MEETING PROCEDURES AND LIABILITY ISSUES FOR PUBLIC OFFICIALS

Robert F. Brown, Esq. and Bret C. Keast, AICP

This chapter addresses two very important issues regarding the day to day operations of a planning (and zoning) commission. There are two primary objectives of the chapter which touch on the procedural applications and legal issues regarding the conduct of commission meetings. The first objective is to establish practical guidelines and standard operating procedures for planning (and zoning) commission meetings. Most of the material provided below is applicable to both planning and zoning commissions organized either independently or jointly. Where necessary, sections which apply to one or the other or which may not be appropriate for all municipalities, are denoted as (optional). The parenthetic denotation used for the planning *(and zoning)* commission signifies the applicability to either a planning or zoning commission operating independently or jointly. Discussed within the meeting procedures section are the roles and responsibilities of planning commission members and city staff as well as advisable techniques for efficiently managing and conducting public meetings.

The purpose of the second objective is to address the legal considerations pertaining to the liabilities of public officials associated particularly with the proceedings and decision-making of the planning (and zoning) commission and governing body. This section uses case law citations and other legal references to define and describe the common pitfalls of public officials in hearing and acting on proposals for development and other planning related matters. The issues discussed include both discretion and non-discretion in zoning and platting matters; official capacity suits; absolute legislative, qualified and official immunity; and, official/legislative privilege. This section of the chapter focuses on the rational and legal basis supporting planning decisions as well as those decisions that may be in conflict with legal precedence and supportive case law.

This chapter is designed to complement Chapter 2, *Roles of Planning Commissioners and Elected Officials,* which discusses the legal basis for planning in the United States and

particularly in Texas, the authority and jurisdiction of planning and zoning commissions, protocol and conduct of meetings, and the roles of commission members. The premise of a chapter on meeting procedures and liability issues is to provide detailed and useful information pertaining to the management and organization of planning (and zoning) commission meetings; procedures for operating in an appropriate manner; and, legal considerations, requirements and ramifications of commission procedures and final actions.

PART I

MEETING PROCEDURES

By Bret C. Keast, AICP

This section focuses on meeting procedures applicable to planning (and zoning) commissions and is intended to serve as a valuable resource for planning commissioners, citizen planners, city staff members, and interested others in understanding the roles, responsibilities and procedures in preparing for and conducting a successful planning (and zoning) commission meeting. Examples of effective techniques and strategies used in cities throughout Texas, and elsewhere, have been used to demonstrate the variety and success of different practices. Regardless of the success of an approach in one community, it may not be applicable or effective for another community of similar size, structure and organization. It is recognized by the author that the guidelines and standards illustrated in this chapter are not *"end-all"* solutions and may not be appropriate in every community. Rather, the standard procedures are meant to provide a source of information to document the effective practices and procedures enacted and utilized in communities throughout the state of Texas.

A general observation is that most planning (and zoning) commissions operate similarly in terms of meeting format and organization. The manner in which meetings are conducted, however, varies widely according to the size and sophistication of the city, the organization and function of the planning commission, individual preferences of commission members, and the personal management style of the chairperson presiding over the meeting. Aside from state statutes (Texas Local Government Code) regulating the authority and jurisdiction of municipal boards and commissions or individual city charters specifying the rules of procedure for public

meetings, there are no definitive rules governing how a community must operate their planning (and zoning) commission meetings.

The use of standard operating procedures will, therefore, help to ensure that meetings are conducted in a well managed and orderly fashion.

General Rules for Operation of Meetings

Rules of Order - A useful guide for conducting public meetings in an orderly format is the use of ***Robert's Rules of Order,*** or a similar set of rules for exercising control of a meeting. Applying standardized rules helps to ensure consistency and fairness in handling applications and other planning related matters. In addition to improving the efficiency and effectiveness of meetings, there are legal practicalities of meeting protocol as well. It is incumbent upon the planning (and zoning) commission, as an advisory body, to ensure that all applications are handled consistently and all persons are given an equal and fair opportunity to be heard regarding their opposition or support of an application. The use of standard operating procedures for accepting public comment and testimony, discussing the factors relevant to an application, and considering the matter for final recommendation or approval is an important component of an adopted set of procedures for planning (and zoning) commission proceedings.

A practical reason for adopting standard rules of order is to simplify the meeting format and organization. Many people are familiar with Robert's Rules of Order and, therefore, have an understanding of the rules of conduct expected in open meetings. As a result of the Texas Open Meetings Act (Tex. Rev. Civ. Stat. Art. 6252-17) and the legal requirement to publish notice of op en meetings (Tex. Loc. Gov. Code 43.052, 211.006) and notify surrounding property owners of pending applications (Id. 211.007), planning (and zoning) commission meetings tend to attract *a* wide variety, and on occasion, a large number of persons. It is, therefore, important to maintain control of meetings and operate in a fashion that is easy to follow and understand. Utilizing a consistent format as illustrated in the model agenda on Page 13-21 will improve meeting efficiency and encourage conformance with the standards of conduct.

Model Agenda for Planning (and Zoning) Commission Meetings

The model agenda reflects a collection of techniques and innovative approaches used by municipalities throughout Texas to prepare a meeting agenda which encourages public involvement, establishes a consistent and efficient meeting format, institutes reasonable ground rules for meeting conduct, and ensures fairness for all persons interested in addressing the commission. The general format is common among many jurisdictions in terms of meeting organization, however, there are procedures which, if implemented, may be useful in successfully controlling and managing the desired meeting outcome. It is important to recognize that standard procedures are not necessarily appropriate for all municipalities. In some instances, a community may utilize a similar approach which is more effective given the local characteristics, adopted codes and policies, and the individuals involved in the meeting. The procedures exhibited in the model agenda are meant to inform elected and appointed officials, city staff members, and citizens of the practices and procedures commonly utilized elsewhere in the state. If there are standard procedures which are not currently practiced and would be useful, the intent of this chapter would be satisfied. The responsibility for preparing a meeting agenda varies among different municipalities. Most commonly, a member of the planning staff (if available) is responsible for establishing the agenda based on previous meeting minutes and submission deadlines for new agenda items. In some cases, the planning (and zoning) commission chairperson may review and comment on the organization of agenda items. It is advisable for a city staff member, usually the planning director, to meet with the commission chairperson prior to the meeting to brief him/her of the scheduled cases and significant issues to be addressed. The focus of this meeting should be solely on the objective facts of the individual cases thereby in no way influencing the opinion or outcome of the meeting. Such a meeting allows the chairperson an opportunity to appropriately prepare for the upcoming planning (and zoning) commission meeting. In cities operating with an independent planning commission and limited city staff available, the situation may be quite different. Typically, a city clerk, city manager or another staff person will fulfill the obligation of preparing the agenda. In small communities, the commission chairperson or an appointed commission member (commission secretary) may be responsible for assembling the agenda. City staff would then see that the agenda is published in accordance with state statutes (Id. 43.052, 211.006).

The use of a standard agenda format greatly simplifies the order of applications scheduled for public hearings, or the consent (optional) or regular agenda. Items which have been continued or tabled to the current agenda should be considered prior to more recently submitted applications. In certain circumstances, however, it may be advisable to reorganize the agenda to accommodate large groups of people wishing to comment on a controversial agenda item. If there are no inconveniences expressed by other applicants, moving an item forward may substantially improve the meeting outcome and prevent frustration of persons sitting through the discussion of multiple items.

Elements of Model Agenda - Following is a discussion of the elements comprising the model agenda for planning (and zoning) commission meetings. The model agenda includes both standard meeting protocol and procedures for enforcing the rules of conduct and presiding over an open meeting. The format and content of the model agenda has operational and legal practicalities which are advisable as minimum standards, if considered necessary and appropriate by the local public officials.

1. Call to Order - The A call-to-order is at the request of the planning (and zoning) commission chairperson, or in his/her absence the vice-chairperson, to commence proceedings of the open meeting in accordance with the authority and jurisdiction granted by the city charter, code of ordinances, and state statutes. The call-to-order should be accompanied by strikes of the gavel to command order of the meeting. The call should entail a statement of the date and time the meeting is called to order along with an indication of the meeting purpose, i.e. regularly or specially scheduled planning (and zoning) commission meeting, joint city commission (council)/planning (and zoning) commission meeting, et cetera.

2. Approval of Meeting Minutes - The approval of meeting minutes is most generally conducted at the beginning of the meeting to review and adopt into the official record the minutes of the previous planning (and zoning) commission meeting. In some instances, particularly when there was extensive testimony of *a* controversial item, there may be minutes from more than one commission meeting. The approval process generally consists of the commission chairperson requesting changes or amendments to the minutes or a motion for approval. Following a second to the motion and an affirmative vote, the minutes are entered into

the permanent records of the city. Approving meeting minutes is important to enter into public record the testimony, discussion, and action of previously considered agenda items. There are both procedural and legal practicalities of documenting public meetings for future reference. An option to considering the minutes as a separate agenda item is to approve them as part of a consent agenda (optional), subject to there being no changes or amendments to the minutes as submitted.

