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Public Participation During Open Meetings

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- Texas Government Code section 551.007 was enacted in 2019.
- Entitled “Public Testimony,” it authorizes a member of the public to address the governmental body at its meetings.
- It is more commonly known as “public comment.”



Presentation Outline

- Public comment under the Open Meetings Act before 2019
- Section 551.007's requirements (2019)
- Public comment practices during the Governor's emergency orders applicable to public meetings
- Post-emergency order practices (the present)



Public Comment Before 2019

- The Open Meetings Act did not entitle the public to speak at public meetings prior to the enactment of section 551.007.



Original Purpose of the Act

- “The Open Meetings Act was enacted in 1967 for the purpose of assuring that the public has the opportunity to be informed concerning the transactions of public business.”
- “Our citizens are entitled to more than a result. They are entitled not only to know what government decides but to observe how and why every decision is reached.”

--Texas Supreme Court, in *Acker v. Tex. Water Comm'n* (1990)



Prior Interpretation of the Act

- Courts and the Attorney General interpreted the Act to give the public the right to attend and watch open meetings, but not to speak.



Constitutional Limitations

- Prior to the enactment of section 551.007, the main limitation on rules regulating public comment was constitutional, allowing only rules that (1) do not discriminate against speech on the basis of viewpoint, and (2) are reasonable in light of the purpose served by the forum.



- Open Meetings Act said little about public comment.
- Governmental bodies were not required to allow public comment for most types of meetings, although most did.
- Governmental bodies had wide discretion to regulate such matters as when public comment would be allowed, the length of presentations, and the number of speakers.
- The main requirements were that rules be viewpoint neutral and reasonable under the circumstances.



Enactment of Section 551.007

- One motivating concern was the practice of conducting public comment at the end of the meeting. Thus, a governmental body might act on an agenda item before the public had the opportunity to provide input.
- The 86th Legislature added section 551.007, entitled “Public Testimony,” effective September 1, 2019.



- Tex. Gov't Code § 551.007:
 - (a) Specifies to whom the statute applies
 - (b) Establishes the public's right to speak
 - (c) Allows reasonable rules, including time limits
 - (d) Time allowed when public testimony is translated
 - (e) Governmental body must not prohibit criticism



Applies to Most Local Bodies

- Subsection (a): “This section applies only to a governmental body described by Sections 551.001(3)(B)-(L).”
- Does not apply to State level governmental bodies
- Does apply to all other local government bodies listed in section 551.001(3), including:
 - Commissioners courts
 - City councils
 - Other city and county deliberative bodies
 - School boards
 - Special districts
 - Certain nonprofits



- Tex. Gov't Code § 551.007(b):
 - “A governmental body shall allow each member of the public who desires to address the body regarding an item on an agenda for an open meeting of the body to address the body regarding the item at the meeting before or during the body's consideration of the item.”



Scope of the Right to Speak

- Because a “governmental body shall allow each member of the public who desires to address the body” to do so, anyone who wants to speak must be allowed to speak.
- The right to speak is limited to agenda items.
- The right to speak is “at the meeting.”
- Public comment must occur “before or during the body’s consideration of the item.”



Reasonable Rules

- Tex. Gov't Code § 551.007(c):
 - “A governmental body may adopt reasonable rules regarding the public's right to address the body under this section, including rules that limit the total amount of time that a member of the public may address the body on a given item.”



What Rules are Reasonable?

- Under the Constitution, rules must be viewpoint neutral and be reasonable in light of the meeting's purpose.
- Current First Amendment precedent would allow rules that restrict speakers to the subject of the meeting, impose time limits on speakers, and prevent disruptions of the meeting.



Reasonable Time Limits

- Subsection 551.007(c) expressly allows rules “that limit the total amount of time that a member of the public may address the body on a given item.”
- What is a reasonable time limit?
- Three minutes is a common limitation, but whether a time limitation is reasonable may depend on the particular circumstances.



- Section 551.007(b) calls for an opportunity to address the governmental body “before or during” consideration of an item.
- Thus, a governmental body might adopt a rule consistent with “subsection 551.007(b)’s requirements by having a single public comment period at the beginning of an open meeting to address all items on the agenda.”
- Can limit total speaker time only if “reasonable.”

