



# Public Law Report

JUNE 2010

## Avoiding Illegal Meetings: Understanding When Meetings Occur and When the Public may be Excluded

BY JONATHAN D. POLLEY

A member of the governing body (a "Director") of an entity subject to the Texas Open Meetings Act, Tex. Gov't Code §§ 551.001, *et seq.* (the "Act"), that knowingly calls or organizes a closed meeting, closes an open meeting or merely participates in a closed meeting in violation of the Act can be fined between \$100 and \$500 and/or put in county jail for one (1) to six (6) months. While most illegal meetings probably result from misunderstandings or misinterpretations of the Act, the only way to ensure no one accuses a Director of knowingly violating the Act is to avoid illegal meetings altogether. As a result, Directors must understand what constitutes a "meeting" under the Act, when Directors must keep a meeting open and when Directors may close a meeting to the public. This article will address precisely these issues. The discussion below assumes the notice and other requirements of the Act have been satisfied.

**GENERAL RULE.** The purpose of the Act is to allow the governed (i.e., the public) to witness the deliberations of its governors (i.e., Directors), unless public policy dictates otherwise. The Act requires every meeting of a governmental body, non-profit water supply or sewer service corporation and many property owners associations (the "Affected Entities") to be open to the public, unless a statute specifically allows Directors to close the meeting. Also, just in case any doubt exists about whether a specific kind of water district falls within the Act's definition of "governmental body", the Texas Water Code requires Directors for all water districts to conduct their meetings in accordance with the Act. As a result, if you are a Director for an Affected Entity and you cannot point to a Texas statute that allows you to close a meeting, the meeting must remain open to the public.

**What is a "meeting"?** In order to understand when Directors must hold public meetings and when Directors may close meetings, Directors must first understand precisely what constitutes a meeting under the Act. The Act defines a meeting as follows:

a deliberation between a quorum of [Directors], or between a quorum of [Directors] and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action.

The Act specifically excludes social functions, conferences, workshops, ceremonial events and press conferences from this

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## Conveyance of Real Estate Part I – Fee Estates and Deeds

BY JOLIE S. LENZ

Do you ever find yourself discussing a real estate transaction and hear terms like "fee simple", "easement", "special warranty deed", but not really know exactly what they mean? If you answered "yes", then this article is right up your alley. This article describes – in non-technical language – exactly what these and other real estate terms mean and why they matter.

Due to the breadth of the scope of real estate conveyances, this article is divided into two (2) parts. Part I includes a general description of the most common categories of interests in real estate and the types of documents used to convey fee estates. Part II will be continued in the next *Public Law Report* and will include a discussion regarding easements and the documents used to create and/or convey easements. While leasehold estates are occasionally referenced, I will not discuss them in depth because they are not typical real estate interests that occur with any frequency in transactions involving utility and other special districts.

### INTERESTS IN REAL ESTATE

The three (3) most common categories or types of interest in real estate are:

1. Fee (also sometimes called "Fee Simple") Estate – This is the broadest and most complete form of ownership of real estate. In other words, the owner of a fee estate owns all of the rights related to the land with the unconditional power to sell or otherwise dispose of it during his lifetime and the estate is inheritable upon the owner's death. If you purchased your home, your interest is most likely a fee estate. This estate is most commonly conveyed by a Deed.
2. Leasehold Estate – This is an estate in which exclusive possession of a specified area of land (or a building) is granted to the tenant for a set period of time. If you live in an apartment, your interest is most likely a leasehold estate. This estate is created by the execution of a lease agreement.
3. Easement – This is a non-possessory interest in real estate for a limited use or purpose. The easement can be "appurtenant" or "in gross". "Appurtenant" means an easement that is related or attached to another tract of land. An example of an easement "appurtenant" is an easement that provides access from an identified tract of land to a specific street or roadway. "In gross" means an easement that is held by the owner as a personal right; it is not tied to another tract of land. An example of an easement "in gross" is an easement granted to a utility district for a water line. Easements can be created or conveyed in many ways, which will be discussed in further detail in Part II of this article.