There are a variety of acceptable methods to document the minutes of a meeting, including a verbatim (word by word) or short hand transcript, audio and/or video taping, etc. It is becoming more common for cities to use audiovisual equipment to record the proceedings of public meetings to accurately document the actions of the commission. Many of the larger communities are even televising planning (and zoning) commission meetings via local cable channels. Using local media is an effective technique for informing the public of the issues and proposals considered by the city.

3. Statement of Rules - There are a variety of techniques used by cities to aid in the management of their planning (and zoning) commission meetings. One such technique is a "statement of rules" articulated by either the commission chairperson or city attorney (if required to attend) at the onset of an open meeting. An alternative to verbally presenting the rules is to provide a typed handout outside the commission meeting room for distribution to any interested person. The handout would be useful for general distribution as well to introduce the commission members and inform meeting participants of the rules of conduct.

Since a quorum of commission members constitutes an "open meeting" as defined by the Texas Open Meetings Act (Tex. Rev. Civ. Stat. Art. 6252-17), the statement of rules should be read at all commission meetings regardless of whether it is a regularly scheduled meeting, special meeting, or joint city council/planning commission meeting. The purpose of the statement is to establish ground rules pertaining to the involvement of the public in the meeting. The described procedures include the organization of the meeting and the format allowing applicants and all interested parties a reasonable and fair opportunity to be heard, to present evidence relevant to an application, and to rebut evidence presented by others.

This technique informs all parties of their right to speak as well as the acceptable standards for presentations.

4. Public Comment - Inviting public comment is a method used to encourage citizen participation in the local planning process. The purpose of this agenda item is to allow citizens to address the planning (and zoning) commission regarding the general affairs of the city as related to planning and development matters. Any person desiring to speak on a matter which is not scheduled on the agenda is invited to do so during public comment at the beginning of each meeting. As a matter of policy, the issues raised during the comment period are generally for awareness or informational purposes and, if necessary, should only be considered as an action item on a subsequent meeting agenda. No immediate action is required.

Without a mechanism for persons to convey their interests and concerns on public record, it is difficult to actively involve the general public in a planning (and zoning) commission meeting. Generally, the only opportunity for persons to speak is during a public hearing regarding a particular application. Otherwise, they must wait for the general discussion section of the agenda at the end of the meeting when there are few people to listen and the commissioners are preparing to adjourn the meeting. The other options are to address the city commission (council) or visit with the planning commissioners individually, neither of which are necessarily the appropriate format for discussing planning related issues.

5. Consent Agenda (Optional) - A technique used by many municipalities is to establish a consent agenda for items that require little or no discussion by the planning (and zoning) commission, public, or applicant. Examples of consent items include preliminary plats, replats, or lot splits which conform to the requirements of the city's zoning ordinance, subdivision regulations, and design standards; are in conformance with the comprehensive plan, thoroughfare plan and other adopted plans and policies; are well conceived in terms of good land planning and site engineering design principles; and conform with all submission requirements. Another example is for communities which have required standards and review procedures for site development plans. A site plan could be appropriate as a consent item if it conforms with the use restrictions, height and area regulations and development performance standards of the local zoning ordinance and meets the standards for landscaping, parking, circulation, site access, structural sitting, architectural design, and other appropriate standards.

The planning (and zoning) commission will act on these items in a single motion toward the beginning of the meeting. If there are concerns expressed by a commissioner regarding any of the consent items, they may ask to withdraw a particular item from the consent agenda for separate consideration. If there are no concerns expressed, the items on the consent agenda will be approved following a motion and affirmative vote of the commission. Approval of the consent items indicates that the staff recommendation is acceptable to the commission along with any terms, conditions or requirements as specified in the staff recommendation.. At the discretion of the commission chairperson, a member of the public may request that an item be withdrawn from the consent agenda for a verification of facts, discussion and review, and separate consideration.

One of the biggest advantages of a consent agenda is the ability to shorten the length of meeting by reducing the number of items to review, discuss, and consider. Aside from items requiring a public hearing, the goal for each application is to be on the consent agenda. If an applicant can meet the conditions and requirements of the city, their application may be approved without commission discussion. The applications to be acted upon by the commission as consent items should be so noted on the published agenda notice.

6. Public Hearings - Often times there is confusion between an open meeting, public meeting, and a public hearing. An open meeting is a formal and organized gathering of any deliberative city body having rule-making or quasi-judicial power. In accordance with the Texas Open Meetings Act (Id. 6252-17), open meetings must be publicized with a written notice which is to be placed on a bulletin board within city hall that is convenient to the public at least 72 hours preceding the scheduled time of the meeting (Id. 6252-17,3A). The written notice must contain an agenda of the items to be discussed at the meeting (Id.).

A public meeting is more informal and functional in nature. The purpose of a public meeting is to deliver information, solicit citizen input and participation, and provide a forum for public debate. An open meeting may also be a public meeting. A public meeting conducted by a governmental body should be an open meeting. The primary difference between the two is the contextual meaning with an open meeting referring to the Texas Open Meetings Act and a

public meeting being an open meeting that is typically conducted in an informal or workshop format.

A public hearing is a scheduled item on an open meeting agenda which is established to review and discuss such items as zoning text and comprehensive plan amendments; rezoning proposals; final plans for planned developments; special use permits; utility easement, building setback, and street vacation requests; and annexations. Each of these items may be optional depending on whether a city practices zoning, exercises its municipal annexation powers, or opts to require a public hearing for these matters. The purpose of a public hearing is to allow all interested parties and citizens to have a reasonable and fair opportunity to be heard, to present evidence relevant to an application, and to rebut evidence presented by others. A public hearing requires an accurate written summary of the proceedings which shall be available to the public. The planning (and zoning) commission may adopt rules of procedure, i.e. order of testimony, rebuttals, time limits, presentation conduct; etc., for public hearings by resolution or bylaws. As a matter of common practice and good meeting procedure, it is advisable to adopt rules of procedure to minimize procedural questions and avoid legal challenge. '

Notice Required - Prior to holding a public hearing, state law requires notification procedures which include publishing a notice of the time and place of the hearing in an official newspaper or a newspaper of general circulation hi the municipality (Id. 211.006) by a prescribed number of days before the date of the hearing. Procedures for the adoption of zoning regulations and district boundaries (Id. 211.006) require notice before the 15th day before the date of the hearing (Id. 211.006). For annexation hearings (Id. 43.051) there is required to be two public hearings for which notice must be published at least once on or after the 20th day but before the 10th day before the date of the hearing (Id. 43.052). In addition to publishing notice, before the 10^{th} day before the hearing date, written notice of each public hearing before the zoning commission on a proposed change in the zoning classification shall be sent to each owner, as indicated by the most recently approved municipal tax roll, on real property within 200 feet of the property on which the change in classification is proposed. (Id. 211.007) For annexations, the only additional notification required is to each railroad company that serves the municipality and is on the municipality's tax roll if the

company's right-of-way is in the area proposed for annexation. (Id. 43.052) The notification procedures for comprehensive plan amendments; final plans for planned developments, and special use permits are determined by municipal charter or the city's code of ordinances. As a matter of general practice, it is advisable to conduct public hearings for these planning related matters.

Proceedings - The format of a public hearing varies according to the adopted policies and practices of individual cities. The important aspect of a public hearing which must be present to prevent legal challenge for lack of due process is the opportunity for all persons to be heard regarding an application:. The commission chairperson has discretion in limiting comments and rebuttals of applicants and opponents, but there must be a forum present to allow testimony and debate. To ensure due process, it is advisable to handle the proceedings as follows:

A. Open public hearing with established ground rules for meeting conduct and presentation (may include a summary of adopted rules of procedure).

B. Receive staff comments, findings, and recommendations and ask questions as necessary. For cities that employ one or more professional planner(s), it is advisable to accept a recommendation from staff as a criteria for considering applications. Otherwise, it is the discretion of the planning (and zoning) commission as to whether they prefer a staff recommendation or evaluation.

C. Invite the applicant or his/her appointed designee (agent or consultant) to make a presentation regarding the proposed application. The presentation should address the pertinent and relevant factors which demonstrate conformance with adopted ordinances, approved plans and policies, and established criteria of the city. The commission should ask questions as necessary.

