Beyond Three Minutes: An Expanded Legal Framework for Public Participation

by Matt Leighninger



Three Minutes at the Microphone: How outdated citizen participation laws are corroding American democracy

Most people dislike public meetings. This is true for both the public officials who preside over them and the citizens who attend them. But over the last two decades, a wide range of participatory meeting formats and dynamic online tools have emerged – so why do we continue conducting public business in such an outdated fashion?

There are a number of reasons, but one is the legal framework that governs public participation. At the local, state, and federal levels, these laws can stifle innovation, fail to ensure transparency, and discourage public officials and employees from reaching out to citizens. When combined with other kinds of engagement opportunities, traditional public hearings can work, mainly by providing a sense of closure and validation to public debate on an issue. But since our legal framework supports only the bare minimum of deliberation, the pressure of dealing with contentious policy issues falls squarely on a format that isn't up to the task. The consequences go far beyond miserable meetings: as the relationship deteriorates between the people and their public institutions, the legitimacy and financial sustainability of governments continue to decline.

New needs, old processes

If you attend a public meeting, it is easy to see why no one enjoys the experience. The vast majority of these gatherings are run according to a formula that hasn't changed in decades: officials and other experts present, and citizens are given three-minute increments to either ask questions or make comments. There is very little interaction or deliberation. Turnout at most public meetings is very low – local officials often refer to the handful of people who typically show up as the "usual suspects." But if the community has been gripped by a controversy, turnout is often high, and the three-minute commentaries can last long into the night. On most issues, the public is either angry or absent; either way, very little is accomplished.

For 21st Century citizens, who are more skilled and educated than their predecessors, who have access to endless quantities of information through their smartphones, and who are used to having a wide array of choices open to them, these old meetings seem like a waste of time; there is little for them to learn, and little they can contribute.

Most of the laws governing public participation are at least thirty years old; one of the most notorious, California's Brown Act, just turned sixty. They predate the Internet as well as many innovations in face-to-face engagement, and it is unclear how they apply to:

– Use of Twitter and other social media platforms by public officials and public employees;

– Participation by public officials and public employees in neighborhood online forums, email listservs, and other online arenas;

– Participation by public officials and public employees in small-group dialogue and deliberation as part of larger public engagement efforts;

– Use of online tools to announce and proactively recruit for public meetings (rather than the old formula still found in many laws, which require governments simply to post a notice about a meeting in a city bulletin); and

– Collaboration between public institutions and private, nonprofit, charitable, and faith-based institutions in organizing and supporting public participation.

In all of these scenarios, our laws ought to uphold values such as transparency, privacy, inclusion, fairness, and freedom of speech.

In the Knight Foundation's "Soul of the Community" study, researchers found that attending a public meeting was more likely to reduce a person's sense of efficacy and attachment to community than to increase it. At the federal level, the poorly structured "town hall meetings" on health care reform in the summer of 2009 led to a number of highly publicized clashes between constituents

and Members of Congress, and were widely viewed as being detrimental to the policymaking process. In legislative hearings, school board meetings, zoning hearings, and city council proceedings all over the country, democracy is dwindling, three minutes at a time.

Reframing the relationship

Many local leaders understand the implications of this shift. They know that the financial pressures facing local governments, school systems, and other public institutions are not just the result of the recent economic downturn. "If we think we're going to come out of this recession and expect everything to go back to normal, we've got another thing coming," says Harry Jones, county executive of Mecklenburg County, North Carolina. "We need to reach out and reframe our relationship with citizens – the people who are the ultimate source of our revenues."

To support this new relationship, our public participation laws ought to support newer, more meaningful forms of citizen engagement. Over the last two decades, Jones and many other local leaders have pioneered a new generation of participation practices. These range from much more intensive, deliberative face-to-face meetings to a burgeoning array of online tools and arenas. The most successful of the face-to-face efforts rely on proactive, network-based recruitment to bring more than the "usual suspects" to the table. They use small, facilitated groups that allow people to explain why they care about an issue, become more informed about it, consider a range of policy options, and decide how they can contribute to problem-solving – in addition to making recommendations to government. In some cases, as with the practice of Participatory Budgeting, citizens vote on how public money should be spent. Neighborhood and school online forums have emerged that employ some of the same tactics, giving leaders the chance to interact with sustained networks of citizens. And online tools have been established that allow people powerful and convenient ways to report problems, generate and rank ideas, work in small action teams, and visualize options for public budgeting and land use planning.

We must free public officials and employees to engage the public without abandoning the goals of transparency and accountability. We must enable government to reach out to its constituents, adapt its practices and expectations, and repair the relationship. The success and even the survival of our governments may depend on it.

Many of these efforts have been initiated by people and groups outside government, from community foundations to neighborhood organizers to universities to Chambers of Commerce. But whether or not they are led by public officials, most of these efforts occur outside the scope of official citizen participation processes and the laws that govern them.

