UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

20th Annual LAND USE CONFERENCE
Planning, Law, and Regulation

Conference
April 28-29, 2016
Austin, TX

TOMA AND TORA, WHAT TO DO TOMORROW

Land Use Practice under the Texas Open Meetings Act and the Texas Open Records Act

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I. Introduction.

Nothing generates more talk and flurry of paperwork like a divisive land use issue in a community. Special town hall meetings, neighborhood meetings and one-on-one meetings with politicians are not unusual. Because of the myriad of legal requirements and the innate complexity of land use matters, the amount of paperwork and "digital-work" may grow exponentially at these times. Rumors abound, with varying degrees of accuracy. This may include rumors of additional, alternative plans and proposals for development, or include allegations of furtive meetings among a quorum of politicians or between politicians and interested parties. When a faction is not able to successfully contest the main issue head-on, attempts will be made to look for failures in the process. To ensure adherence to process, the land use practitioner needs to be familiar with both the Texas Open Meetings Act ("TOMA") and the Texas Public Information Act ("TPIA") formerly known as the Texas Open Records Act ("TORA").

Land use practice involves working with many governmental bodies subject to TOMA and TPIA. This includes city councils, planning and zoning commissions, zoning boards of adjustments, construction boards of adjustments and appeals, property owners associations, nonprofit development boards plus subcommittees of one or more of these. This invokes the usual set of obligations with respect to notice of meetings, deliberation of matters in public with exceptions, retaining various types of records for minimum periods of times, timely providing copies of records in various formats, and so on. The focus of this paper is to discuss some of the most common and most recent ways requirements under TOMA and TORA affect the land use practice.

II. TOMA

A. General. TOMA is applicable to many areas in government. Generally, governmental bodies must deliberate and take action at a public meeting except for express statutory exceptions.

B. Notice Requirements. There are many notice requirements the land use practitioner must know about. Often, it makes sense to prepare one notice and have it meet multiple statutory requirements. For land use, general public notice may be required in addition to specific notice to landowners and is often times coupled with requirements associated with the holding of public hearings. Because of the multiple statutory requirements that must be met to meet notice requirements in a land use context, sufficiency of notice, errors in notice, waiver of notice, and other related issues may become a basis for litigation.

Many of the public notices and public hearing requirements are found under chapters 211 and 212 Texas Local Government Code. Additionally, TOMA requires the following:

> § 551.041. Notice of Meeting Required.
>
> A governmental body shall give written notice of the date, hour, place, and subject of each meeting held by the governmental body.

Although simply stated, what constitutes sufficient notice under this statute can become a hot button. Factors considered in determining adequacy of notice under §551.041 Texas Government Code as recited in Texas Attorney General Opinion GA-0668 (2008) are as follows:

1. Comparing the content of the notice to the action taken at the meeting (citing *Markowski v. City of Marlin,* 940 S.W.2d 720, 726 (Tex. App. – Waco 1997, writ denied));

2. Whether the notice departs from any customary practice where such custom establishes an expectation in the public about the subject of the meeting (citing *River Rd. Neighborhood Ass'n v. S. Tex. Sports,* 720 S.W.2d 551, 557 (Tex. App. – San Antonio 1986, writ dism'd)); and

3. Whether the subject is of special interest to the public (citing *Cox Enters., Inc. v. Bd. Of Trs. Of Austin Indep. Sch. Dist.,* 706 S.W.2d 956, 958-59 (Tex. 1986)).

At a minimum, it has long been established that in order for notice under TOMA to be sufficient there must be more than an iteration of the applicable law.[1] There must be application of facts, including notice of what exceptions apply to keep the matter from being discussed in open session.[2] However, general notice can be substantial compliance even though the notice is not as specific as it could be.[3] The notice must be sufficiently specific to alert the general public to the topics to be considered.[4]

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[1] *Cox Enters., Inc. v. Bd. Of Trs. Of Austin Indep. Sch. Dist.,* 706 S.W.2d 956, 958-59 (Tex. 1986).
[2] *Id.*
[3] *Id.* at 959.
[4] *Id.* at 958.

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First appeared as part of the conference materials for the
20th Annual Land Use Conference session
"TOMA and TORA: What to Do Tomorrow?
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