D. Request to hear for those in attendance who would like to speak in favor of the application. These persons should be asked to present relevant factual information which is pertinent to the application being discussed. Persons not in attendance may request that a statement be read into the public record by the secretary of the planning (and zoning) commission.

E. Request to hear from those in attendance who are in opposition to the application. These persons should, likewise, be asked to present relevant factual

information which is pertinent only to the proposed application and to avoid personal or slanderous comments toward the applicant. The presenter should not be allowed to address the applicant without permission from the commission chairperson and should not encourage remarks from the audience or read lengthy documents which can be made part of the public record.

F. Invite the applicant or his/her appointed designee (agent/consultant) to address particular questions or comments made by an opponent and to present any counter arguments to relevant facts of the application.

G. (Optional) If determined necessary and appropriate by a simple majority of the commission members, there may be an opportunity to allow rebuttals by either those in favor of or in opposition to the application. A request should be made for only relevant new information which has not been previously stated.

H. Request the staff (if available) to address any particular questions and present final conclusions, if any.

I. Ask for a motion and second to close the public hearing.

J. Ask each member of the commission to discuss their views of the application. The commission members should restrict their opinions to the substantive, factual issues and conditions of the application and avoid improprieties relating to personal or emotional influences or matters. Questions may be directed to any person who made comments during the public hearing.

K. Accept a motion and second to either recommend approval, denial or continuance of the application to a subsequent meeting agenda. An affirmative vote of the commission is a simple majority of the members present.

L. Issue a final report to the city commission (council) with specific findings of fact relating to the conformance of the application with the adopted ordinances, approved plans and policies, and established criteria of the city. Preparation of the final report is usually done by the city staff (if available) responsible to the planning commission.

Matters of Public Record - Since public hearings are a requirement of state law for specific actions of the planning (and zoning) commission, it is particularly important and of legal significance to maintain accurate and detailed minutes of the public hearing proceedings. It is, therefore, advisable to ask all presenters to state their name, address and who they represent for the record.

This information should either be transcribed or recorded (if possible) to ensure that there is a record of the individuals who spoke and the content of their comments.

7. Regular Agenda - The regular agenda is for review and consideration of action items which do not require a public hearing. Regular agenda items generally consist of those not included on the consent agenda (if exercised) or public hearing agenda, which may include preliminary and final plats; site plan reviews; preliminary development plan reviews for planned developments; and, utility easement, street, or building setback vacation requests. Each of these items may be optional dependent upon whether a city exercises their authority to regulate property through zoning restrictions, subdivision regulations or design standards. Since regular agenda items do not require public hearings, the proceedings are not as extensive in terms of due process requirements. The commission chairperson has discretionary authority to allow individuals other than the applicant to speak in regard to an application. As a matter of common practice, the chairperson may allow comment although nondiscretionary items such as subdivision plats may not change as a result.

It is common to see a regular agenda organized into either old and new business items or matters of business such as subdivisions, use permits, site plans, vacations, etc. With the prior organization, old business items are generally handled first and include applications that were tabled from a previous agenda. [A cautionary note dealing with tabled subdivision plats is the legal procedure which requires that the municipal authority responsible for approving plats shall act on a plat within 30 days after the date the

plat is filed. A plat is considered approved by the municipal authority unless it is disapproved within that period. (Id. 212.009) In many Texas cities, the planning (and zoning) commission is the municipal authority responsible for approving plats with the city commission (council) responsible for accepting easements and rights-of-way for all subdivision plats.] New business items are the applications received in compliance with an adopted schedule for planning (and zoning) commission application submittals. The latter organization of the regular agenda separates the items into action categories based on the type of application.

Proceedings - The regular agenda is commonly conducted as follows:

A. Receive staff comments, findings, and recommendations and ask questions as necessary. For cities that employ one or more professional planner(s), it is

advisable to accept a recommendation from staff as a criteria for considering applications. Otherwise, it is the discretion of the planning (and zoning) commission as to whether they prefer *a* staff recommendation or evaluation.

B. **Invite the applicant or his/her appointed designee (agent or consultant) to make**
a presentation regarding the proposed application. The presentation should address the pertinent and relevant factors which demonstrate conformance with the adopted ordinances, approved plans and policies, and established criteria of the city. The commission should ask questions as necessary.

C. **(Optional) If considered appropriate by a simple majority of the commission members, there may be an opportunity to allow others to comment on an application.** Comments should be relevant factual information which may render the application in conflict with the adopted ordinances, approved plans and policies, and established criteria of the city or of detriment to the public health, safety, morals and welfare of the city.

D. **Ask each member of the commission to discuss their views of the application.**
The commission members should restrict their opinions to the substantive, factual issues and conditions of the application and avoid improprieties relating to personal or emotional influences or matters. The commission should ask questions as necessary.

E. **Accept a motion and second to either recommend approval or denial of the application**. An alternative motion is to table the item to an agenda on a specified date in order to allow the collection of additional information which will allow an informed judgment. An affirmative vote of the commission is a simple majority of the members present. A tie vote or failure to obtain a majority vote of the planning (and zoning) commission on any motion is generally considered to be a recommendation or action of disapproval. The city charter or code of ordinances may, however, include specific language regarding the constitution of approvals and failures.

F. **Issue a final report with specific findings of fact for items requiring city commission (council) approval.**

Matters of Public Record Although minutes of regular agenda items may not have as much legal importance as public hearing items in terms of the procedural aspects of due process, there are important legal considerations dealing with equal protection and other clauses of the U.S. Constitution.' For this reason, the minutes of the regular agenda should be conducted in similar fashion.

8. General Discussion - Items included within this section of the agenda generally include special topics or presentations regarding current issues or long range considerations. Discussion items are generally restricted to informational material which is done for commissioner orientation or,

education; introduction of new innovations or techniques in planning; or, as a heads-up on upcoming applications, proposals or special studies. The purpose of general discussion is to receive initial comments from the planning (and zoning) commissioners and to solicit their ideas and opinions regarding a particular project or study approach. In addition, it allows the commissioners an opportunity to question staff about a particular issue or to raise a concern about the potential repercussions of an action. More intensive discussions regarding special projects such as preparing or updating a zoning ordinance, subdivision regulations or comprehensive plan are typically scheduled for a special meeting-or focus group work session. As a matter of common procedure, it is advisable to keep the general discussion at the end of an agenda short and sweet, particularly following lengthy and controversial meetings.

9. Meeting Adjournment - The meeting is officially adjourned following a motion and second for adjournment. As a matter of common practice, this item is generally welcomed by the commissioners!

Meeting Management Tips

The most important efficiency measure for public meetings is simply the length of the meeting. Employing the techniques and strategies mentioned above, i.e. statement of rules, consent agenda, standardized meeting format, etc., will undoubtedly help to improve meeting efficiency and thereby enhance the effectiveness and success o f planning (and zoning) commission meetings. The purpose of this subsection is to identify and discuss issues related to the overall management of open meetings.

Presentation Restrictions - A common mistake in managing and controlling planning (and zoning) commission meetings is allowing too many persons to address the commission, many of whom are simply reiterating what was previously stated. While it is the inherent function of an open meeting to solicit comment from all interested persons, placing restrictions on presentations to include only relevant, new information is important to the fluency of the meeting. Techniques to prevent an uncontrolled wave of testimony include:

1. Make a statement requesting that testimony include only relevant, new information. If a person would like to reiterate an earlier point, they should indicate by saying they agree and support all previous comments.

2. Place a time limit, e.g. 3 minutes per person, on all individuals interested in speaking. Some commission chairpersons have even gone as far as to use a timer to emphasize their point;

3. Suggest the use of a spokesperson for large groups of people each of whom will be similarly burdened with approval (or denial) of the subject request. A good example is asking a homeowners' association president or elected other to address the commission regarding the common beliefs of the neighborhood.

4. Request a petition to be entered into public record which expresses the consensus of the group.

5. Request large numbers of individuals to submit letters outlining their concerns and opinions regarding a specific proposal or request.

6. Restrict the amount of testimony and rounds of counter argument. The above proceedings for public hearing and regular agendas are advisable, however, each city may want to employ their own practices and policies regarding the number of rounds of counter argument permitted.

7. Accept expert testimony from both sides of an issue, but limit the amount of expert rebuttal. It is advisable to permit each side to make their initial comments followed by one round of counter argument.

Request to Speak Cards - Many cities are effectively using request to speak cards to manage the process of receiving public comment. The cards are available to each meeting participant that is interested in addressing the commission, particularly regarding a specific application. Typically, the cards are placed on a table at the entrance to the meeting room with a label and brief description regarding the purpose and use of the cards. As a matter of common practice, there are generally no limitations placed on the number of cards received. Rather, the purpose is to commit the persons to speak and to organize the order of presentations.