Revising the legal framework

Over the last year, a working group that includes representatives from the International City/County Management Association, American Bar Association, International Municipal Lawyers' Association, National League of Cities, National Civic League, Policy Consensus Initiative, and Deliberative Democracy Consortium have worked to produce new legal tools for public participation. These include:

–A model public participation ordinance for local governments.

–A model public participation act for state governments.

–A document describing local policy options and techniques for strengthening public participation.

The intent of these tools is not to offer cookie-cutter solutions for city councils and state legislatures, but to encourage them to at least consider their options. This would be a great help to city attorneys and other legal advisors, who often have to make recommendations without clear laws, legal precedents, or policymaker intentions.

The legal tools crafted by the working group are intended to allow innovation, not require it. "We took as our inspiration the laws on alternative dispute resolution (ADR) enacted during the 1980s and 90s," says Lisa Bingham of Indiana University, a public administration scholar who has taken the lead for the working group in the drafting process. "Simply by authorizing public agencies to use mediation, facilitation, and other ADR processes, those laws resulted in a dramatic proliferation of these practices at every level of the legal system."

The same is needed for public participation techniques. We must free public officials and employees to engage the public without abandoning the goals of transparency and accountability. We must enable government to reach out to its constituents, adapt its practices and expectations, and repair the relationship. The success and even the survival of our governments may depend on it.

Model Municipal Public Participation Ordinance

Whereas, direct and active participation in self-governance is a widely held value in the United States; and

Whereas, knowledge and talent are widely dispersed in society, and all benefit when those skills and abilities are

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directed toward common goals; and *Whereas,* public participation and collaboration may enhance local government's effectiveness, expand its range of options, improve the quality of its decisions, and enlist the problem-solving capacities of the general public; and *Whereas,* public agencies and municipal authorities may collaborate with the general public and state, regional, and local government agencies, tribes, nonprofit organizations, businesses, and other non-governmental stakeholders to accomplish public work and deliver public services more efficiently and effectively, and *Whereas,* there have been dramatic changes in the techniques of public participation and the technology allowing for greater transparency of government both through broadcast media and the internet;
Now, therefore, the city of _____ enacts the following Public Participation Ordinance:

Section 1: Definitions
For all purposes under this Act,
a) the phrase "public participation" is defined to include "public engagement," "community engagement," "citizen engagement," "public hearing," and "public comment" and includes, but is not limited to, any form of in-person, technology-aided, or online communication that provides for discussion, dialogue, or deliberation among participants, allowing residents to engage meaningfully in local problem identification, and/or problem solving related to community challenges, problems, and opportunities.
b) "Policy process" means any action in developing, implementing, or enforcing public policy, including but not limited to identifying and defining a public policy issue, defining the options for a new policy framework, expanding the range of options, identifying approaches for addressing an issue, setting priorities among approaches, selecting from among the priorities, implementing solutions, rulemaking, project management, and assessing the impacts of decisions.

Section 2: Public Participation Policy
a) It is hereby declared a matter of public policy that the active public participation of community members to offer comments, ideas and recommendations, both individually and collectively, on public challenges, problems and opportunities is a public good and will be pursued in the interest of the health, prosperity, safety, and welfare of the community, and in the pursuit of effective and trusted governance. Further, as these ends are best achieved by community members who have the opportunity to become informed and to jointly deliberate on public matters prior to offering their ideas and recommendations, that such deliberative opportunities are to be offered when and where possible, and public input received will be considered in final decision making by the appropriate agency body.
b) The city and its municipal departments may use any process that meets the principles for public participation set forth in Section 3 in addition to statutorily or federally required forms of public input such as notice and comment or public hearings for public participation.
c) The city shall adopt and make publicly available a Public Participation Policy to guide the city's use of participation strategies and techniques to satisfy the principles for public participation set forth in Section 3.

It is hereby declared a matter of public policy that the active public participation of community members to offer comments, ideas and recommendations, both individually and collectively, on public challenges, problems and opportunities is a public good...

Section 3. Principles for Public Participation
a) The following principles govern meaningful and effective public participation:
1. **Planning Ahead**: Public participation is an early and integral part of challenge and opportunity identification, planning and design, budgeting, and implementation of city policies, programs, and projects.
2. **Inclusive Design**: The design of a public participation process includes input from appropriate local officials as well as from members of intended participant communities.
3. **Authentic Intent:** A primary purpose of the public participation process is to generate public views and ideas to actually help shape local government action or policy.
4. **Transparency:** Public participation processes are open, honest, and understandable. There is clarity and transparency about public participation process sponsorship, purpose, design, and how decision makers will use the process results.
5. **Inclusiveness and Equity**: Public participation processes identify, reach out to, and encourage participation of the community in its full diversity. Processes respect a range of values and interests and the knowledge of those involved. Historically excluded individuals and groups are included authentically in processes, activities, and decision and policymaking. Impacts, including costs and benefits, are identified and distributed fairly.
6. **Informed Participation**: Participants in the process have information and/or access to expertise consistent with the work that sponsors and conveners ask them to do. Members of the public receive the information they need to participate effectively with sufficient time to study.
7. **Accessible Participation**: Public participation processes are broadly accessible in terms of location, time, and language, and support the engagement of community members with disabilities.
8. **Appropriate Process**: Each public participation process uses one or more engagement formats that are responsive to the needs of identified participant groups and encourage full, authentic, effective