--Tex. Att’y Gen. Op. No. KP-0300 (2020)



Governmental Body's Response

- Section 551.007 authorizes a member of the public to address the governmental body about agenda items only. The governmental body members may, but are not required, to respond to a section 551.007 address.
- If a member of the public making a section 551.007 address raises a non-agenda item, section 551.042 of the Act still applies to require the governmental body to limit its comments about non-agenda items.



Rules for Orderly Procedure

- “A governmental body may adopt reasonable rules to maintain order at a meeting.”

--Tex. Gov't Code § 551.023(b).

- Section 551.007 likely allows rules that promote orderly procedure provided they do not unreasonably frustrate the public's right to speak.



Criticism

- “(e) A governmental body may not prohibit public criticism of the governmental body, including criticism of any act, omission, policy, procedure, program, or service. This subsection does not apply to public criticism that is otherwise prohibited by law.”
- Rules must be viewpoint neutral, but as the U.S. Supreme Court has said, “Giving offense is a viewpoint.”
- “[P]ublic criticism that is otherwise prohibited by law” is a narrow exception.



Consequences

- Section 551.007 does not state consequences for noncompliance.
- An agenda item passed without an opportunity for public comment may be voidable.



- Governor declared disaster on March 13, 2020
- Suspension letter issued March 16, 2020



- The suspension list included subsection 551.007(b) as a statute “that may be interpreted to require face-to-face interaction between members of the public and public officials.”
- The list suspended subsection 551.007(b), “provided, however, that governmental bodies must offer alternative methods of communicating with their public officials.”



Video Conference

- Suspended the video conference rules requiring a member of the governmental body to be present at a physical location
- Suspended public's right to address the governmental body face-to-face at a physical meeting
- Did not suspend the public's right to address the governmental body at the meeting



- For emergency or public necessity when convening a quorum in one place is difficult or impossible.
- Notice should explain rules and procedures explaining how a member of the public may address the governmental body under section 551.007.



Advance Notice of Rules

- The agenda notice should clearly inform the public about all rules, procedures, and special instructions concerning participation in a section 551.007 public comment.



Lifting of Post Emergency Order

- Effective September 1, 2021, all Open Meetings Act requirements are again fully in effect.
- What practices developed during the emergency may continue?



Public Comment by Video Conference Call

- Videoconference call meetings are not limited to emergencies but must strictly comply with section 551.127, requiring presence of one or more members of the governmental body.
- Although not entirely clear, section 551.007 likely entitles a member of the public to appear in person at the meeting for public comment.



- A governmental body may still offer a member of the public the option to participate remotely.
- Subsection 551.127(k) allows a for members of the public to “testify” from a remote location by videoconference call.



Advance Registration

- Some governmental bodies have had rules requiring a member of the public wishing to speak to register in advance of the meeting and identify the agenda item the speaker wishes to address.
- If otherwise reasonable, such rules might be justified as a regulation to provide for an orderly meeting.
- As implemented, the rules must not unreasonably infringe on the speaker's right to address the governmental body about any agenda item.



Written Public Comment

- Some governmental bodies have required members of the public to submit written comments to be read by an officer or member of the governmental body at the meeting.
- Limiting public comment to submitted written comments may be inconsistent with the right of a member of the public to address the governmental body at the meeting.
- The governmental body may give the option to submit written public comment, but it does not supplant the right to appear in person for public comment.



Open Forum

- Some governmental bodies provide for both public comment for agenda items under section 551.007 and an open forum for non-agenda subjects.
- An open forum for non-agenda items is not governed by section 551.007. The governmental body has more latitude to regulate an open forum provided its rules are viewpoint neutral and otherwise reasonable.



Overflow Rooms

- Some governmental bodies have limited seating capacity in the meeting room and provide overflow rooms with audio/video equipment. Rules must be reasonable and comply with the core purposes of TOMA.
- It is an open question whether a member of the public can be required to address the governmental body from the overflow room.



Final Thoughts

- Section 551.007 gives a member of the public the right to participate in a meeting by addressing the governmental body about items on the meeting's agenda.
- A governmental body may offer additional or alternative ways for a member of the public to participate in the meeting, but it remains the member's choice.
- A member of the public may always reject suggested alternatives and insist on the right to address the governmental body under section 551.007 as written.



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