Each card requests information pertaining to the name and address of the participant, who they represent (if any), and the agenda item(s) they are interested in addressing. The information serves a secondary purpose of documenting the individuals who spoke regarding an application, which should be entered into the public record. During the statement of rules for proceedings portion of the model agenda (see Page 13-21), either the planning (and zoning) commission chairperson or city attorney (or appointed other) will announce that all persons interested in speaking are required to submit a request to speak card in order to address the commission. As each public hearing or regular agenda item is discussed, the names of the individuals speaking

are called in the order received. Each person may then address the commission. If a point has already been made and there is no need to reiterate, a persons may decline or reserve their opportunity to speak. Based on the number of cards received for a particular application, the chairperson may use discretion in allotting a time restriction per presentation.

Interpreter Services - In many situations there is a need to have an interpreter (English-Spanish and/or sign language) available to assist with communication during an open meeting. Without an interpreter, it is difficult to fluently communicate in an open meeting. Communication differences are often handled in many Texas communities by commissioners and staff members who are bilingual. An issue, however, are those persons not able to understand the conversation if there is no public interpretation. Since commission meetings are meant to inform the public of issues and proposed considerations, it is important that all persons have the ability to understand the public comment and discussion. It is, therefore, advisable to ensure that at least one person is available to objectively relay information presented in another language.

Continuing And Tabling Applications - The procedures for continuing and tabling applications are generally a matter of local policy as specified by the city charter or code of ordinances. The difference between *continuing or tabling* an application is a matter of whether the application is a public hearing or regular agenda item. A continuance refers only to a public hearing item principally due to the pre-meeting notification procedures required by state law (Id. 43.052, 211006; 211.007). Reasons for *continuing* a public hearing for an application are typically to allow the submission of additional information considered necessary for the commission to make an informed judgment regarding the approval or denial of an application. A continuance is usually initiated by the commission. However, if permitted by the city, an applicant may request a continuance for reasons either known or unknown to the commission. It is the commission's discretion, however, as to whether a continuance is granted or denied.

When a public hearing for an application is continued the hearing is not closed. Rather, it is continued to a subsequent meeting on a specified date. The issue relating to continuances is, thus, the renotification of the public hearing both via the newspaper and letters to property owners as specified by state statutes for zoning-related procedures. Since there are no legal requirements for renotification, the question of whether it is necessary is a local policy issue. According to state law,

once a public hearing has been published in accordance with prescribed procedures, it is incumbent upon interested persons to be informed of the continuance. An alternative stance is that it is incumbent upon the city (or applicant) to ensure that citizens are informed of continuances. The underlying issue is the burden placed on interested citizens to attend more than one meeting regarding an application.

As a matter of procedure, it is advisable to establish a deadline for applicants to file a request for a continuance. If a request is submitted within the prescribed time frame prior to the public hearing, and the city feels it is necessary to renotify, every attempt should be made by either the applicant or city to notify all persons previously notified either by mail or telephone. In any event, written notice should be sent prior to the date of the rescheduled public hearing in the same manner as required for notice of the original public hearing. It is also advisable to republish a notice in a newspaper of general circulation in the city prior to the rescheduled public hearing.

Tabling an application refers to rescheduling a regular agenda item to a subsequent agenda. Generally, an application is tabled to allow further negotiation between the applicant and adjacent property owners or staff, to collect additional relevant information, or to allow time for more analysis and study. Since there are no notification requirements for regular agenda items, there are generally not as many people burdened if the application is rescheduled. Tabling simply means that an application is not ready for consideration and is, therefore, delayed and placed on a later *agenda.*

Development Guide - The preparation of a development guide may serve as a valuable tool to introduce and explain a city's development regulations, policy provisions, and standard operating procedures relating to all land development activities in the city. The purpose of the guide is not only to educate developers, contractors, engineers, surveyors, planning consultants and the general public of the requirements of the city, but also to aid in the coordination and timeliness of the application and approval process. The development guide may serve as a perfect vehicle for specifying many of the techniques and procedures discussed in this chapter. Standard operating procedures for planning (and zoning) commission and other official meetings could be included in the guide to provide an all-in-one handbook to successfully maneuver through the development process.

. Dependent upon the individual city, a development guide may include a variety of topics as applicable to the ordinances and policies of the local government. A typical guide, however, may include information and procedures addressing the following:

1. List of city officials;
2. City contact persons by process or activity;
3. Land subdivision (platting) process;
4. Zoning and development guidelines;
5. Technical specifications and design criteria for public improvements;
6. Site plan review;
7. Building permits, certificates of occupancy and inspection;
8. Utility connections and permits;
9. Codes, licenses and permits; and,
10. Others as deemed important.

Decision Making - The process of decision-making leading to a final recommendation or approval is perhaps the single most important function, of the planning (and zoning) commission. The charge of the commission is to make informed and rational decisions relating to the physical development of the city. The process cannot be underestimated as to its procedural importance and legal significance. In order to ensure that decisions are well founded and have legal standing, it is critical for the commission to articulate specific and purposeful reasons supporting *a* decision. Without sound judgment defined by practical reason, the commission may be subject to legal challenge on the basis of being arbitrary and capricious. As long as the commission has consistently applied standard procedures which are compatible with the laws of due process and equal protection, the remaining responsibility is to explain the reasons for the action taken. An example of a motion for approval supporting a development application is as follows:

> *AI move to approve the application on the grounds that the proposed development would be in conformance with the objectives and policies of the comprehensive plan as well as the standards and criteria of the zoning ordinance and subdivision regulations,(or the city's code of ordinances if there are no zoning or subdivision requirements), the development is suitable for the property and compatible with nearby and adjacent uses, as presented ii does not appear that*

the use would detrimetally impact surrounding property owners, and it generally represents good land planning practice

Albeit this statement sounds perhaps too professional or practiced for a citizen planner, but the motion specifically states why the application is being recommended for approval. There are a few key words or phrases which will help to ground the commission's approval of the application on sound judgment. These key statements reference the city's adopted ordinances, plans and policies which indicates the forethought and preparedness of the city to regulate development.

Planning Commissioner Preparation - It is incumbent upon each planning commissioner as their responsibility to appropriately prepare for planning (and zoning) commission meetings. Each commissioner should commit themselves to learning as much as possible about the functions and operations of the city by reviewing any and all materials available. The city staff (if available) should be helpful to provide orientation and issue workshops to help educate and inform the commissioners of their roles and responsibilities. The primary pre-meeting responsibilities of a commission include the following:

1. Thoroughly read and review the materials pertaining to the applications on the upcoming agenda.

2. Review any plans or conceptual drawings (if applicable).

3. Visit the site to familiarize yourself with the issues and considerations of the case.

4. Develop a list of questions for either city staff (if applicable) or the applicant.

5. Review any staff comments, findings and recommendations (if available).

6. Attend the planning (and zoning) commission meeting and participate in the discussion.

7. Make rational decisions based on your objective opinions of the applications using the adopted and approved plans and policies available. Avoid being influenced or

persuaded by emotion or other personal matters, i.e. political or social status, friendships, etc.

City of
Planning (and Zoning) Commission Agenda

DATE
TIME OF MEETING

AGENDA ITEMS:

I. Call to order:

II. Approval of Minutes:

Consideration and approval of minutes of the regularly scheduled Planning (and Zoning)
Commission meeting of the City of _____ held on_____, 19____.

III. Statement of Rules for Proceedings:

(Example) "The rules for the conduct of tonight's meeting are to ensure fairness to all persons interested in speaking either about general planning matters or a specific application. Anyone wishing to address the Commission regarding an application on this evening's agenda is asked to complete a "request for comment" card available at the back of the meeting room. Please turn them in to the Secretary of the Planning (and Zoning) Commission at this time. All persons filing a card will' have the opportunity to speak (subject to a time period as specified by the Planning Commission chairperson). Please limit your comments to new and relevant factual information. Persons wishing to make general comment not addressing a particular agenda item are invited to do so at this time."

IV. Public Comment:

V. Consent Matters:

1. PP-02-96: Requesting approval of a preliminary plat for 100 lots, 30.23 acres, of Lone Star Subdivision, Phase II; located at the northeast corner of Main Street and 1st Avenue, adjacent to the Sam Houston Elementary School.

Owner:
Applicant/Agent:
Engineer/Architect: _____ *If applicable*

2. PR-01-96: Requesting approval of a site plan review for construction of a 5,000 square foot commercial retail facility; located at the southwest corner of Main Street and 2nd Avenue, within the Old Town Addition.

Owner:
Applicant/Agent:
Engineer/Architect: _____ *If applicable*

VI. Public Hearing Matters:

1. RZ-01-96: Requesting approval to rezone 5.3 acres from Agricultural (AG) to
Medium Commercial (C-2); located at the northeast corner of FM 1000 and Maple Street, situated adjacent to the west of the post office.

