City Meetings and the First Amendment

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It is important to note that this paper is not intended to be specific legal advice or to be acted upon as legal advice. This paper is an overview of the interplay between various statutes and state and federal cases addressing First Amendment issues with regard to city council and related governmental body meetings.

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City Meetings and the First Amendment

Introduction

This paper is not intended to provide a review of the Texas Open Meetings Act, which is the subject of a continued review by the Texas Attorney General in his excellent publication, entitled "Open Meetings – 2006 Handbook". Instead, the purpose is to provide an overview of the interplay between the First Amendment, the Texas Open Meetings Act and state and federal cases addressing First Amendment issues with regard to city council meetings and rights of participants at these meetings. Central to this discussion is the concept of a public forum. Definitions of these two words are provided below:

Public:

> "**1 a:** exposed to general view**:** **OPEN** not restricted to a particular group or category of participants <*open* to the public>" Merriam-Webster Online Dictionary (2006)

Forum:

> "**1 a:** the marketplace or public place of an ancient Roman city forming the center of judicial and public business **b:** a public meeting place for open discussion" Merriam-Webster Online Dictionary (2006).

These words together mean when a governmental body meets, the meeting is to be exposed to general view by the public (open to the public), in a public location, with no restrictions on who may attend and where open discussion is allowed. While this is a noble goal, the reality is that without rules governing conduct and what may be discussed, there may be a tendency by some to abuse or derail the noticed subjects of the public meeting for purposes inconsistent with the legitimate goals of local government.

Statutes and rules are designed to ensure that fair notice is given to the public of what will be discussed at a public meeting so the individual citizen can make an informed decision on whether or not he or she wants to attend that particular meeting. Additionally the rules are to govern conduct so that an orderly meeting can be held.

While rules of conduct and limitations on speech related to public meetings may be designed to maintain decorum, avoid physical violence, various forms of "trash-talking", and other types of deemed disorderly conduct by participants, we as a people strongly believe in the First Amendment right to free speech. The tension between the justification for these rules and the premise of free speech is often a recipe for headaches and stress for the city attorney and public official who sometimes are thrust into the position of parliamentarian or ruling authority during a particularly contentious public meeting where immediate action is required.

The Texas legislature has enacted Chapter 551 of the Texas Government Code, the "Texas Open Meetings Act" (TOMA), with the focus of dictating mandatory procedures

designed for open government. Its focus is not to provide regulation of public comment and, in fact, does not provide entitlement to the public to speak on or determine topics of discussion by the governmental body. However, various opinions of the Attorney General and state and federal courts have provided some guidance in balancing the constitutional right of free speech and proper regulation of public meetings to avoid disruption. For background, we will now look at the First Amendment and the TOMA.

I. GENERAL PROPOSITIONS OF LAW GOVERNING FREE SPEECH, CONTENT AND CONDUCT

A. The First Amendment

> **"**Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S.C.A. Const.Amend. 1 (Emphasis added).

While the First Amendment clearly states there can be no law that abridges freedom of speech, it does not create a right to communicate a person's views at all times or in any manner that person desires.[1] Further, federal courts have held there is a significant governmental interest in conducting orderly, efficient meetings of public bodies.[2] A city may place limitations on the time, place and manner of speech as long as the restrictions are content neutral and narrowly tailored to serve a significant governmental interest and leave open ample alternatives for communication.[3]

A city must create and timely post an agenda to give the public sufficient notice on what items (topics) will be discussed at the council meeting. Most cities place a "public comment" section or "open mike" item on the agenda whereby members of the public are usually given a short amount of time to express their concerns or views on any subject to the city council. While currently there is no requirement under TOMA for such public comment, once public participation or comment is permitted there is then created a public forum where the speaker is accorded First Amendment Rights.[4] Consequently, once such public comment is accorded, a city council may not then exclude a person from speaking simply because it does not like the topic or viewpoint. Selective exclusion from this public forum may not be based on content alone.[5] There is some existing authority that a city council may restrict the individuals who speak at meetings to those individuals who have a direct stake in the business of the city, such as a landowner, resident, vendor or business owner, so long as the restriction is not based on the speaker's viewpoint (content neutral).[6]

A city council also has a significant governmental interest in ensuring order at its meetings. Therefore, a speaker may not use the First Amendment as authority to disrupt a council meeting.[7] For example, the removal of a landowner from a governmental meeting was determined not to violate the landowner's First Amendment rights when the landowner became repetitive, truculent, and repeatedly interrupted the chair.[8] Put another way, allowing a speaker

to hijack the proceedings or conduct a filibuster would impair the rights of other would-be participants.[9] Various courts have also noted that being "disruptive" is not confined to physical violence, but also includes conduct that seriously violates rules of procedure that have been ostensibly established to govern conduct of meetings. We next visit TOMA which governs how open meetings by governmental bodies in Texas are to be noticed and what can be discussed.