and equitable participation consistent with process purposes. Participation processes and techniques are well-designed to appropriately fit the legal authority, scope, character, and impact of a policy or project. Processes adapt to changing conditions as projects move forward.
9. **Use of Information**: The ideas, preferences, and/or recommendations contributed by community members are documented and given consideration by decision-makers. Local officials communicate decisions back to process participants and the broader public, with a description of how the public input was considered and used.
10. **Building Relationships and Community Capacity**: Public participation processes invest in and develop long-term, collaborative working relationships and learning opportunities with community partners and stakeholders. This may include relationships with other temporary or ongoing community participation initiatives.
11. **Evaluation**: Sponsors and participants evaluate each public participation process with the collected feedback, analysis, and learning shared broadly and applied to future public participation efforts for continuous improvement.

Section 4. Public Participation Specialist
The mayor/city manager shall designate a public participation administrator to assist in the implementation of this ordinance and to provide ongoing training in public participation processes for city employees, members of city advisory boards and commissions, and such others as may be determined by the mayor/city manager.

Section 5. Public Participation Advisory Board
a) Establishment. A public participation advisory board for the City of _____ is hereby created.
b) Purpose and Intent. The purpose of this board is to advise the city council on the design, implementation, and evaluation of public participation processes for determining community goals and policies and delivering services.
c) Duties and Responsibilities. The board shall have the following duties and responsibilities:
1. Develop and propose to the city council a multi-year plan for public participation to guide the public participation policies, protocols, practices, and assessment of the City of _____;
2. Develop guidelines and recommendations to the city council that support inclusive participation and a diversity of viewpoints in public engagement processes; and
3. Provide advice and recommendations to the city council regarding the implementation of public participation guidelines and practices.
4. Review public participation process evaluation results to provide advice and recommendations to the city council regarding continuous improvement of public participation policies and practices;
5. Provide an annual report to the city council regarding the status of public participation activities.
d) Composition. The public participation advisory board shall consist of numbers of members and terms consistent with the practices of the appointing authority. The appointing authority shall give due consideration to recognized qualifications and experiences in the field of public participation and shall designate representatives reflecting the diversity of interests of the broader community.
e) Procedure. A majority of the board shall constitute a quorum. The commission shall adopt such rules and bylaws as appropriate to further govern its proceedings.
f) Meetings. The board shall hold regular meetings as may be provided by its bylaws, and may hold special meetings on the call of the chairperson or at the request of the city council.

Model State Public Participation Act: An Amendment to the State Administrative Procedure Act and Government in the Sunshine Act
Comment: Some states include municipalities as agencies subject to the Administrative Procedure Act. Others do not. The model would need to be adapted to each state's context. In each state, the Act should incorporate by reference that state's statutory definition of state agency or municipal authority (city, town, county, water district, etc.).
Whereas, direct and active participation in self-governance is a widely held value in the United States, and
Whereas, knowledge and talent are widely dispersed in society, and all benefit when those skills and abilities are directed toward common goals; and
Whereas, public participation and collaboration enhance the Government's effectiveness, expand its range of options, improve the quality of its decisions, and enlist the problem-solving capacities of the general public; and
Whereas, public agencies and municipal authorities may collaborate with the general public and state, regional, and local government agencies, tribes, nonprofit organizations, businesses, and other non-governmental stakeholders to accomplish public work and deliver public services more efficiently and effectively, and
Whereas, there have been dramatic changes in the techniques of public participation and the technology allowing for greater transparency of government both through broadcast media and the internet, and
Whereas, existing statutory requirements place limits on the interaction between public agencies, municipal authorities, and members of the general public;
Now therefore, the [state] Administrative Procedure Act and Government in the Sunshine Act shall be amended as follows:
Now therefore, the state of _____ enacts the following Public Participation Act:

Section One: Definitions
For all purposes under this Act,
a) For all purposes under this Act, the phrase "public participation" is defined to include "public engagement," "community engagement," "citizen engagement," "public hearing," and "public comment" and includes, but is not limited to, any form of in-person, technology-aided, or online communication that provides for discussion, dialogue, or deliberation among participants, allowing residents to engage meaningfully in local problem identification, and/or problem solving related to community challenges, problems, and opportunities.
b) Municipal authorities may include [to be defined]
c) State agencies may include [to be defined]
d) "Policy process" means any action in developing, implementing, or enforcing public policy, including but not limited to identifying and defining a public

