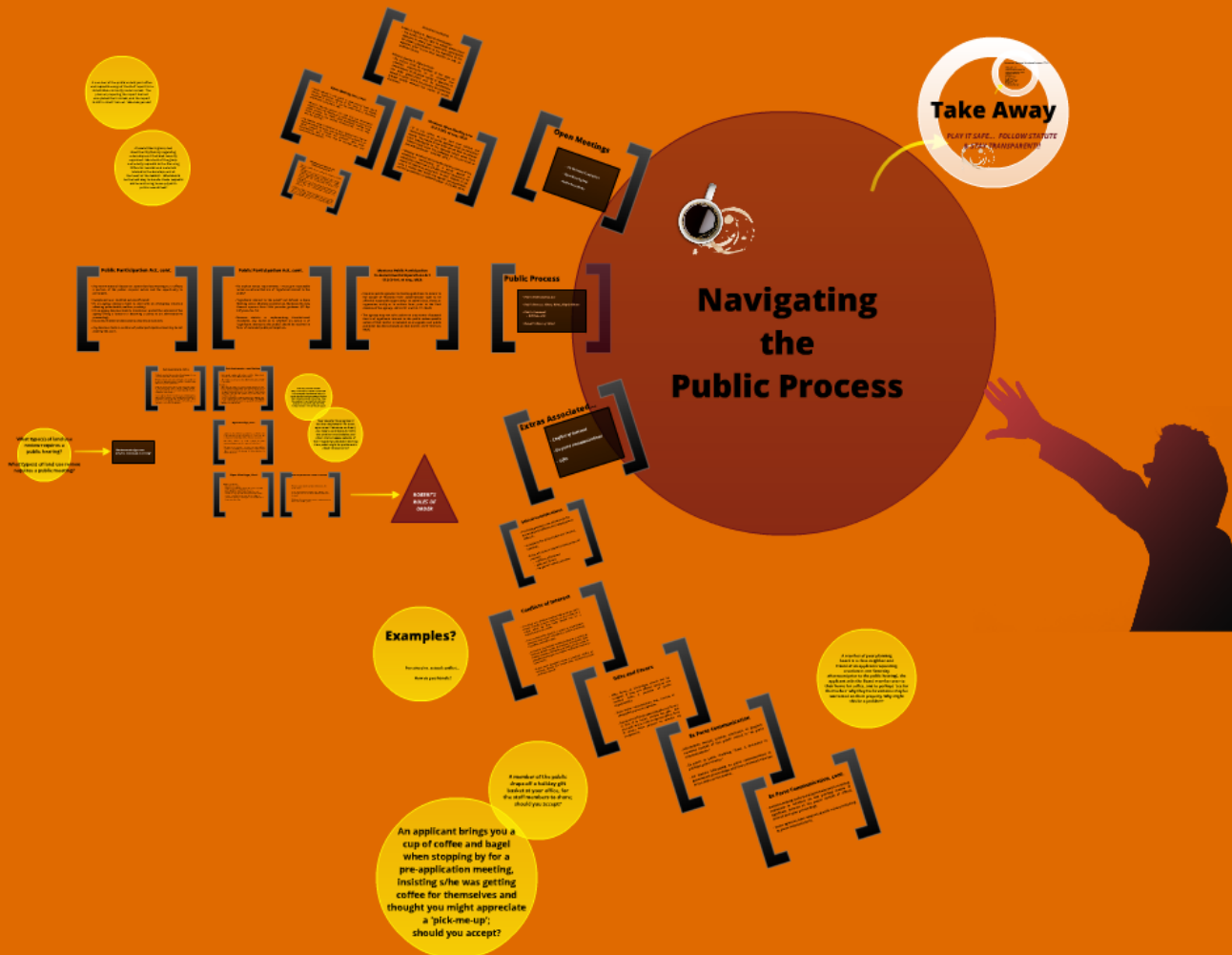


# Thank you for your attention!





# **Navigating the Public Process**

# Open Meetings

- *The Montana Constitution*
- *Open Meeting Law*
- *Public Records Act*

## Montana Constitution

### Article II, Section 8 - Right of Participation.

- The public has the right to expect government agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

### Article II, Section 9 - Right to Know

- No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of the state government and its subdivisions, except in cases where the demand of individual privacy clearly exceeds the merits of public disclosure.