Owner:
Applicant/Agent:
Engineer/Architect: _____ *If applicable*

2. SU-01-96: Requesting approval of a special use permit for operation of an in-
home day care center within a private residence; located at 320 E. Palm Street, within the Trails Subdivision.

Owner
Applicant/Agent:
Engineer/Architect: _____ *If applicable*

Regular Matters:

1. FP-01-96: Requesting approval of a final plat for 75 lots, 23.65 acres, of Lone Star Subdivision, Phase 1; located on the north side of Main Street approximately one eighth mile east of 1st Avenue.

Owner:
Applicant/Agent:
Engineer/Architect: _____ *If applicable*

2. AV-01-96: Requesting approval to vacate an unused alley; located between Palm and Live Oak Streets between C and D Avenues, within the Old Town Addition.

Owner:
Applicant/Agent:
Engineer/Architect: _____ *If applicable*

VIII. General Discussion Items

1. General discussion regarding the process of updating the city's comprehensive plan.

IX. Adjournment

Bibliography

Allor, David J. The Planning Commissioners Guide. American Planning Association. Chicago, IL. 1984.

American Planning Association. Texas Chapter. Education Foundation, Inc. A Guide to Urban Planning in Texas Communities. 1986.

Bair, Frederick H. The Zoning Board Manual. American Planning Association. Chicago, IL. 1984

Solnit, Albert. The Job of the Planning Commissioner. American Planning Association. Chicago, IL. 1987.

Smith, Herbert H. The Citizen's Guide to Zoning. American Planning Association. Chicago, 11. 1983.

Texas Local Government Code. West Publishing Company. St. Paul, Minnesota. 1996. Texas Revised Civil Statutes Annotated, Article 9886 (Vernon, 1992)

PART II

LIABILITY ISSUES FOR PUBLIC OFFICIALS

By Robert F. Brown

This section considers liability issues for city council members and planning and zoning officials. This portion of the chapter is based upon a document which was originally presented at

the Southwestern Legal Foundation's Short Course on Planning and Zoning for Public Officials, held on June 15, 1994. An edited version of the article is included here with the permission of the author.

Discretion in Zoning Matters - Applicable Law

As a general rule, local governmental officials are afforded broad discretion in zoning matters. Further, in determining the constitutionality of a zoning ordinance, a court is guided by the rational basis test under both the due process and equal protection clauses of the United States Constitution.[1, 2] Zoning ordinances and zoning legislation may be held unconstitutional only if they are shown to bear no possible relationship to the state's interest in securing the health, safety, morals or general welfare of the public and are clearly arbitrary and capricious.[3]

Within this general framework, a municipality's decision making body is afforded considerable discretion in its zoning decisions. The decision making body will not be judged according to whether its zoning decision was necessarily the best course for the cornmunity.[4] Rather, in making such a determination, the appropriate inquiry is whether there was a conceivable or even hypothesized factual basis for the specific zoning decision made.[5] This is not to suggest, however, that a zoning decision can be justified merely by mouthing an irrational basis for an otherwise arbitrary decision.[6, 7] "The key inquiry is whether the question is 'at least debatable" [8]

Discretion in Platting Matters - Applicable Law

As a general principle, the scope of discretionary authority in platting matters is severely circumscribed by state law. Section 212.010 of the Texas Local Government Code provides the standards for plat approval. Thus, the approval of plats, both preliminary and final, is mandatory as long as the conditions enumerated in Section 212.010(a) are met. If a plat meets all applicable standards and regulations, the decisionmaking body's inclusion of new standards or guidelines, not misdated by the applicable zoning ordinance and subdivision regulations, prior to approval by that body of the plat may operate as a denial of the applicant's state and federal due process rights about impelling health, safety or welfare concerns. Consequently, while there may exist in extremely committed circumstances valid health, safety or welfare concerns for rejecting a plat that complies with all applicable regulations, as a general

principle, local governments are not granted wide latitude in considering platting issues; however, a city is not liable for negligence in the plat approval process? Luther, the approval of plats is a governmental function.[1°]

Official Capacity Suits

Kentucky v. Graham, 473 U.S. 159 (1985), the United States Supreme Court attempted "to nave; ce again the distinction between personal- and official-capacity suits." [11]

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." As long as a government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damage judgment in an official-capacity suit must look to the government entity itself.
>
> **-Graham,** 473 U.S. at 165-66 (citations omitted) (emphasis in original).

As the Supreme Court subsequently notes in Graham, in order for the government entity to be liable in an official-capacity action, the government entity itself must be a "moving force" behind the constitutional deprivation and the government entity's "policy or custom" must have played a part in the violation of federal law.[12]

In reviewing ambiguous pleadings, the Seventh Circuit has determined that where a complaint alleges that the conduct of a public official acting under color of state law gives rise to liability under ' 1983, it will ordinarily assume that the official has been sued in his official capacity and only in that capacity.[13] How the Fifth Circuit reviews ambiguous pleadings is not as well-settled.[14] It is well-settled, however, that a judgment against a county official in his or her official capacity may impose liability on a county if the county receives notice and an opportunity to respond to the lawsuit.[15]

Absolute Legislative Immunity

The Fifth Circuit has adopted a functional approach in determining the type of immunity to be afforded an official in federal matters; that is, the relevant inquiry is whether an action by that official most closely resembles a legislative, judicial or administrative act.[16] If a particular action is sufficiently similar to a legislative or judicial function, then absolute immunity is applicable; however, if the action is determined to be administrative in nature, then only qualified immunity applies." Absolute immunity is a question of federal, not state, law.[18] Federal law is well-settled that local legislators are entitled to an absolute immunity from suit under' 1983 for conduct in furtherance of their legislative duties. [19, 20]

"A considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it has, however, resulted in a rule of absolute immunity for legislative and judicial officers when acting within the scope of their respective functions." [21] The landmark case of Tenney v. Brandhove, 341 U.S. 367 (1951), discusses the historical antecedents of legislative immunity. Justice Frankfurter wrote that legislators:

> ... [A]re immune from deterrence to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of a pleader or to the hazard of the judgment against them based upon a jury's speculation as to motives.
>
> **-Tenney,** 341 U.S. at 377.

This language was repeated favorably in Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. at 405. Justice Frankfurter in: Tenney quoted language from Coffin v. Coffin, 4 Mass. 1, 27 (1808), in describing the parameters of absolute legislative immunity:

> I will not confine it to the delivering of an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office and . . . securing to every member exemption from prosecution, for everything said or done by him as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house or irregular and against their rules.
>
> **- Tenney,** 341 U.S. at 374.[22]

Public policy considerations also favor "the recognition of absolute immunity for elected local officials performing legislative functions. Local officials are directly accountable for their words and votes. In fact, the electoral process is a far stronger protection for the public where the legislator is local rather than state or federal." [23] Many local legislators serve for little or no salary.

> Adding the risk [to the local legislator] of a lawsuit at every vote hardly makes the task more attractive. Local government should not be reserved for only those who can afford to hire lawyers and defend against potential personal liability. Furthermore, absolute legislative immunity protects the legislative process from encroachment by or subordination to the judiciary or individual plaintiffs. For the good of the public, local legislators must be able to speak their minds and vote their consciences without fear of personal liability under 42 U.S.C. '1983. Finally, no potential plaintiff will be disadvantaged by this immunity. If liability is found, all taxpayers will pay the damages that the local officials, in discharge of legislative duties in behalf of the public, may be found to have caused. Of course, local legislators must face the political consequences of this liability.
>
> **- Heiar**, 558 F.Supp. at 1180-81.

State law also recognizes the doctrine of absolute legislative immunity. In Mayhew v. Town of Sunnyvale, 774 S.W.2d 284 (Tex.App.-Dallas 1989, writ denied), the Dallas Court of Appeals upheld a summary judgment granted in favor of defendant town council members who voted to deny the plaintiff developer's application for planned development. The court held that the town councilrnembers were entitled to absolute legislative immunity for their role in denying the developer's zoning change request.

> Thus, we reach the question of whether the individual defendants acted in a legislative capacity when they voted to deny [the developer's] application for planned development under . . . the zoning ordinance. When a zoning body acts on an individual request, it is motivated by legislative concerns C its role is to decide the best .course for the community and not necessarily to adjudicate the fights of contending parties. [Citation omitted.] We conclude, therefore, that the individual defendants acted in a legislative capacity. Therefore, the individual defendants are entitled to absolute immunity. Consequently, the individual defendants were entitled to judgment in their favor as a matter of law.
>
> **- Mayhew**, 774 S.W.2d at 298.