B. Texas Open Meetings Act

In regards to TOMA, the Texas Supreme Court has "demanded exact and literal compliance with the terms of this statute."[10] TOMA provides framework requirements for municipal meetings. Some of the more basic and relevant sections for purposes of this paper include:

> 1. Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter. Section 551.002;
>
> 2. A governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body. Section 551.041;
>
> 3. (a) If, at a meeting of a governmental body, a member of the public or of the governmental body inquires about a subject for which notice has not been given as required by this subchapter, the notice provisions of this subchapter do not apply to:
>
> (1) a statement of specific factual information given in response to the inquiry; or
>
> (2) a recitation of existing policy in response to the inquiry.
>
> (b) Any deliberation of or decision about the subject of the inquiry shall be limited to a proposal to place the subject on the agenda for a subsequent meeting. Section 551.042;
>
> 4. Notice of a meeting of a governmental body must be posted in a place readily accessible to the general public at all times for at least 72 hours before the scheduled time of the meeting, except as provided by Sections 551.044-551.046. Section 551.043; and
>
> 5. An action taken by a governmental body in violation of this chapter is voidable. Section 551.141.

To summarize, in most circumstances a meeting must be properly posted 72 hours in advance specifying the date, hour, place and subjects to be discussed. Additionally, only subjects on the agenda may be discussed, deliberated or debated. The Act requires full disclosure of the subject matter of the meetings.[11] This allows members of the public who are the "intended beneficiaries of the Act" to be informed, which is the purpose of TOMA, and to determine whether or not they wish to attend the meeting.[12]

In addition to full disclosure of the subject matter to be discussed, notice is also required if there is possible action to be taken by the council on the subject matter. Notice of possible action is sufficient if "it would alert a reader to the fact that some action" would be taken on a

certain topic.[13] To determine if there is sufficient notice to inform the public of the topic under discussion, a court will perform an analysis by comparing the content of the notice given and the action taken at the meeting.[14] A reviewing court will look to see if the public has a special interest in the topic under discussion and, if so, whether the notice of the subject matter and action to be taken require more specific notice.[15] For example, the hiring/termination of a police chief, city manager or similar ranking official is reflected as of great interest to the public and the agenda must do more than merely use the general words "employment of personnel" to inform the public of the council's intent regarding these types of positions.[16] On the other hand the phrase "employment of personnel" has been held adequate to inform the public of the employment of a police dispatcher or administrative assistant to the city manager, which are determined to be positions of lesser interest to the public.[17] Adequacy of proper notice has been addressed in relation to what previously had been routine agenda items several years ago, including agenda items such as "City Manager Comments" or "Staff Reports," and this will be discussed in more detail later.

Also, under TOMA a member of the public or city may inquire about a subject not on the agenda, but any responses are limited to giving a statement of factual information given in response to the inquiry, recitation of existing policy, advising the individual of the name of the appropriate staff member to speak with, that the request will be forwarded to the appropriate staff for consideration, or stating the issue raised will be placed on the next agenda.

With this very general overview of the First Amendment and TOMA we will now look at different situations that may (or most certainly) will occur during a public meeting governed by TOMA. As will be discussed hereafter, the current cases and opinions addressing alleged violations of TOMA (or similar statutes) where First Amendment rights are asserted indicate a general reluctance, apparently due to the fact specific nature, to specifically address the parameter of such individual First Amendment rights. Most situations will involve one of three types of people: (i) the public; (ii) city staff; and (iii) mayor and council members. We will begin with the public.

II. THE ANGRY CITIZEN

A. Who Can Speak?

As provided by TOMA, all regular, special or called meetings are open to the public. Therefore any member of the public can attend. It is another question if a person's conduct will allow that person to make comments or be subject to removal from the meeting.

The mere fact that a member of the public may attend the meeting does not mean that person has a right to speak about the items on the agenda.[18] However, most cities may and do provide an opportunity for the public to speak. The city may adopt reasonable rules to regulate speaking by the public that are consistent with law.[19] The common method is to require completion of a form or sign up sheet for public comments or the "open mike" section. In some municipalities, the rules provide that members of the public are allowed to speak during the "public comment" portion of the meeting if their comments are not related to any topics on the

agenda. Alternatively, if a member of the public wishes to comment on a particular agenda item, many cities allow that person to make their comment when that agenda item is called for consideration by the mayor or presiding officer. Many cities include rules stating the council does not have to respond to questions by citizens on agenda items. Additionally, the council or presiding officer is usually given the authority to allow or not allow a member of the public to speak on an agenda item if the person failed to sign up to speak prior to the meeting.

As noted earlier, there is federal case law that supports the proposition that a city council may restrict the individuals who speak at meetings to those individuals who have a direct stake in the business of the city, such as a landowner, resident, vendor or business owner.[20] However the council or presiding officer must exercise care to ensure that any denial to speak is not premised on the speaker's viewpoint, and that the speaker is not a stakeholder in the affairs of the city. The council or presiding officer should be cautious in exercising this authority on a fair and consistent content neutral basis. Otherwise it may be an invitation to litigation alleging wrongful discriminatory restriction on protected speech by the governmental body. The governmental body should be prepared to clearly articulate the legal basis why the speech was prohibited.