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## Avoiding Illegal Meetings

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definition, as long as the Directors do not take formal action and discussion of public business is incidental to the primary purpose for the gathering.

Based on this definition, if the following three (3) elements exist, a meeting is occurring: (1) deliberation; (2) involving a quorum of Directors; and (3) about business/policy within the Affected Entity's supervision or control. Of these elements, this author encounters the most frequent misunderstandings or misinterpretations regarding whether certain discussions constitute "deliberation" and whether a quorum of Directors is involved in those deliberations. As a result, the paragraphs below discuss both of these topics in detail.

**What is "deliberation"?** The Act defines deliberation, but the statutory definition alone does not paint the full picture. Under the Act, "[d]eliberation' means a verbal exchange during a meeting between a quorum . . . or between a quorum . . . and another person, concerning an issue within the [Affected Entity's] jurisdiction." However, according to case law and Attorney General Opinions, "deliberation" and "discussion" are synonymous. In addition, a "verbal exchange" may also include an exchange of written materials or electronic mail. Therefore, "deliberation" occurs whenever oral or written discussions involving a quorum of Directors and concerning the Affected Entity's business occurs. However, this discussion about what constitutes a meeting and deliberation begs the question of what constitutes a quorum of Directors.

**What is a "quorum"?** Obviously, the number of Directors necessary to attain a quorum will vary depending on the entity at issue. For many Affected Entities, a quorum requires at least a majority of Directors, but the number may vary from one organization to the next. Many water district and homeowners association boards have five (5) Directors and achieve a quorum by the presence of three (3) Directors. If you are unsure about how many Directors constitute a quorum, ask your entity's general counsel or feel free to contact any attorney at this firm for the answer.

While the concept of a quorum seems fairly straightforward, Directors can create a "walking quorum" even if a quorum is not discussing public business all at the same time. This kind of illegal meeting occurs when an entity deliberately holds a series of meetings with less than a quorum present to deliberate about public business, and then ratifies its actions as a quorum in a subsequent open meeting. However, a walking quorum only occurs when there is intent to avoid the Act's requirements.

**The Bottom Line.** Based on these definitions, "meetings" occur anytime a quorum or walking quorum of Directors discusses, whether verbally or in writing, business/policy within an Affected Entity's supervision or control. As a result, if a quorum is three (3) Directors and one (1) Director calls or emails two (2) other Directors, either separately or simultaneously, to determine whether the votes exist to take a certain action at the board's next meeting, an illegal meeting has occurred. If the first Director who contacted the other two (2) Directors knows that he/she orchestrated an illegal meeting, he/she could be fined up to \$500 and incarcerated for up to six (6) months!

For example, a fictitious municipal utility district, which we will call Springfield MUD (an Affected Entity in which three (3) Directors constitute a quorum), has a very hotly contested vote

coming up regarding whether to increase its water rates to begin funding curbside recycling collection service. The President of the Springfield MUD, named Adrian, feels very strongly that the HOA should provide this service and wants to try to persuade the other Directors to vote his way. As a result, Adrian calls another Director, named Vince, to discuss the matter. During the course of their conversation, Adrian and Vince agree that recycling is a service Springfield MUD residents desire and, as a result, they are both going to vote in favor of a motion for Springfield MUD to increase its rates to provide recycling.

Feeling enthusiastic about his chances to pass a hotly debated motion, Adrian calls another Director, who we will call John. During the course of their discussion, Adrian tells John that he and Vince are planning to vote in favor of the motion, and Adrian asks John if he would join them in the vote. John agrees that Springfield MUD should provide recycling, and he tells Adrian that he is planning to vote accordingly.