Qualified Immunity

Local government officials are entitled to assert the defense of qualified immunity in federal matters. The United States Supreme Court in Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789 (1991), changed the methodology for reviewing a qualified immunity defense. In Siegert, the Court's stated purpose was to "clarify the analytical structure under which a claim of qualified immunity should be addressed." 24 In rejecting the approach taken by the lower court, which had assumed without deciding that a constitutional claim had been stated, the Supreme Court held that the first inquiry in the examination of a defendant's claim of qualified immunity is whether the plaintiff "allege[d] the violation of a clearly established constitutional right" [25]

Before Siegert, the Fifth Circuit routinely addressed a defendant's entitlement to qualified immunity before reaching the merits of a plaintiffs constitutional claims.[26] After Siegert, however, the Fifth Circuit changed its methodology for reviewing a qualified immunity claim, instructing trial courts that they should first determine whether a plaintiff has stated a claim for a violation of a constitutional right and then, and only then, address whether a defendant is entitled to qualified immunity.[27]

The United States Supreme Court has held that government officials performing discretionary functions generally are entitled to qualified immunity from suit and damages where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." [28] The critical issue is not whether a defendant actually infringed upon a plaintiffs rights: "Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard." [29] To aid in that determination, the Court has reaffirmed that "whether an official protected by qualified immunity maybe held personally liable for an allegedly unlawful action turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken."[30] For the relevant legal standards to be "clearly established," the "contours" of the right alleged to have been violated "must be sufficiently clear that a reasonable, official would understand that what he is doing violates that right" [31]

As noted in Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir. 1992):

> Substantively, qualified immunity shields government officials performing discretionary functions "from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Whether a defendant asserting qualified immunity may be personally

> liable turns on the objective legal reasonableness of the defendant's actions assessed in light of clearly established law. The Supreme Court explained that when a plaintiff invokes a clearly established right, the appropriate inquiry is whether "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates the right." If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity. Thus, even when a defendant's conduct actually violates a plaintiffs constitutional rights, the defendant is entitled to qualified immunity if the conduct was objectively reasonable (footnotes and citations omitted).

Official Immunity

Local government officials are also entitled to the defense of official immunity in state law causes of action.

> Government employees are entitled to official immunity from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority.
>
> **- City of Lancaster v. Chambers**, 883 S.W.2d 650, 652-53 (Tex. 1994).[32]

This immunity is indiscriminately and interchangeably referred to by Texas courts as official, governmental, quasi-judicial or qualified immunity.[33] For consistency, this paper will use the term "official immunity." [34]

Part of the test for determining if an official is entitled to official immunity centers on whether the official's act may be characterized as ministerial or discretionary.[35]

> Ministerial duties require only obedience to orders, or the performance of a duty in which the employee or officer has no choice of his own. [Citation omitted.] On the other hand, duties which are discretionary involve acts requiring personal deliberation, decision, and judgment on the part of the officer or employee. [Citation omitted.] A state officer or employee who "is required to pass on facts and determine his actions by the facts found" is performing duties that are "quasi-judicial" in nature and are discretionary.
>
> **- Chapman,** 824 S.W.2d. at 687 (quoting Torres v. Owens, 380 S.W.2d. 30, 33-34 (Tex.Civ. App.-Corpus Christi 1964, writ ref d n.r.e.)).[36]

When a public official gathers facts and then acts, such actions are discretionary in nature.[37]

Public officials are "liable personally only when, in the exercise of the powers conferred upon them, they have acted willfully, maliciously or when activated by malice." [38] The doctrine of official immunity evinces this state's public policy to encourage public officials to carry out their duties without fear of personal liability.[39]

It is important to note that the doctrine of official immunity embraces the concept of both immunity from suit as well as immunity from damages.

> The justification for [granting immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible; in the unflinching discharge of their duties.
>
> **- Baker,** 621 S.W.2d. at 644 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).[4]

The doctrine of official immunity was the focus of attention in Travis v. City of Mesquite, 830 S.W.2d 94 (Tex. 1992), a case that stemmed from a fatal "hot pursuit" police chase. Although the Texas Supreme Court as a body avoided addressing the issue of official immunity on the grounds that the issue had not been preserved, Justice Comyn, joined by Justices Phillips and Gonzalez, argued otherwise in a concurring opinion. - The sole dissenting member of the Court, Justice Cook, also recognized the defense of official immunity, although the concurring justices and the dissent disagreed on the issue of whether the official immunity defense had been established as a matter of law. Justice Comyn noted the justification for the official immunity doctrine:

> [I]t is significant that the Legislature amended Section 51.014 of the Texas Civil Practices and Remedies Code in 1989 to allow a government employee an interlocutory appeal of an order denying a summary judgment based on official immunity:" This rare opportunity for interlocutory appellate review reveals just how important the legislature considers the defense of official immunity for governmental employees to be. When successfully invoked, such procedure renders an officer's immunity an immunity from suit, not just immunity from liability. [Citation omitted.] The very reasons for the grant of immunity are effectively unsalvageable if the official is determined to be immune from liability only after a trial on the merits. [Citation omitted.] The articulated basis for such immunity is: the importance of avoiding distraction of officials from their governmental duties; the desire to avoid inhibition of discretionary action; minimizing deterrence of able people from public service; avoiding the costs of

> an unnecessary trial; and insulating officials from burdensome discovery. [Citation omitted.]
>
> **- Travis**. 830 S.W.2d at 102 n.4 (Comyn, J., concurring) (emphasis in original).

While it is clear that the Texas doctrine of official immunity requires that a party act in good [tit in order to be entitled to the immunity,[42] Texas cases had not, prior to Travis, attempted to articulate whether the good faith element of official immunity was one of subjective good faith i.e. nether the individual defendant subjectively believes he was acting in the good faith performance of s job duties) or objective good faith i.e. (whether a reasonably prudent public official, in the same or similar circumstances, would have believed he was acting in the good faith performance of his job sties). Federal courts, in analyzing qualified immunity under 42 U.S.C. 1983, have adopted an objective or "reasonably prudent person" standard for qualified immunity review.[43] In reviewing the god faith aspect of official immunity in Travis, Justice Comyn's concurrence noted that "because of the similarity between good faith as it applies to the defense of qualified immunity to section 1983 claims, these [federal court] cases addressing good faith in that context are instructive." [44]

In **Chambers, supra**, the Texas Supreme Court clarified that the test for good faith for state law official immunity claims is an objective, not a subjective, one: Whether a reasonably prudent public official, under the same or similar circumstances, could have believed that his actions were lawful in right of clearly established law.[45]

Official/Legislative Privilege

The members of a local government's governing body are entitled to invoke the) official/legislative privilege, which essentially provides that an individual legislator may not be questioned to determine the subjective knowledge, motive, mental processes, individual knowledge, act of knowledge, understanding or thought processes relating to the legislative body and the decisions and actions of the legislative body.[46]

The official/legislative privilege also applies in federal court proceedings because the availability of privileges in federal court is controlled by Rule 501 of the Federal Rules of Evidence, which provides as follows:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government,

> State or political subdivision thereof shall *be* governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of *a* claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof Shall be determined in accordance with State law.

Rule 501, in federal civil cases, incorporates the doctrine of Erie RR. Co. v. Tompkins, 304 U.S. 64 (1938), and requires deference to any applicable state laws governing privileges.[47] In determining the federal common law of privileges, federal courts may consider state law privileges.[48]

In **Sosa**, 739 S.W.2d 397, the Corpus Christi Court of Appeals affirmed the trial court's quashing of the notices of deposition directed to individual members of the Corpus Christi City council. In that case, the plaintiff had listed each matter of inquiry that involved the individual council member's "complete understanding and knowledge" of actions taken by the City council in eliminating the position of district fire chief, and "the complete process" undertaken by each City council member "in determining the advisability" of that action.[49] The trial court held, and the appellate court affirmed, that the "individual knowledge, lack of knowledge, understanding, or thought process of any individual member of a governmental body such as a City council have no bearing upon the validity of the action taken by the body." [50] In concluding that public policy dictates that the wiser course is not to hale legislators into court every time a legislative action is questioned, [51] the appellate court stated that "[i]ndividual legislators may not be questioned to determine the evidence upon which they relied or their reasons for voting a particular way." [52] Since the Corpus Christi City council could only act collectively as a legislative body, the appellate court additionally held that "individual members of the City Council are not competent to testify regarding the 'good faith' of the Council in enacting [legislation.] . . . Furthermore, public policy dictates that individual legislators be incompetent witnesses regarding a law enacted by the legislature as a body." [53]

Similarly, in Mayhew, *774* S.W.2d 284; the Dallas Court of Appeals upheld a town council-member's assertion of the official/legislative privilege when a developer, whose application for development approval was denied by the town, sought to depose the councilmember. The court held that:

> [J]udicial review of legislative actions should be restricted to examination of the language of the law in question and official legislative records. [Citation omitted.] Individual legislators may not be questioned to determine the evidence upon which they relied or their reasons for voting a particular way. [Citation omitted.] These principles are consistent with the basic doctrine that the subjective knowledge, motive, or mental process of an individual legislator is irrelevant to a determination of the validity of a legislative act because a legislative act expresses the collective will of the legislative body. [Citation omitted.] Furthermore, public policy dictates that individual legislators be incompetent witnesses regarding a law enacted by the legislature as a body. Legislators' hands must not be bound by a possibility of being haled into court to testify every time a legislative action is questioned.
>
> **- Mayhew,** 774 S.W.2d at 298-99 (emphasis in original).