B. City Rules for Public Comments

There are many cities that have adopted rules of conduct prohibiting "personal attacks" or similar types of speech. A discussion of rules on "personal attacks" raises two questions. First, may the city enact rules of conduct prohibiting such type of speech towards council members? Second, does this violate First Amendment rights? While a general answer to both questions may be in the affirmative, the end result clearly rests upon the specific facts and the goal of ensuring an orderly meeting without disruption under established legal principles.

A city council meeting has been held to be a limited public forum.[21] By creating a "public comment" item on the agenda, a city creates a "public forum" where First Amendment protections are afforded. Because of the "public forum," the council cannot exclude a person from speaking because it does not like the topic or viewpoint. Selective exclusion from this public forum may not be based on content alone.[22] Reasonable time, place and manner regulations are permissible and any content-based prohibition must be narrowly drawn to effectuate a compelling state interest. [23] Further, by creating a "public forum" by allowing public comment, it is a violation of the First Amendment to selectively prohibit others from similarly addressing the council as to the same matters based on their speech or their status in the community.[24]

However, recent U.S. Supreme Court opinions indicate that regulation of a limited forum, such as "public comments" may survive under a test that is less strict than the one above stated.[25] Under the less strict test for reviewing limited forum speech, content-based restrictions are permitted so long as they are designed to confine the "forum to the limited and legitimate purposes for which it was created."[26] Under this reasoning, the city potentially may limit the "public forum" to comments that address city and citizen concerns (For example, the city may eliminate public comment on items unrelated to city business/jurisdiction *i.e.*, speech promoting

steroid testing for major league baseball). However, two limitations remain: (i) any restrictions on speech must be viewpoint neutral; and (ii) restrictions must be reasonable in light of the purpose served by the forum ("public comment" section).[27] In other words, content-related regulation is permissible so long as the content regulation is tied to the limitations that frame the scope of the "Public Forum" e.g. the regulation is neutral as to viewpoint within the subject matter of the content.

While not binding on Texas cities, the Michigan Attorney General ("MAttorney General") has given a common sense and easily understood advisory opinion that addresses whether a municipal body could adopt a prohibition on "personal attacks" during the public comment portion of a meeting. The MAttorney General concluded that if the definition of personal attacks included "the manner in which an employee of the board or a board member carries out his or her duties, the rule restricting such speech would be invalid."[28] But if the definition of personal attacks "refers to the conduct of the person being attacked that is totally unrelated to the manner in which he or she performs his or her duties, the exclusionary rule may be applied."[29] This opinion is instructive in light of the ability of a city to limit content to the purpose of the public comment section.

Thus, if the municipality has created a designated forum on its agenda for "public comment" with a limitation that comments are limited to subjects that address city and citizen concerns, is the city allowed to prohibit a citizen from making a statement that the "mayor and council are liars and thieves" on the premise this is a personal attack? Assuming the municipality has articulated the referenced limitation, if the citizen does not tie the name calling to an issue concerning the city or citizens or to the job performance or duties of the council, the answer may be in the affirmative.

However, what if the speaker stated "council members that support property tax rate hikes are liars and thieves because they promised, if elected, there would be no tax rate hikes"? Arguably this speech is protected because his statement is within the content permitted, and it is the speaker's view that by supporting tax rate increases the governing body are liars and thieves based on past campaign promises. Furthermore, it remains a question of fact under the circumstances if calling someone a "liar and thief" are "fighting words" that would or may cause violence or disorderly conduct.

Another example includes the airing of a police chief's affair with the wife of a police officer. Normally, the airing of an affair would be a purely personal matter and subject to restriction under "personal attack". However, since the affair involves another officer's wife, this type of behavior may be considered a public concern as it relates to the morale, leadership and teamwork in the city police department. Consequently, the comments arguably may not be prohibited, and this was the ruling in a Michigan case involving a First Amendment analysis.[30]

As we see from these examples, a balance has to be sought between the interests of the citizen who wishes to speak on matters of public concern and the interest of a city in promoting the efficiency of the public services it performs through a city council.[31] The Austin Court of Appeals has supported this reasoning when it determined a person's appearance before a zoning

board was for purely personal reasons.[32] The Austin Court held that if a person's appearances before a zoning board cannot be fairly characterized as constituting speech on a matter of public concern, then it was unnecessary for the Court to scrutinize the reasons for his removal.[33] The Austin Court concluded the City had imposed a constitutionally permissible restriction on the person's speech to promote and effectuate good government.

C. Them are "Fighting Words"

There are ample state and federal cases, mostly criminal cases, involving disorderly conduct charges, which define "fighting words". One definition is: "'Fighting words' are one such class of speech, which are 'personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.'"[34] In a criminal action, whether particular words constitute fighting words is a question of fact.[35] Section 42.01 of the Texas Penal Code prohibits disorderly conduct and makes it a criminal misdemeanor. In short, a council or its presiding officer may be within its rights to have a member of the public escorted out of the meeting for disorderly conduct upon making the determination that the speech was within this scope and disruptive to an orderly meeting.

Section 42.01 of the Penal Code does not define profane or vulgar (obscene) language, but just provides it is the type of language that if spoken tends to incite an immediate breach of the peace. So, what language, if any, is defined as profane and vulgar so that it is prohibited by law?