This example is a rather clear-cut illegal meeting because it involves a quorum of Directors deciding to pass a specific motion at an upcoming meeting. As a result, Adrian and John committed a crime if they knew they were conducting an illegal meeting (and if Adrian and John read this article before their phone conversation, they knew!). However, do not be fooled into thinking that the fact that these Directors decided what action to take made their telephone calls an illegal meeting. If Adrian, Vince and John had merely discussed (i.e., deliberated about) the recycling issue and did not agree on how they would vote, Adrian has still conducted an illegal meeting, because he created a walking quorum by calling two (2) other Directors and discussing the board's business outside of a public meeting. In addition, an illegal meeting still would have occurred had the conversations between Adrian, Vince and John occurred over email instead of by phone.

**EXCEPTIONS TO THE GENERAL RULE.** The general rule is clear: Affected Entities must allow the public to attend Directors' meetings. However, in certain very narrow circumstances authorized by statute, Directors may exclude the public from board deliberation. However, the Act requires that even when a closed session is appropriate, a quorum of Directors for the Affected Entity must first convene in an open meeting for which the Affected Entity has provided proper notice and in which the presiding officer announces that the Directors will convene a closed session and cites the statute authorizing the closed session. Unfortunately, Directors and the professional consultants they hire often misunderstand and/or misuse these exceptions. As a result, the remainder of this article will clarify some of the most misunderstood and misused exceptions.

**Consultations with an Attorney.** Probably the most often used and, as a result misused, reason for having an executive session is so Directors can consult with an attorney. This exception to the general rule allows Directors to consult an attorney about three (3) topics: (1) pending or contemplated litigation; (2) a settlement offer; or (3) legal advice that would otherwise be within the attorney-client privilege. If the governing body of an Affected Entity holds a closed session to consult with its attorney, it must limit the discussion in the closed session to one of these areas.

The Directors may not discuss policy not directly related to legal matters merely because an attorney is present. For example, the Directors may consult their attorney regarding legal issues raised in

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## Conveyance of Real Estate

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### CONVEYANCE OF FEE ESTATES

Except for transfers through probate, the most common form of conveyance of a fee estate is by deed. There are several types of deeds used to convey a fee estate. The first three (3) deed types described below are distinguished by the warranty of title provided by the grantor or seller of the real estate.

1. **General Warranty Deed** – This is the most common form of deed. The grantor of the real estate warrants that the title to the real estate is good from the "Sovereignty of the Soil", more commonly, the State of Texas, down through said grantor. In other words, when a grantor executes a general warranty deed, he is warranting that title is good from the initial land grant from the State of Texas down through the grantor.
2. **Special Warranty Deed** – This is the second most common form of deed. The grantor of the real estate warrants that the title to the real estate is good only as to parties claiming through said grantor. In other words, the current grantor or seller is warranting that during his period of ownership, he has done nothing to negatively impact the title of the real estate.
3. **Deed Without Warranty** – This is a deed in which the grantor does not make *any* warranty of title. This form of deed is rarely used.
4. **Quitclaim Deed** – This deed does not actually convey a specific interest or estate in real estate and no warranty of title is made. It simply conveys any right, title or interest which the grantor *may* have in the real estate. The grantor does not represent that he owns or has any interest in the real estate. The grantor does not make any warranty of title. This form of deed should never be accepted for the conveyance of a fee estate. It should only be accepted when there is some questionable claim to possession or other minor interest in the real estate at issue.

Each of the above described deeds must comply with the following formalities:

1. Be in writing;
2. Contain a sufficient description of the real estate;
3. Be executed by the owner;
4. Have the owner's signature notarized;
5. Be delivered to the grantee; and
6. Be recorded in the real property records of the county in which the real estate is located to constitute notice to third parties.

To read about easements and the conveyance and/or creation of easements, please be sure to watch for Part II of this article in the next *Public Law Report*.

*Ms. Lenz is an Associate with Johnson Radcliffe Petrov & Bobbitt PLLC and specializes in banking and real estate.*

## JRPB Employee Profile Meet JRPB's New Employees

Elliot Barner and Amy Sillmon joined JRPB in April 2010 and are assisting in the Firm's public law and public finance practices.