# **Montana Open Meeting Law**

## **§§ 2-3-201, et seq., MCA**

- **“It is the intent of this part that actions and deliberations of all public agencies shall be conducted openly. The people of the state do not wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the part shall be liberally construed.” (§2-3-201, MCA.)**
- **“Meeting” is defined as the convening of a quorum of the constituent membership of a public agency or association described in 2-3-203, whether corporal or by means of electronic equipment, to hear, discuss, or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power. (§ 2-3-202, MCA.)**

## **Open Meeting Law, cont.**

- **'Public agency' is any public or governmental body, board, bureau, commission, agency of the state, or any agency supported in whole or in part by public funds or expending public funds. (§ 2-3-203(1), MCA.)**
- **Montana Attorney General has held that the Constitution requires "that any meeting [of a public agency] be open to the public, whether the matter being considered involves large issues of policy or the smallest ministerial act." (47 Op. Att'y Gen. No. 13 (1998).)**
- **Any decision made in violation of open meeting laws may be declared void by the court, and any plaintiff who prevails in an action brought to enforce the plaintiff's rights under constitutional right to know may be awarded costs and reasonable attorney fees.**

# **Montana Public Records Act**

## **§§ 2-6-101, et seq., MCA**

**What is a public record? Defined by statute as “public writings”:**

- (1) “written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, ... except records that are constitutionally protected from disclosure;**
- (2) public records of private writings, including electronic mail, except for library records, burial site records, and records that are constitutionally protected from disclosure.**

**Public has a right to inspect and take a copy of any public record of the state, and every public officer having the custody of a public record is bound to give the citizen on demand a certified copy of it.**

**A member of the public enters your office and requests a copy of the staff report for a subdivision currently under review. The planner preparing the report has not completed their review, and the report is still in 'draft' format. What do you do?**



**A local citizen's group has sued the City/County regarding a development that was recently approved. Members of the group make daily requests to the Planning Office for records and materials related to the development at the heart of the lawsuit. What would be the best way to handle these requests while continuing to comply with public records law?**

# **Montana Public Participation in Governmental Operations Act §§ 2-3-101, et seq., MCA**

- **Requires public agencies to develop guidelines to secure to the people of Montana their constitutional right to be afforded reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to the final decision of the agency. (§§ 2-3-101 and 2-3-111, MCA.)**
- **The agency may not take action on any matter discussed that is of significant interest to the public unless specific notice of that matter is included on an agenda and public comment has been allowed on that matter. (§ 2-3-103(1)(a), MCA.)**

# Public Participation Act, cont.

- No explicit notice requirements - must give reasonable notice on actions that are of “significant interest to the public”
- “Significant interest to the public” not defined in Open Meeting Law or Montana Constitution. Montana Attorney General opinion from 1998 provides guidance (47 Op. Att’y Gen. No. 13)
- Because statute is implementing Constitutional mandates, any doubt as to whether an action is of “significant interest to the public” should be resolved in favor of increased public participation.

# Public Participation Act, cont.

- Any non-ministerial decision or action that has meaning to, or affects a portion of the public, requires notice and the opportunity to participate.
- Exceptions (no or modified notice sufficient):
  - (1) an agency decision made to deal with an emergency situation affecting public health, welfare, or safety;
  - (2) an agency decision made to maintain or protect the interests of the agency (filing a lawsuit or becoming a party to an administrative proceeding);
  - (3) purely ministerial decisions (no discretion involved).
- Any decision made in violation of public participation laws may be set aside by the court.