The Texas Attorney General ("Attorney General") was asked: "Whether the use of 'abusive, indecent, profane or vulgar' language in a public place constitutes an immediate breach of the peace"?[36] The Attorney General, after analyzing case law, statutes and the penal code, provided this summary:

> "Article 42.01(a)(1) of the Penal Code applies only to speech which as a matter of fact constitutes 'fighting words'. As a matter of law, the statute does not reach speech that merely causes public inconvenience, annoyance, or unrest. 'Fighting words' are words which would likely cause an average addressee to fight. An 'average addressee' is not someone either overly sensitive or overly inured to the speech in question."[37]

Consequently, indecent, profane or vulgar language is prohibited if it would cause the average person to fight (fact issue). That is a wide spectrum, especially in Texas. What may be offensive to one type of personality or community might not be determined offensive to another.

A case that may offer more guidance in relation to public forums and "fighting words" is *Estes v. State* which was decided by the Fort Worth Court of Appeals.[38] In *Estes,* during a high school graduation ceremony, students were going on stage to receive their diplomas from the principal. One student shook hands with the principal, accepted the diploma, then gave the "finger". No violence or disruption of the proceedings resulted and the ceremony continued. However, the principal later filed charges. The Court noted that the setting was a formal ceremony in a public arena, which carries with it an expectation of decorum and civility. Further, the principal was in a position of authority over the student, they knew each other and

the student made the gesture a few inches from the principal's face in disregard of the principal and the ceremony. The Court stated the following:

> "We must determine if the gesture in this case, under all of the attendant circumstances, amounted to 'fighting words'. In making such determination, we must consider the gesture as being directed to an average person and not necessarily Principal Farris.
>
> While Farris testified that he did not attack Estes, and under no circumstances would have attacked him or retaliated physically, he still had to resist his 'animal instinct to retaliate.' Farris was a professional in the field of adolescent education who had developed his emotional self-control as a part of his position as a high school principal. Under the same circumstances, we hold such gesture to an average person could have constituted 'fighting words'."[39]

Using this analysis, it is reasonable to state a city council meeting is in a public arena and carries an expectation of decorum and civility, and that the mayor or presiding officer is granted authority in that setting to protect that expectation. Therefore, if a citizen makes an obscene gesture that would invoke a reaction or speaks "fighting words", then it may be reasonable to quell that speech and, if necessary, remove the person from the proceedings as determined reasonably necessary.

It must be noted that the proof for sustaining a criminal charge of disorderly conduct is higher than that of a council's right to cause a person to be removed from a meeting. And therein is the interplay between First Amendment rights of speech and the ability of the council to enforce rules of conduct and prohibit speech. Fortunately, the council as a legislative body can later ratify the quashing of speech or expulsion of a citizen for using this type of language by making a fact finding that such language was outside the scope and content of the "public forum" or was of the character to cause an immediate breach of the peace. This type of factual finding will also help in the defense of the city's actions if the disruptive citizen decides to file a lawsuit.

Going back to our previous example, suppose a citizen during the public comment section calls each council member a liar and a thief. Would this be sufficient behavior for the speaker's comments to be cut off and/or removed from the council chamber based on disorderly conduct? Under criminal law, the answer arguably may be no because language that is merely harsh and insulting does not generally rise to the level of "fighting words". Derisive or annoying words only rise to such level when they plainly tend to excite the addressee to a breach of the peace.[40] Furthermore, it is not enough if the name calling merely arouses anger or resentment.[41] However, if these are the only words by the speaker, and he wishes to continue to call them liars, then council may consider the speech irrelevant to the purpose of the meeting or the public comments section, not tied to any city business, and may quash or prohibit further speech or personal attack.

D. Other Forms of Disruptive Behavior

In the case of *Estes*, an obscene gesture is noted as one form of disruptive behavior.

Listed in Section 42.01 of the Penal Code are some other forms of disruptive behavior that may occur in a meeting as follows:

> -abusive, indecent, profane, or vulgar language, and the language by its very utterance tends to incite an immediate breach of the peace;
>
> -makes an offensive gesture or display in a public place, and the gesture or display tends to incite an immediate breach of the peace;
>
> -creates, by chemical means, a noxious and unreasonable odor;
>
> -abuses or threatens a person in an obviously offensive manner;
>
> -fights with another in a public place; or
>
> -moons or flashes another (paraphrased for decorum).

In addition to the above and as noted earlier disruptive behavior may be the type of conduct that seriously violates rules of procedure established to govern the conduct of meetings, such as when a citizen becomes repetitive, truculent, conducts a filibuster or repeatedly interrupts the chair.[42] This type of behavior impairs the rights of other would-be participants.[43] Additionally, a citizen who is addressing the council in a limited public forum may be stopped from continued speaking if the speech is "irrelevant or repetitious" or "disrupts, disturbs or otherwise impedes the orderly conduct of the council meeting" as long as the citizen is not "stopped from speaking" because the council or presiding officer simply disagrees with the viewpoint of the citizen.[44] These types of speech or disruptions may be restricted by the city council or presiding officer dependent upon rules adopted by the subject municipality.

