planning commission to make decisions about. This opinion by the court offers some comfort to those who worry about falling into the

trap of discussing incidental issues not related to their offices without putting such nonissues onto the agenda.[14]

State statute also provides that the public body may discuss items raised in a public meeting by the public at the discretion of the presiding officer. No final action may be taken, however, unless the item is raised in an emergency meeting.[15]

What is the difference between a public "meeting" and a public "hearing"?

Quite a bit. *Anyone can observe a public meeting, but there is no right to speak or be heard there*. Although it is common (and wise) for local bodies to freely allow public comment when that comment is constructive and not disruptive, they have no legal duty to do so.

Local ordinances and state statutes may provide for the obligation to hold public hearings, and those rules must be followed. Beyond that, the public participates in presenting opinions and evidence at the pleasure of the body that is conducting the meeting.

Many would be surprised, for example, to know that there is no state requirement that a city or county council conduct public hearings on rezoning requests or other similar business.[16] Most do, and perhaps are required to do so by local ordinance, but they are not obligated by some state law to do so. Check the local ordinance or relevant state statute to see if a public hearing is required.

It is not uncommon for legislative bodies to have time on their agenda for "comments" or "questions" from the public. This is normally limited in time to avoid taking time on items that are not on the agenda at the expense of the items that are. In fact, though the public may raise any issue, it would violate the notice requirements explained above if the body extensively discussed a matter that is not on the agenda just because a citizen brought it up.[17] It would certainly be out of order to make a decision without the agenda showing that the issue was to be brought up.

Although there is nothing wrong with taking advantage of an open mic if it is provided, the better practice would be to call the clerk or chair of the body and ask to be on the agenda so they could discuss your matter completely and legally, and perhaps make a final decision on the matter. If the meeting is not a public hearing, you have no right to participate. You are entitled, as mentioned, to record it, to observe

it, to tell your friends about it, and to communicate your thoughts to the members of the body outside of the meeting, but you don't have any right to speak up unless the body invites you to do so.

Check with someone ahead of time to find out if public input is commonly accepted and how you can express your desire to speak if you are so moved while the meeting is proceeding.

If the meeting is a public hearing, there are usually some restrictions on participation such as time limits. If unduly narrow and strict, these limits may actually violate due process, but normally they must be followed. If you do not have time to say all you wish, submit written material for the record so that everything you wish to be considered can be taken into account as the decision is made. If your property rights are at issue, there are standards of due process that must be afforded to you.[18]

The right to adequately present your evidence and argument cannot be unreasonably restricted. If you are not allowed to submit written materials, ask a member of the body to submit them for you. The record must include any information that a member submits.[19]

What records of public meetings must be kept?

Written minutes or a tape recording must be kept of all open meetings. The records must indicate:

1. when and where the meeting was held, *and*
2. which members of the body were present, *and*
3. the substance of all matters discussed, and
4. a record by individual members of all votes taken, *and*
5. the names of all citizens who appeared and the substance, in brief, of their testimony, *and*
6. any other information that a member of the body requests be entered in the minutes.[20]

If a tape is used to record a meeting, written minutes must be produced within a reasonable time and be made available to the public.[21] The tape is a public document. It may not be erased or destroyed except under a schedule of destruction for public

documents.[22] Only written minutes, however, are considered evidence of the official action taken at the meeting.[23]

Anyone present may also record all or part of a meeting, so long as the recording does not interfere with the conduct of the meeting.[24]

Are there some meetings that do not have to be open to the public?

Yes, if they fit into one of the following narrow exceptions for closed meetings or "executive sessions" outlined in state statute:

1. to discuss the character, professional competence, or physical or mental health of an individual, or
2. strategy sessions to discuss collective bargaining, or
3. strategy sessions to discuss pending or reasonably imminent litigation, or
4. strategy sessions to discuss real estate, water right, or water share transactions where such a private discussion would help the public body get the best deal, so long as public notice has been given that any property, water, or water rights would be offered for sale, or
5. to discuss the deployment of security systems, or
6. investigative proceedings involving allegations of criminal misconduct, or
7. discussion of trade secrets made necessary to properly conduct a procurement.[25]

The Utah Supreme Court also held that an exception to the Open and Public Meetings Act may allow a closed meeting when a public body deliberates like a jury in determining the facts of a given situation and applying those facts to a matter properly at issue before them in a "quasi-judicial" proceeding.[26]

> It is clear that the legislature intended that an official meeting of the [public body], wherein it performs the "information obtaining" phase of its activities, should not be held in private or in secret, but should be open to the public. However, once the "information obtaining" procedure has been completed, it is essential that during the "decision making" or judicial phase, those charged with that duty have the opportunity of discussing and thinking about the matter in private, free from any clamor or pressure, so they can calmly analyze and deliberate upon

> questions of fact, upon the applicable law, and upon considerations of policy, which bear upon the problems with which they are confronted.[27]

Therefore, as long as the "information obtaining" procedures are conducted in the open and any final or formal action is announced or issued in the open, the "decision making" or deliberation of a public body during a judicial process may be held in private and is exempt from the requirements of the Act.

It would generally not be appropriate to discuss proposed legislative decisions such as the general plan, zoning ordinance, rezoning requests, annexations, or similar policy questions in private. In the rare event that a closed meeting to discuss legislation is appropriate under the law, it would probably be in the context of the exception allowed to discuss pending or reasonably imminent litigation.

What are the limits on a closed meeting?