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policy issue, defining the options for a new policy framework, expanding the range of options, identifying approaches for addressing an issue, setting priorities among approaches, selecting from among the priorities, implementing solutions, rulemaking, project management, and assessing the impacts of decisions.
Comment: This section is intended to define these terms for all purposes under a state's statutory code. The intent is to broaden the statutory definition so as to explicitly authorize innovation. Most states use these terms repeatedly across the code, not only in the Administrative Procedure Act, but also in statutes involving land use and transportation planning, the environment, utilities regulation, etc.

Section Two: Public Participation Policy
It is the policy of this state to encourage state agencies and municipal authorities to provide broad, inclusive, deliberative, participatory and meaningful public engagement in the policy process with the general public and stakeholders from the public, private, and nonprofit sectors, including state, regional, and local government agencies, tribes, nonprofit organizations, businesses, and other nongovernmental stakeholders. This act should be construed broadly to promote the fullest opportunity permitted by law to participate meaningfully in governance and the policy process and to provide their Government with the benefits of their collective expertise and information.
Comment: This section establishes that this is a remedial statute to be construed broadly.

Section Three: Commitment to Agency or Municipal Authority Discretion
Each state agency shall and each municipal authority may develop a policy on public participation that will allow broad, inclusive, deliberative, participatory, and meaningful public engagement in the policy process. The choice of a particular form of engagement or sequence of opportunities for the public to participate is committed to agency or municipal authority discretion and not subject to judicial review, provided the agency or municipal authority provides some form of public participation, hearing, or comment as required by law.
Comment: This section is intended to shield agencies and municipal authorities from litigation over the choice of process model, for example, deliberative polling, deliberative town hall meeting, blog, etc.

Section Four: Public Participation Specialist
The head of each state agency shall designate a staff person to be the public participation specialist. This designation may be a collateral duty appointment. The public participation specialist shall be responsible for the implementation of the public participation policy and other provisions of this Act. Each agency shall provide for training on a regular basis for the public participation specialist of the agency and other employees involved in implementing the public participation policy of the agency. The public participation specialist shall periodically recommend to the agency head agency employees who would benefit from similar training.
Comment: This section locates responsibility for public engagement expertise within an agency or municipal authority. The public engagement specialist can obtain training and expertise that he or she can share with other employees in the agency or municipal authority through in house continuing education. This pyramid structure for disseminating training is cost effective.

Section Five: Collaboration
State agencies, municipal authorities, and other public entities may initiate or participate in cooperative agreements with one another, tribes, nonprofit organizations, businesses, other nongovernmental stakeholders, and the general public in carrying out any of their public participation powers and duties under state law.
Comment: This section allows agencies and municipal authorities to collaborate with one another and the broadest public on anything that they could do independently.

Section Six: Public Participation Meetings
a) State agencies and municipal authorities may conduct meetings for the sole purpose of public participation provided these meetings are: (1) open to the general public; and (2) a notice stating in general terms the subject matter of the meeting is posted and/or published according to Open Meeting Law. Members of state agencies and municipal authorities, including a quorum, may attend these meetings and interact with the public, including responding to issues and ideas not specifically identified within the original agenda, provided these issues or ideas originate with the public. Members of public agencies and municipal authorities, including a quorum, shall not engage in decision making, or vote upon or take official action at a public participation meeting.
b) Public agencies and municipal authorities may consider and make use of information from public participation meetings in a subsequent public meeting at which they take official action, provided that records of the general content of the public participation meeting are made public within three (3) days after the meeting, and are public for a period of at least fourteen (14) days prior to official action.
Comment: This section carves out an exception to the Sunshine Act to permit public officials to attend public engagement meetings and participate in discussion, deliberation, or dialogue with members of the public that may inform their later participation and action on public business. ML

Hiring and Firing *Cont'd from page 9*

Fair, Consistent Treatment
Traditional discrimination and retaliation issues (particularly under Title VII) remain a constant source of concern for any employer. In the public sector, these concerns are multiplied by the alternative theories of discrimination and retaliation available under civil rights statutes such as 42 U.S.C. §§ 1981 and 1983. In addition to providing a vehicle for state and local employees to bring suit to vindicate their free speech and due process claims, Section 1983 provides an alternative path and an additional weapon for terminated public employees to assert Fourteenth Amendment equal protection claims.[20] Section 1981 and 1983 claims have the added dangers of allowing longer statutes of limitations, no damages caps, no exhaustion requirements (as with Title VII), and the potential for personal liability for individual state officials named as defendants.

Public employers can reduce their exposure to liability under the Equal Protection clause by ensuring that dis-