III. WHAT ABOUT CITY STAFF/EMPLOYEES?

What First Amendment rights do city employees have? If the city employee speaks, not as a citizen but as an employee, on a matter of personal interest, constitutionally protected speech is not involved.[45] However, the First Amendment does protect speech by an employee commenting as a citizen on a matter of public concern.[46] To determine whether the employee's speech addresses a matter of public concern is a question of law and one must examine the content, form, and context of the given statement.[47] Finally, discrimination by a city for an employee's speech that concerns only matters of the employee's personal interest, and not matters of public interest, is not actionable under Section 1983 as a violation of the employee's First Amendment rights.[48] While the above statements are instructive they are from two U.S. Supreme Court cases where public employees were fired for activities considered as speech outside of a public meeting.

The employee's First Amendment rights while commenting as a citizen on a matter of public concern does not give the employee the right to be disruptive, abusive, profane, or act in a

disorderly manner at a public meeting. The city council may move to curtail this type of behavior as it would if the employee were a citizen or a member of the public.

A more difficult question is whether or not an employee might be able to speak as a citizen during the public comment section. What happens if the employee, during the public comment section, wishes to make comments on matters on which the city council and city have jurisdiction? Based on a recent Attorney General opinion (unless the city posted notice of the topic the employee was going to address) the employee would not be able to talk about that topic because notice was not previously provided to the public about an issue for which the municipality had jurisdiction/control.[49] Attorney General Opinion JC-0169 stands for the proposition that since a city exercises control over its employees it presumably can ascertain in advance what subjects a particular employee will address and, therefore, should be able to post proper notice of that topic.

What if the employee wishes to comment on a matter over which the city council and City have no jurisdiction? Without questioning the relevancy of the comment, arguably under these circumstances the employee should be able to speak on that matter during public comment.

Additionally, this opinion made clear that due to the 1999 statutory modifications to the Act, agenda items denoting "employee or staff briefing sessions" were insufficient to provide adequate notice of the subject that was going to be discussed. The agenda is now required to specifically notify the public of the subject matter for discussion during staff/employee briefing. The Attorney General reflected that "a governmental body decides what it will discuss at its meetings, and it can know or can learn in advance the subject matter of reports or briefings by employees, consultants, auditors, persons engaged in business with the governmental body, and by other third parties with this specific connection to the governmental body. Thus, there are no particular difficulties of providing notice of the subject matter of such presentations." [50]

Next we will discuss the third group, council members.

IV. IS A COUNCIL MEMBER ALWAYS A COUNCIL MEMBER?

May a council member or mayor ever speak as a citizen during the "public comments" or "open mike" portion of the agenda? Apparently yes, but in very limited circumstances. Using the same logic the Attorney General used in JC-0169, if a governmental body exercises control over its employees such that it knows or is capable of knowing in advance the subject that is to be addressed, then the same would arguably be true for council members/staff, who have or should have the ability and opportunity to place the subject item on the agenda for notification to the public in advance of the meeting.

A. Comments by Texas Courts

Under the above framework, Texas courts have reviewed the Act with regard to sufficiency of notice included in the posted agenda for the remarks made and have noted that while Attorney General opinions are not considered binding on an appellate court, they are considered to be persuasive authority.[51]

The Austin Court of Appeals had the opportunity to review a County Commissioner's comments under an agenda item that read: "Presentation by Commissioner Russ Molenaar". [52] This agenda item was under the section of the agenda entitled "Proclamations & Presentations". The record reflects that County Commissioner Molenaar used this time to speak about a Proposed 2026 Transportation Plan and used his presentation as an opportunity to speak as he apparently had "grown tired of being used as a punching bag without an opportunity to speak in defense of his integrity" and "wished to respond to the repeated accusations by offering his individual point of view, by defending himself, as well as county employees and other members of the commissioner's court, and by extolling their successes and accomplishments".[53]

At the noticed meeting there were no questions asked of Commissioner Molenaar, there were no discussions of issues which he brought up, nor was there any formal action taken. Nonetheless, Hays County was sued for violation of the Texas Open Meetings Act because the agenda "notice" allegedly failed to satisfy TOMA by giving specific notice of the item to be commented on or discussed at the meeting. The Austin appellate court noted that the residents had standing to bring the action as TOMA required that the governmental bodies give the requisite advance written notice of the subject matter under Texas Government Code, Section 551.041. Thereafter, the Austin court, after reviewing four Texas Supreme Court cases of *City of San Antonio v. Fourth Court of Appeals*, 820 S.W. 2d 762 (Tex. 1991); *Cox Enterprises, Incorporated v. The Board of Trustees of Austin ISD*, 706 S.W. 2d 956 (Tex. 1986); *Texas Turnpike Authority v. City of Fort Worth*, 554 S.W. 2d 675 (Tex. 1977); and *Gore Colorado River Authority v. City of San Marcos*, 523 S.W. 2d 641 (Tex. 1975), determined that the agenda item ("Presentation of Commissioner Molenaar") was inadequate notice to the public of the matters presented by Commissioner Molenaar. The Court reflected "There is nothing in the posting that would give a resident of Hays County any inkling of the *substance* of Molenaar's proposed presentation."[54]

The Court went further to state:

> "Furthermore, Molenaar's presentation was noticed for and did occur during the "Proclamations and Presentations" portion of the meeting. The other matters noticed for this segment of the meeting were mere formalities – New Employee Introductions, Employee Recognition, and the Declaration of Red Ribbon Week in the county. The juxtaposition of Molenaar's presentation with these items gives no indication to any reader that Molenaar would make comments about substantive policy issues of great importance to the county."[55]

Hays County also argued that the First Amendment prohibited this interpretation as a "government was abridging the freedom of speech" citing the United States Supreme Court case of *Pickering v. Board of Education*, 391 U.S. 563, 888 S.Ct. 1731, 20 L.Ed. 2d 811 (1968) for

the proposition that an elected official should not give up his right of free speech merely by virtue of his office. The court determined that, ". . . we see no restriction of the right of free speech by the necessity of a public official's compliance with the Open Meetings Act when the official seeks to exercise that right at a meeting of the public body of which he is a member."[56]

What is interesting, from a legal standpoint, is the fact that Molenaar did not make his comments during the "public comment" section where comments were limited to three minutes. The court, however, summarized the remarks of the commissioner as addressing the responsibilities and efforts of the Hays County Commissioners Court of which he is a member:

> "Molenaar is not an employee of the Commissioner's Court; he is an elected county commissioner. He suffered no sanction of penalty by virtue of his speech and would have suffered none had the Agenda fully disclosed the topics of which he would speak. The Open Meetings Act may not, and does not, restrict or abridge protected speech. The problem with Molenaar's remarks is not that he could not make them at all, <u>but rather the location and timing of his comments</u>."[57] (Emphasis added).

The last quoted sentence, and the reason for its inclusion by the Court, leaves a significant question as to whether had Molenaar made his presentation during the public comment section, whether the Court would have found a violation of TOMA. Perhaps a guiding issue is if the substance of the remarks are in the capacity of an elected official concerning public business over which the governmental body has supervision or control, then specific notice of the substance of the comments must be included in the agenda under the reasoning of this case. It is freely acknowledged that this guide provides little assurance to the official who fails to post the subject matter of the proposed comments under the belief that the comments do not constitute public business under the control of the governmental body; hence, the suggestion that there be adequate posting of the subject matter of the proposed comments.

Another case demonstrates the risk of comment by an elected official on any public business when a quorum is present outside of a council meeting due to the notice requirements of TOMA. In *Gardner v. Harring*, 21 S.W.3d 767 (Tex. App.—Amarillo 2000, no pet.) the issue was whether there was a violation of the Act when a school board member commented during an informal congregation of a quorum of the board's members that the school board's president's lawsuit against the district was "regrettable". The Court phrased the issue as whether the verbal exchange was *about a matter of public business or within the board's jurisdiction*, requiring specific notice of its substance in advance to the public in compliance with TOMA.

The school board in the case was unable to obtain a summary judgment, despite the fact that the alleged comment took place outside of a formally noticed meeting where there just happened to be a quorum assembled at an outside event. The court determined that whether there was a violation of the Act for failure to post an agenda item giving notice of the matter on which the alleged comment was based was a fact issue precluding the school district from a summary judgment.

For these reasons, a conservative approach is suggested that the subject of a council member's proposed comments be included in a posted agenda. As noted earlier, the Texas Supreme Court has stated that TOMA demands "exact and literal compliance with the terms of the Texas Open Meeting Act".[58] The "public comment" item currently included in many municipalities agenda is certainly part of a "meeting" as defined under the Act because the city council receives information from the person commenting. Any council member comment will be measured by the statutory definition as to whether it relates to public business or public policy over which the governmental body has supervision or control. The issue of supervision and control has generally been held to be a fact issue for determination of the trier of fact. Further, public business is a very expansive term which would include a potential universe of matters. If a staff or council member comments under the "public comment" provision in the agenda, and there is prosecution for an alleged violation of the Act, the matter commented upon or discussed will be measured by a court or jury to determine whether the commented item should have been the subject of specific notice on the agenda. Moreover, prior cases have determined that notice must be even more specific if the public has a special interest in the topic under discussion.[59] It may also be expected that under this rationale there will be an argument that any comment or remark of a council member or high official with the city is a matter of special interest to the public and should be the subject of specific substantive notice in the agenda to alert the public.

V. LITIGATION CONCERNS

As previously noted, the Texas Supreme Court has indicated that TOMA is to be liberally construed. Since a city decides what it will discuss at its meetings, it has the ability to know or learn in advance the subject matter of reports of briefing of employees, consultants, auditors, persons engaged in business with a governmental body, and by other third parties with a special connection with the city. Consequently, there are no particular difficulties in providing notice of the subject matter of such presentations to the public. Accordingly, a city should not be surprised that the Attorney General may argue that any comments by staff or a council member under the public comment section of the Agenda, without a specific notice of the subject matter to be addressed, would be a violation of TOMA.

Additionally, the Attorney General in JC-0169 opined that "if a governmental body is apprised in advance" that members of the public will be present to comment on a specific item during public comment, that the agenda item provide notice of the subject matter of that public comment.