Before going into a closed meeting, the body must meet in open session and take a motion to go into a closed meeting. The motion must pass by a two-thirds majority vote of the quorum that is present to conduct the meeting. The reason(s) for holding the closed meeting must be announced and made part of the record of the open meeting and the vote must be recorded individually.[28]

The public body, in a closed meeting, may not take a substantive vote, make any decisions, and cannot approve an ordinance, resolution, rule, contract, or appointment. It must come out of a closed meeting to make a decision.[29]

The public body must tape record closed meetings or keep detailed written minutes that disclose the content of the closed portion of the meeting. These minutes or tapes are protected records, however, and the public can only have access to them now or in the future under the limitations imposed on such records by GRAMA. The minutes must include the date, time, and place of the meeting; the names of those present and absent; and the names of all others present except where noting someone's presence may violate a confidence and defeat the purpose of keeping the meeting closed.[30]

If a closed meeting is challenged in court, the judge will review the tape recording or minutes in privacy and decide if the meeting was legally held. If the rules were followed, the court will seal the record and not reveal any of its contents. If the judge

determines that the meeting was not conducted properly in private, the court will reveal all or any part of the record of the meeting which relates to business that should have been conducted in public.[31]

The ability to weigh facts in private does not lessen the duty a public body has in supporting its decisions by substantial evidence on the record. No decision can be made behind closed doors. The public body must come out of a closed meeting, state the facts as they find them to be, and then make a decision that is supported by those facts if their decisions are to be valid.[32]

Can meetings be held by telephone or on the internet?

Yes, as long as the public can also participate by silent observation. One location for participation must be in the city where the body normally meets. Notice of the meeting and the means to participate must be provided twenty-four hours in advance.[33]

How are open meeting requirements enforced?

First of all, the duty to enforce the statute is imposed on the Attorney General and county attorneys.[34] There is a specialist at the office of the Attorney General who handles these matters and will respond to local concerns and questions.

Anyone denied any right to participate in open and public meetings can also bring suit to compel compliance with the rules. In the right case, the court can award attorneys' fees and court costs to a successful plaintiff. Decisions made in violation of the Open Meetings Act (either by improperly closing a meeting or by failure to provide the required notice) can be voided by a court if the decision is challenged by filing legal action within 90 days.[35]

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1 Utah Code Ann. §52-4-102.

2 Utah Code Ann. §52-4-103(9).

3 Utah Code Ann. §52-4-103(6).

4 Id.

5 Id. The definition of a "meeting" includes "by means of electronic communications". That said, however, Utah Code Ann. 52-4-210 provides that nothing in the open meetings act is to be construed to restrict a member of a public body from transmitting an electronic message to other members of the public body at a time when the public body is not convened in an open meeting.

6 Utah Code Ann. §52-4-202(2).

7 Utah Code Ann. §52-4-202(1).

8 Utah Code Ann. §52-4-202(3).

9 Utah Code Ann. §52-4-202(5).
10 Utah Code Ann. §52-4-202(4).
11 Utah Code Ann. §52-4-202(1)(b) and (6).
12 Utah Code Ann. §52-4-202(6)(a).
13 *Ward v. Richfield*, 798 P.2d 757 (Utah 1990).
14 *Harper v. Summit County*, 2001 UT 10, 26 P. 3d 193.
15 Utah Code Ann. §52-4-202(6)(b).
16 See, for example, Utah Code Ann. §10-9a-502(1)(b) where the duty to hold a hearing on a land use regulation is imposed on the planning commission, not the legislative body. The city council must only take a vote on the plan at a public meeting but is not required by state law to hold a hearing. Of course, every city council I am aware of holds a hearing, which is entirely appropriate. The law sets minimums for public participation, not maximums.
17 Utah Code Ann. §52-4-202(6).
18 *Dairy Prod. Servs., Inc. v. Wellsville*, 2000 UT 81, ¶24, 13 P.3d 581.
19 Utah Code Ann. §52-4-203(2)(a)(vii).
20 Utah Code Ann. §52-4-203(2).
21 Utah Code Ann. §52-4-203(4)(g).
22 Utah Code Ann. §52-4-203(6). The duty to preserve records by municipalities and counties, which are political subdivisions of the state, is referred to in Utah Code Ann. §63G-2-701. Each government entity is to adopt a schedule for the retention of records, including tape recordings of meetings.
23 Utah Code Ann. §52-4-203(4)(i).
24 Utah Code Ann. §52-4-203(5).
25 Utah Code Ann. §52-4-205(1). For a case discussing the pending litigation exception see, *Kearns Tribune v. Salt Lake County Commission*, 2001 UT 55 28 P. 3d 686. The court did not read the exception narrowly, but allowed Salt Lake County to
discuss strategy for a pending hostile annexation issue even though litigation had not been filed against the county in the matter.
26 *Dairy Prod. Servs., Inc. v. Wellsville*, 2000 UT 81, 24, 13 P.3d 581. See also *Common Cause of Utah v. Public Serv. Comm'n*, 598 P.2d 1312, 1315 (Utah 1979); see also *Andrews v. Board of Pardons*, 836 P.2d 790, 792-93 (Utah 1992) (per curium) (finding judicial nature of board deliberations to be exempt from requirements of Utah Open and Public Meetings Act).
27 Id.
28 Utah Code Ann. §52-4-204.
29 Utah Code Ann. §52-4-204(3).
30 Utah Code Ann. §52-4-206.
31 Utah Code Ann. §52-4-304.
32 Utah Code Ann. §52-4-302(1)(a).
33 Utah Code Ann. §52-4-207.
34 Utah Code Ann. §52-4-303(1).
35 Utah Code Ann. §52-4-303(3), (4).