The Houston Court of Appeals in Salazar, 781 S.W.2d 347, has also upheld the official/legislative privilege. In Salwzar, officials of the Clear Lake City Water Authority ("Authority") sought protection from discovery regarding their subjective thought processes in denying utility services to a property owner. The appellate court, holding that members of the Authority were not susceptible to judicial inquiry into their subjective thought processes, traced the development of the official/legislative privilege in Texas. The court wrote that "[a]ny privilege or immunity of one governmental department as against another implicates the doctrine of separation of powers. This doctrine derives from Article II, ' 1 of the Texas Constitution."[54]
In addition to the Texas constitutional provisions requiring separation of powers of the three branches of government, the appellate court reviewed and adopted the reasoning of Sosa. The Salazar court added that:

> [I]t simply is not consonant with our scheme of government for a court to inquire into the motives of legislators. [Citations omitted.] . A contrary result would not only violate the general rule of Article II, 1, the specific rule of the Speech and Debate clause [Tex. Const. art. 1„ 16], and the holding of Sosa v. City of Corpus Christi, but it would also prove an extremely difficult doctrine to contain. No limiting principle would prevent the spread of intergovernmental inquisition to other situations. A court has no more authority to investigate the motives of local legislators than that legislative body has to regulate our deliberations in conference or ask why we ruled a certain way in a given case. . . Indeed,.. . legislators need not give - or even have - an explanation.
>
> **- Salazar**, 781 S. W.2d at 350.

The El Paso Court of Appeals applied the official/legislative privilege in Madero, 803 S.W.2d 396, an inverse condemnation action, where judgment was rendered in the trial court against the City and its planning commission for a taking of property without just compensation by virtue of the rezoning of the plaintiff's property for Planned Mountain Development ("PMD"). The appellate court reversed and rendered, dismissing the action for want of jurisdiction and holding that the case was not ripe for adjudication.[55] In so ruling, it found the record failed to reveal that the plaintiff landowner had applied for variances to the zoning, and the possibility therefore existed that it "could develop the subdivision according to its plat, or if not according to its plat, with some compromise to its plat after obtaining certain variances and that this would give it reasonable beneficial use of its property:[156] The landowner sought to introduce the testimony of two city aldermen to establish that these individuals had stated words to the effect that they wanted to impede the development of the property by zoning the property PMD, and that therefore it would be futile for the landowner "to attempt to obtain variances in view of the City's mind-set." [$7] The appellate court, in decreeing that the landowner had failed to establish what degree of taking, if any, had occurred and that the futility exception to the ripeness doctrine was not applicable, held that "[i]ndividual legislators are incompetent witnesses in regard to laws enacted because any law expresses the collective will of the legislative body and must be interpreted in that light.[58]

It is well settled that city council members are incompetent to testify as witnesses regarding a law enacted by the legislature as a body. [59] This legal maxim serves as both sword and shield to the parties in litigation because the status of incompetency as a matter of law, unlike a privilege, cannot, be waived. All city council members should not be compelled or permitted to testify regarding their subjective knowledge, motive or mental process relating to the evidence upon which they relied or their reasons for voting a particular way, because those matters are irrelevant to the determination of the validity of a legislative act and the collective will of the legislative body, and they are incompetent, as a matter of public policy, to testify regarding action taken by the legislative body, the city council 6[0]. Additionally, to reject the claim of official/legislative evidentiary privilege would undermine the concept of absolute immunity accorded legislators under federal law to protect the integrity of the legislative process.

> What is at issue in this action, according to plaintiffs, is the motivation of the local legislators in rezoning plaintiffs' property. However, this is precisely the kind of

> activity which is protected by legislative immunity. Balanced against this doctrine of immunity is the demand by two private plaintiffs in this civil action to know why they have been denied the value they claim their land had prior to the legislative acts in question. I cannot find that this 'interest rises to a level of public need for the full development of relevant facts sufficient to warrant threatening the interest in protecting the legislative process mandated by the Supreme Court in Tenney [v. Brandhove, 341 U.S. 367 (1951)] and Lake Country Estates anc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).] Accordingly, I must allow defendants' assertion of privilege and deny plaintiffs' motion to compel them to answer questions relating to their motivations and deliberations regarding legislation they enacted.
>
> **- Swearingtown Corp,** 575 F.Supp. at 1299.

While federal law on the official/legislative privilege is not as plentiful as Texas law, federal courts also have recognized the privilege. In Foley, 747 F.2d 1294, the Ninth Circuit reviewed a city's request for a protective order prohibiting a corporation from deposing city officials to determine their motives for enacting a sexually oriented business ordinance. In holding that the city officials' motives were not subject to discovery, the court noted that "[t]he Supreme Court has held that an otherwise constitutional statute will not be invalidated on the basis of an 'alleged illicit legislative motive,' [citation omitted], and has refused to inquire into legislative motives." [61]

The Foley court; although recognizing that plaintiffs are often required to prove invidious purpose or intent, as in racial discrimination cases, nevertheless upheld the privilege.[62]

> The Court prevents inquiry into the motives of legislators because it recognizes that such inquiries are a hazardous task. Individual legislators may vote for a particular statute for variety of reasons. [Citations omitted.] "The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile."

-**Foley**, 747 F.2d at 1297 (quoting Soon Hing v. Crowley, 113 U.S. 703, 710-11 [1885]).

Similarly, there is some authority to suggest that other officials, such as appointed planning and zoning commissioners, also should receive the same protection from discovery due to their quasi-legislative position and their actions related thereto.[63] The same public policy concerns that underlie the official/legislative privilege C that an individual member of a governmental body is incompetent to testify as to the collective will of the body and, therefore, should not be haled into court or subjected to discovery every time a decision of the body is questioned C apply with equal, if not greater force to

planning and zoning commissioners." The burden placed on a planning commissioner to respond to discovery and consequently reveal that individual's subjective knowledge, motive, or mental process regarding a decision or recommendation of a planning commission is no less significant than the burden placed on a council member.

In Texas, planning and zoning commission members, like city council members, are typically unpaid or very modestly paid citizens of the community who volunteer their time and efforts for the good of the city they seek to serve. A planning and zoning commissioner should not be questioned relative to that person's decision or recommendation on a land use issue, because his or her answers to such questions would be, as a matter of law, irrelevant and inadmissible as to both the collective recommendation of the commission and the collective decision of the council. To allow such questioning creates a restrictive atmosphere for local government. Community members may be hesitant to serve on a planning and zoning commission due to the potential burden of discovery and trial that would be placed upon them should the commission render an adverse recommendation concerning the property of a landowner who, in turn, files suit. Civic-minded citizens bold enough to serve should not be required to make decisions based upon the overall general welfare of the community while facing the spectre oflitigation every time they vote according to conscience, but not in accordance with a developer's desires. The potential for this situation obviously would act as a deterrent to a commission's uninhibited discharge of its duty in recommending zoning decisions to the city council, which decisions are to be based on the commission's collective and independent judgment, not the fear or threat of litigation and discovery.

NOTES

1. Thompson v. Gallagher, 489 F.2d 443, 447 (5th Cir. 1973).

2. Horizon Concepts, Inc. v. City of Balch Springs, 789 F.2d 1165, 1167 (5th Cir. 1986).

3. Village of Euclid v. Amber Realty Co., 272 U.S. 365, 395 (1926); Village of Belle Terre v. Boraas, 416 U.S. 1, 7-8 (1974); Shelton v. City of College Station, 780 F.2d 475, 479-80 (5th Cir.), cert. denied, 479 U.S. 822 (1986).

4. Shelton, 780 F.2d at 480 ("It is not the function of the trial court to determine whether the Town's zoning decision was necessarily the best course for the community, which effect would be to move the function of a zoning decision maker from a legislator to judge").

5. Shelton, 780 F.2d at 480-81.

6. Shelton, 780 F.2d at 481-82 ("[a] denial of a building permit on the King Ranch because of inadequate parking might fall into this category").

7. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 450 (1985)("mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases" upon which a council may rely).

8. Shelton, 780 F.2d at 483.

9. City of Round Rock v. Smith, 687 S.W.2d 300 (Tex. 1985).

10. Tex.Civ.Prac. & Rem.Code 101.0215(a)(29).

11. Kentucky, 473 U.S. at 163.

12. Graham, 473 U.S. at 166.

13. See, e.g., Kolar v. County of Sangamon, 756 F.2d 564, 568-69 (7th Cir. 1985).

14. Johnson v. Kegans, 870 F.2d 992, 998 n.5 (5th Cir. 1989); Mairena v. Foti, 816 F.2d 1061, 1065(5th Cir. 1987), cert. denied sub nom. Connick v. Mairena, 484 U.S. 1005 (1988).

15. Brandon v. Holt, 469 U.S. 464 (1985).

16. Austin v. Borel, supra.

17. Butz v. Econom9u, 438 U.S. 478, 507 (1978) (citing Scheuer v. Rhodes, 416 U.S. 232, 23940 [1974]).

18. Martinez v. California, 444 U.S. 277, 284 n.8 (1980).

19. Hernandez v. City of Lafayette, 643 F.2d 1188, 1193 (5th Cir. 1981), cert. denied. 455 U.S. 907 (1982).

20. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 402-06 (1979); Owen v. City of Independence, 445 U.S. 622, 663 n.6 (1980).

21. Austin v. Borer, 830 F.2d at 1359.

22. Bruce v. Riddle, 631 F.2d 272, 280 (4th Cir. 1980).

23. Heiar v. Crawford County, Wisconsin, 558 F.Supp. 1175, 1180 (W.D. Wis. 1983), affd in part, vacated in part, 746 F.2d 1190 (7th Cir. 1984), cert. denied, 472 U.S. 1027 (1985). Cf. Tenney, 341 U.S. at 378.

24. Siegert, 500 U.S. at 111 S. Ct at 1793.

25. Siegert, 500 U.S. at , 111 S. Ct. at 1793.

26. See, e.a., Mouille v. City of Live Oak, 918 F.2d 548, 551 (5th Cir. 1990); Pfannstiel v. City of Marion, 918 F.2d 1178, 1183 (5th Cir. 1990).

27. Duckett v. City of Cedar Park, 950 F2d 272, 276-78 (5th Cir. 1992); Samaad v. City of Dallas, 940 F.2d 925, 940 (5th Cir. 1991); Quives v. Campbell, 934 F.2d 668, 670 (5th Cir. 1991).

28. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

29. Davis v. Scherer, 468 U.S. 183, 190 (1984).

30. Anderson v_ Creighton 483 U.S. 635, 639 (1987) (citations omitted).

31. Anderson, 483 U.S. at 640.

32. See also Esparza v. Diaz 802 S.W.2d. 772, 778 (Tex.App.-Houston [14th Dist.] 1990, no writ).

33. See, e.a., Carpenter v. Bamer, 797 S.W.2d 99, 101 (Tex.App.-Waco 1990, writ denied) (immunity variously known as governmental, official, quasi-judicial or qualified); Stimpson v. Plano Indep. Sch. Dist. 743 S.W.2d 944, 947-48 (Tex.App.-Dallas 1987, writ denied) (good faith immunity); Baker Y. Story, 621 S.W.2d 639, 644 (Tax.CivApp.-San Antonio 1981, writ ref d n.r.e.) (quasi-judicial immunity).

34. See also Chapman v. Gonzales, 824 S.W.2d 685, 687(Tex.App.-Houston [14th Dist] 1992, writ denied); Brubaker v. Brookshire Mun. Water Dist., 808 S.W.2d 129, 133 (Tex.App.-Houston [14th Dist] 1991, no writ); Wyse v. Dep't of Public Safety, 733 S.W.2d 224, 227 (Tex.App.-Waco 1986, writ refd n.r.e.); Austin v. Hale, 711 S.W.2d. 64, 66 (Tex.App.-Waco 1986, no writ).

35. See, e.g., Esparza, 802 S.W.2d. at 779; Austin, 711 S.W.2d at 66.

36. See also Chambers, 883 S.W.2d at 653; Esparza, 802 S.W.2d at 779.

37. Chambers, 883 S.W.2d at 653; Austin, 711 S.W.2d. at 66.

38. Brubaker, 808 S.W.2d. at 133.

39. Carpenter, 797 S.W.2d. at 101. See also Wyse, 733 S.W.2d, at 227 ("Where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence arid without fear of the consequences'" (Quoting Harlow v. Fitzgerald, 457 *U.S.* 800, 819 (1982)); Baker, 621 S.W.2d at 643 ("[I]f administrative officials are held liable for their tortious conduct, the prudent would be reluctant to enter governmental service and even competent persons who entered public life would not be zealous in discharging their duties.").

40. See also Esparza, 802 S.W.2d at 778 (immunity from suit and liability).

41. Teic Civ. Prac. & Rem. Code 51.014(5).

42. See. Chapman, 824 S.W.2d. at 687.

43. Harlow, 457 U.S. at 819-20.

44. Travis, 830 S.W.2d at 103 (Cornyn, J., concurring).

45 Chambers, 883 S.W.2d at 655.

46 See City of Corpus Christi v. Bavfront Assocs,, 814 S.W.2d 98, 105 (Tex.App.-Corpus Christi 1991, writ denied); City of El Paso v. Madero Dev. & Constr. Co., 803 S.W.2d 396, 401 (Tex.App.-El Paso 1991, writ denied); Clear Lake City Water Auth. v. Salazar, 781 S.W.2d 347, 349-50 (Tex.App.--Houston [14th Dist.] 1989, writ denied); Mayhew v. Town of Sunnyvale, 774 S.W.2d 284, 298-99 (Tex.App.-Dallas 1989, writ denied); Sosa v. City of Corpus Christi, 739 S.W .2d 397 (Tex.App.-Corpus Christi 1967, no writ); City of Las Vegas v. Foley, 747 F.2d 1294, 1297-99 (9th Cir. 1984); Searingtown Corp. v. Incorporated Village of North Hills, 575 F.Supp. 1295, 1298-99 (E.D.N.Y. 1981).

47. In re Grand Jury Investigation, 918 F.2d 374, 379 n.6 (3d Cir. 1990).

48. See Burka v. New York City T ransit Auth., 110 F.R.D. 663-64 (S.D.N.Y. 1986) ("[T]he policies underlying state evidentiary privileges must still be given serious consideration, *even* if they are not determinative); Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co., 455 F.Supp. 1197, 1200 (N.D. III. 1978) (in federal question cases and cases where federal law governs, federal law is to be referred to on the existence and scope of a privilege, but where there is no controlling federal statute on the asserted privilege, the district court may consider existing state law concerning the privilege).

49. Sosa, 739 S.W.2d at 404.

50. Sosa, 739 S.W.2d at 404.Si.

51. Sosa, 739 S.W.2d at 405.

52. Sosa, 739 S.W.2d at 405 (Quoting County of Santa Cruz v. City of Watsonville, 177 Cal.App.3d 831, 223 Cal.Rptr. 272, 279 (6th Dist. 1985)).

53. Sosa, 739 S.W.2d at 405, See also Madero, 803 S.W .2d *at* 401; Mayhew, 774 S.W.2d at 298-99; Foley, 747 F.2d at 1297.

54. Salazar, 781 S.W.2d at 349.

55. Madero, 803 S.W.2d at 400-01.

56. Madero. 803 S.W.2d at 399.

57. Madero, 803 S.W.2d at 401.

58. Mayhew v. Town of Sunnwale, 774 S.W.2d 284 (Tex.App.-Dallas, 1989, writ denied)." Madero, 781 S.W.2d at 401.

59. Bavfront Assocs., 814 S.W.2d at 98; Madero, 803 S.W.2d at 401; Salazar. 781 S.W.2d at 350; Mayhew, 774 S.W.2d at 298-99; Sosa, 739 S.W.2d at 405.

60. Mayhew, 774 S.W.2d at 297-98.

62. Foley, *747* F.2d at 1297.

63. Foley, 747 F.2d at 1298.

64. See Sosa, 739 S.W.2d at 404 ("whether or not any 'employees or officers' of the City acted properly or in bad faith in proposing or supporting the City Council's actions is not relevant to whether the City Council acted in good faith in passing the Ordinance, the only real issue in this case. . . . If the motives of individual members of the City Council are irrelevant, then certainly the motives of the proponents of the Ordinance are likewise irrelevant.") (emphasis in original).

65. See Sosa, 739 S.W .2d at 404.