Further, any member of the public has the ability to institute legal action for alleged violations of the Texas Open Meetings Act or make complaints to the local district attorney's office which will often result in the unpleasant experience of being examined by a grand jury.

The violation of TOMA is generally a fact issue for individual determination and full trial on the merits may be required.[60] As stated by the Attorney General in JC- 0294, any council member who may be called to testify before a grand jury is disqualified from voting on a resolution to pay his/her own legal fees or the legal fees of another council member for defense

of a Texas Open Meetings Act violation. Although city council is not required to do so, it may spend public funds to reimburse a city council member for legal expenses to defend against an unjustified prosecution, if after the outcome of the prosecution the member is found innocent of such violation.

Further, a citizen who is escorted out of a meeting, not allowed to speak or otherwise prevented from making comments has the ability to sue the City for violation of his First Amendment rights. Defense of these types of civil claims is expensive and time-consuming.

VI. SUMMARY

- A city council has a significant governmental interest in ensuring order at its council meeting and a speaker cannot use the First Amendment to disrupt a council meeting, hijack the proceedings, or conduct a filibuster that would impair the rights of other would-be participants.
- A city may place reasonable limitations on the time, place and manner of speech as long as the restrictions are content neutral and narrowly tailored to serve a significant governmental interest and leave open ample alternatives for communication.
- By creating a "public comment" item on an agenda, the city has created a "Public Forum" which is entitled to First Amendment protection.
- Content-related regulation is permissible so long as the content is tied to the limitations that frame the scope of the "Public Forum" and as long as the regulation is neutral as to viewpoint within the subject matter of the content.
- A "personal attack" rule is invalid if it defines a personal attack to include the manner in which an employee of the board or a board member carries out his or her duties.
- A "personal attack" rule is valid if it defines a personal attack to include the conduct of the person being attacked that is totally unrelated to the manner in which he or she performs his or her duties.
- The Austin Court of Appeals has held that if a person's appearances before a Zoning Board "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for the Court to scrutinize the reasons for that person's removal".
- "Fighting words" are words which would likely cause an average addressee to fight. An "average addressee" is not someone either overly sensitive or overly inured to the speech in question."
- A city council meeting is in a public arena and carries an expectation of decorum and civility.

- An employee's First Amendment rights, while commenting as a citizen on a matter of public concern, does not give the employee the right to be disruptive, abusive, profane or act in a disorderly manner at a public meeting.
- An employee who wishes to comment as a citizen on a matter over which the city council and city has no jurisdiction arguably should be able to speak on that matter during public comment.

- If the employee wishes to speak on a matter over which the city has jurisdiction, then the city should be able to determine far enough in advance the content of the employees speech and post an appropriate notice on the agenda prior to receiving such comment.
- The Austin Court of Appeals has stated "we see no restriction of the right of free speech by the necessity of a public official's compliance with the Open Meetings Act when the official seeks to exercise that right at a meeting of the public body of which he is a member."
- The Attorney General has issued an opinion that if a governmental body is apprised in advance that members of the public will be present to comment on a specific item during public comment, that the agenda item give notice of the subject matter of that public comment.

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[1] *Heffron v. Int'l Society for Krishna Consciousness, Inc*., 452 U.S. 640, 647, 101 S.Ct. 2559 (1981).

[2] *Jones v. Heyman*, 888 F.2d. 1328, 1332 (11th Cir. 1989) citing *City of Madison, Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176 n.8, 97 S.Ct. 421, 426 n. 8 (1976) ("Plainly, public bodies may confine their meetings to specified subject matter and may hold nonpublic sessions to transact business").

[3] *Burson v. Freeman*, 504 U.S. 191, 1997 (1992); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); see generally Open Meetings 2006 Handbook (hereinafter the "Handbook") and Tex. Attn'y Gen. LO-96-111.

[4] *City of Madison*, 429 U.S. at 174-57.

[5] *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). See also endnote 2 above.

[6] *Rowe v. City of Cocoa, Florida*, 358 F.3d 800, 803 (11th Cir. 2004) citing *Norlinger v. Hahn*, 505 U.S. 1, 10, 112 S. Ct. 2326 (1992).

[7] *Smith v. Cleburne County Hosp*., 870 F.2d 1375, 1383 (8th Cir.), cert denied, 493 U.S. 847 (1989); *Kindt v. Santa Monica Pest Control Bd*., 67 F.3d 266, 270-71 (9th Cir. 1995).

[8] *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 281 (3rd Cir. 2004).

[9] *Id*.

[10] *Acker v. Texas Water Comm*, 790 S.W.2d 299, 300 (Tex. 1990) citing, *Smith County v. Thornton*, 726 S.W.2d 2, 3 (Tex. 1986).

[11] *Cox Enterprises, Inc. v. Board of Trustees*, 706 S.W.2d 956, 959-60 (Tex. 1986).

[12] *San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 765 (Tex.1991).

[13] *Lower Colorado River Auth. v. City of San Marcos*, 523 S.W.2d 641, 646 (Tex.1975); *see also Rettberg v. Texas Dep't of Health*, 873 S.W.2d 408, 411 (Tex. App.—Austin 1994, no writ).