**What type(s) of land use review requires a public hearing?**

**What type(s) of land use review requires a public meeting?**

***Who knows the difference  
between a hearing & a meeting?***

## **Basic Requirements - Notice**

- **Publication (notice of time and place of hearing, agenda) must occur reasonable period before the meeting**
- **New items should not be added to the agenda but carried over to the next regularly scheduled meeting, or special meeting with two days posted public notice.**
- **Public should have opportunity to obtain information related to every agenda item when notice is published (decision-makers and public should be on equal footing with respect to participation in the decision).**
- **Consent agendas should be treated as part of regular agenda with respect to notice and open meetings; however there is no expectation of board discussion or public comment - items should not be of significant interest to the public and no discussion or comment may take place.**

# Basic Requirements – Open Meetings

- **Hold regular meetings with notice to public. Bylaws should address procedure for calling special meetings.**
- **All meetings must be open to the public! Meet in place accessible to the public.**

## **Exceptions:**

- **When discussion relates to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure. The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, the meeting must be open.**
- **To discuss a strategy to be followed with respect to litigation when an open meeting would have a detrimental effect on the litigating position of the public agency (does not apply when both parties to litigation are public agencies)**



**Your City Council decides they would like to conduct a site visit to a proposed development prior to reviewing the land use request during their scheduled public meeting. They have agreed to go together and have decided on a specific day and time to meet onsite - why is this an issue?**

**Your County Planning Board decides they would like to set up an email list-serve on Gmail, as a way to communicate with one another on schedules and other related issues outside of their regularly scheduled meeting time; what might be problematic about this scenario?**

## **Open Meetings, Cont.**

- **Applies to any committee appointed by a public body for conducting that agency's business if a quorum of the constituent membership of the public body is present**
- **Must keep minutes and make available for public inspection; minutes must be approved by the body.**
- **Meetings occur anytime a quorum is present, whether agency or a committee is just discussing or taking action. This can be by full meeting; by teleconference; by electronic means.**



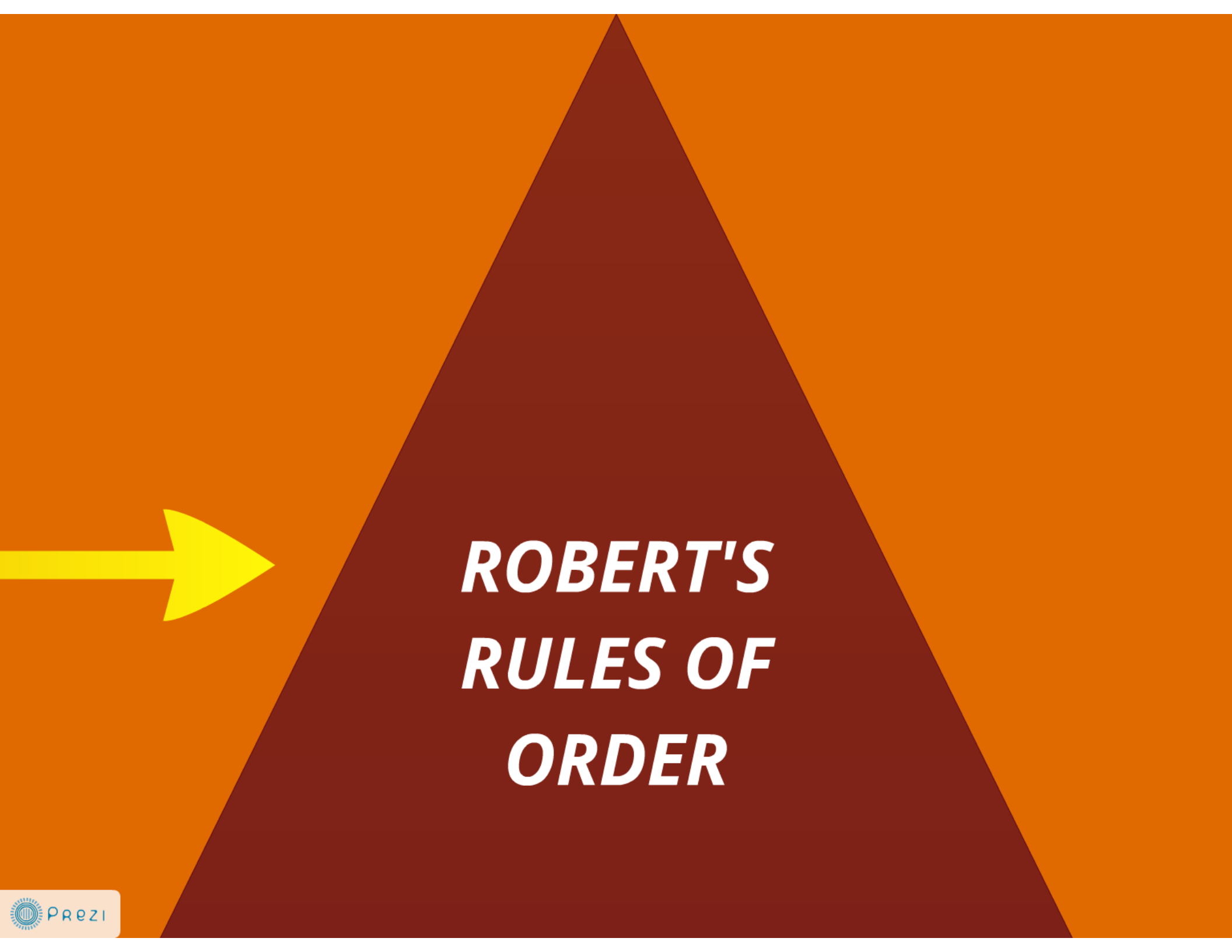
# Open Meetings, Cont.