Elliot obtained a Bachelor of Arts degree in Classics from Baylor University in Waco, Texas, and graduated from South Texas College of Law in 2003. He also earned a Postgraduate Diploma in International Commercial Business Law from the University of East Anglia, Norwich, United Kingdom.

Prior to joining JRPB, Elliot served as an electronic discovery attorney in Dallas, Texas.

When not practicing law, Elliot enjoys music, playing tennis and traveling.

Amy obtained a Bachelor of Arts degree in Philosophy from Emory University in Atlanta, Georgia, and earned her J.D. from Vanderbilt University Law School in 2004.

Prior to joining JRPB, Amy served as an associate in Birmingham, Alabama, in the areas of labor & employment, public finance & tax and various municipal matters.

When not practicing law, Amy enjoys spending time with her family, singing, helping others through volunteer activities and playing with her Shih Tzu, Capri.

JRPB is excited about the addition of Amy and Elliot and believes the Firm's continued growth will better enable JRPB to continue the prompt personal service its clients have come to know.

## In The News...

Jonathan D. Polley will present "Time is Money... Get 'er Done! Keystones of Efficient Board Meetings" at the Association of Water Board Directors - Texas Annual Conference in San Antonio, Texas in June 2010. ([www.awbd-tx.org](http://www.awbd-tx.org))

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Jolie S. Lenz has recently presented an in-house seminar to a local financial institution on April 21, 2010, providing a detailed discussion of commercial real estate loan documentation.

Ms. Lenz also recently presented an in-house seminar to a local financial institution on May 20, 2010, providing a detailed discussion of Texas title commitments, title policies and surveys.



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relation to a construction contract the Directors are considering awarding, but the discussion should not delve into the merits of the bids for the contract until an open session has reconvened.

**Personnel Matters.** Another commonly misunderstood exception to the general rule involves closed sessions to discuss personnel matters. This exception provides that an Affected Entity may hold an executive session "to deliberate about the appointment, employment, evaluation, reassignment, duties, discipline, or dismissal of a public officer or employee; or to hear a complaint or charge against an officer or employee", unless "the officer or employee who is the subject of the deliberation or hearing requests a public hearing". However, too often, Directors and their consultants misunderstand or make incorrect assumptions about what individuals constitute "employees" or "officers" of the Affected Entity.

Independent contractors are not employees or officers of the Affected Entity. As a result, Affected Entities may not hold executive sessions to discuss the hiring or firing of or contract negotiations with their attorneys, engineers, and other professionals with which it contracts, unless another exception to the general rule allows it. Beyond the licensed professionals an Affected Entity hires, determining whether a particular person is an employee or independent contractor can be a fairly involved legal analysis so, if you are not sure in which category a person fits, contact your Affected Entity's attorney for clarification. In addition, note that this exception only allows a closed session when the discussion centers upon a particular officer or employee. Directors must deliberate about a class of employees in open session.

**Deliberation about Real Property.** The final exception this article will discuss is that involving deliberations about real property. This exception allows for an executive session so Directors may discuss "the purchase, exchange, lease, or value of real property if deliberation in an open meeting would have a detrimental effect on the position of the [Affected Entity] in negotiations with a third person". Notice that this exception does not allow blanket authorization to discuss any real property transactions or negotiations in an executive session. Closed sessions on such topics are only legal if an open session would detrimentally affect subsequent negotiations.

**CONCLUSION.** Nearly all discussions about an Affected Entity's business among a quorum of Directors must occur in an open meeting of which the public has received notice. Directors may exclude the public from parts of meetings only if a specific statute allows the Directors to deliberate in private. If you are unsure whether a particular discussion must be held in a public session, either hold the discussion in an open session or defer the discussion until you can find out whether a statute allows a closed session. Remember, knowingly violating the Act can result in Directors being fined up to \$500 and sentenced to up to six (6) months in county jail.

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