[14] *Rettberg v. Texas Dep't of Health*, 873 S.W.2d 408, 412 (Tex. App.—Austin 1994, no writ); *Point Isabel Indep. Sch. Dist. v. Hinojosa*, 797 S.W.2d 176, 180 (Tex. App.—Corpus Christi 1990, writ denied).

[15] *Cox Enterprises, Inc*., 706 S.W.2d at 959; *Mayes v. City of De Leon*, 922 S.W.2d 200, 203 (Tex. App.—Eastland 1996, writ denied).

[16] See generally, *Cox Enterprises, Inc.*, 706 S.W.2d at 959-960; *Gardner v. Herring*, 21

S.W.3d 767, 773 (Tex. App.—Amarillo 2000, no pet.).

17 *Id*.

18 Handbook at pg. 35. See also *Charlestown Homeowner Ass'n, Inc. v. LaCoke*, 507 S.W.2d 876, 883 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.); *Eudaly v. City of Colleyville*, 642 S.W.2d 75, 77 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.) Tex. Att'y Gen. Op. Nos. JC-0169 (2000 at 1, H-188 (1973) at 2.

19 Tex. Att'y Gen. Op. No's. JC-0169 (2000) at 2; H-188 (1973) at 2.

20 *Rowe*, 358 F.3d at 803.

21 *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990).

22 See Endnote 4.

23 *Perry Educ. Ass'n v. Perry Local Educators' Assn*., 460 U.S. 37, 46, 103 S.Ct. 948, 955 (1983).

24 *Gault v. City of Battle Creek*, 73 F.Supp.2d 811, 814 (W.D. Michigan 1999).

25 *Good News Club v. Milford Cent. Sch*., 533 U.S. 98, 106, 121 S. Ct. 2093 (2001).

26 *Eichenlaub*, 385 F.3d at 280; citing *Rosenberger v. Rector & Visitors of the Univ. of Va*., 515 U.S. 819, 829, 115 S. Ct. 2510 (1995) and *Brody v. Spang*, 957 F.2d 1108, 1118 (3d Cir. 1992).

27 *Id*. citing *Good News Club*, 533 U.S. at 107-108.

28 *Gault*, 73 F.Supp.2d at 814-815, citing 1977-1978 Mich. Office of Attorney General No. 5332.

29 *Id*.

30 *Id*. at 815.

31 *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 1734-35 (1968).

32 *Price v City of San Marcos*, 744 S.W.2d 349, 353 (Tex. App.—Austin 1988, writ denied) cert. denied 488 U.S. 961, 109 S.Ct. 485 (1988).

33 *Id*. citing and quoting *Connick v. Meyers*, 461 U.S. 138, 103 S.Ct. 1684, 1689 (1983).

34 *Coggin v. State***,** 123 S.W.3d 82, 87 (Tex. App.—Austin 2003, petition for discretionary review refused (Apr 21, 2004); citing *Cohen v. California*, 403 U.S. 15, 20, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

35 *Duran v. Furr's Supermarkets, Inc*., 921 S.W.2d 778, 785 (Tex. App.—El Paso 1996, writ denied).

36 Tex. Att'y Gen. Op. No. JM-900 (1988) at 1.

37 *Id.* at 2.

38 *Estes v. State*, 660 S.W.2d 873 (Tex. App.—Fort Worth 1983, pet. ref'd).

39 *Id*. at 875.

40 *Id*.

41 *Coggin*, 123 S.W.3d at 90; citing *Skelton v. City of Birmingham*, 342 So.2d 933, 937 (Ala. Crim. App. 1976).

42 See endnotes 7 & 8. *Eichenlaub*, 385 F.3d at 281.

43 *Id*.

44 See endnote 20, *White*, 900 F.2d at 1425.

45 *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983).

46 *Id. Connick*, 461 U.S. at 147, 103 S.Ct. at 1690.

47 *Id.* See also *Upton County, Texas v. Brown*, 960 S.W.2d 808, 814 (Tex. App.—El Paso

1997, no pet).

[48] *Connick*, 461 U.S. at 147, 103 S.Ct. at 1690.

[49] See also *Hays County Water Planning Partnership v. Hays County, Texas*, 41 S.W.3d 174, 180 (Tex. App.—Austin 2001).

[50] Tex. Att'y Gen. Op. No. JC-0169 (2000).

[51] *Willmann v. City of San Antonio*, 123 S.W. 3d 469 (Tex. App.—San Antonio 2003, pet. denied).

[52] *Hays County Water Planning Partnership*, 41 S.W. 3d at 178.

[53] *Id.* at 175.

[54] *Id.* at 180.

[55] *Id*.

[56] *Id.* at 181-82.

[57] *Id.* at 182.

[58] *Acker*, 790 S.W.2d at 300.

[59] See *Markowski v. City of Marlin*, 940 S.W.2d 720 (Tex. Civ. App.—Waco 1997, writ denied).

[60] See Tex. Att'y Gen. Op. No. JC-0203 (2000) p.2, *See Bexar Medina Atascosa Water Dist. v. Bexar Medina Atascosa Landowners' Ass'n*, 2 S.W.3d 459, 461 n.2 (Tex. App.—San Antonio 1999, pet. denied).