## Things to remember:

- **Keep the door open;**
- **Call from a landline, in a place that can be accessible to the public (not a cell phone in a car);**
- **Do not “Reply to all” in an email - this can easily constitute an open public meeting in violation of the statute – even if just discussing and not taking an action it constitutes a meeting of a quorum that must be open to the public.**

# Basic Requirements – Public Comment

- **Provide opportunity for public comment on each agenda item.**
- **Some agencies limit comment period allowed each speaker, but no court decision on if these limitations are legal.**
- **Public must be given opportunity to comment on items that are not on the agenda.**



***ROBERT'S  
RULES OF  
ORDER***

# Extras Associated...

- *Conflict of Interest*
- *Ex parte communications*
- *Gifts*

# Ethical Considerations

- **Providing general rules of behavior for governmental officials and employees is difficult.**
- **Guidelines for ethical behavior do exist, however.**
- **Rules of conduct relate to three areas of concern:**
  - **conflicts of interest**
  - **gifts and favors**
  - **“ex parte” communication**



# Conflicts of Interest

- A member of a decision-making body to whom some private benefit may be derived as the result of an action taken by that body should not be a “participant” in the action.
- Mere membership itself in a group or organization, however, may not be considered a conflict of interest regarding a board’s action.
- A member of a decision-making body with a conflict of interest should recuse themselves and abstain from making motions, discussing, or voting on the action in question (many agencies require conflicted member to leave room).
- If you have questions about a potential conflict of interest, discuss the matter with Department staff and legal counsel.

# Examples?

**Perceived vs. actual conflict...**

**How do you handle?**

# Gifts and Favors

- **Gifts, favors or advantages should not be accepted if they are offered because the receiver holds a position of public responsibility.**
- **Even minor considerations (e.g., lunches or small gifts) are not acceptable.**
- **Best guide to follow regarding gifts and favors is this: if in doubt, decline the gift. Ask yourself: would I still accept this gift or favor if others were present to witness my acceptance?**

**A member of the public  
drops off a holiday gift  
basket at your office, for  
the staff members to share;  
should you accept?**

**ngs you a**

**An applicant brings you a cup of coffee and bagel when stopping by for a pre-application meeting, insisting s/he was getting coffee for themselves and thought you might appreciate a 'pick-me-up'; should you accept?**

# Ex Parte Communication

- Information (verbal, written, electronic, or graphic) received outside of the public record is “ex parte communication.”
- Ex parte is Latin, meaning “from a one-sided or partisan point of view.”
- No statute addressing ex parte communication in government proceedings, and there is limited case law in the state on the matter.



**A member of your planning board is a close neighbor and friend of an applicant requesting a variance; one Saturday afternoon (prior to the public hearing), the applicant asks the Board member over to their home for coffee, and to perhaps 'see for themselves' why they feel a variance may be warranted on their property. Why might this be a problem?**

## **Ex Parte Communication, cont.**

- **Decision-making body should generally avoid receiving testimony or evidence on any pending matter of significant interest to the public outside of official noticed and open proceedings.**
- **Some agencies have adopted specific rules prohibiting ex parte communication.**



*Community Technical Assistance Program (CTAP)*

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# Take Away

***PLAY IT SAFE... FOLLOW STATUTE  
& STAY TRANSPARENT!!***