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Public Meeting Rules: Guidelines for Protecting First Amendment Rights By The Rutherford Institute¹ March 9, 2016

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Representative government works best when the government's actions are fully disclosed and citizens are allowed to speak honestly and openly to their elected representatives and other citizens without fear of retribution. Unfortunately, officials at all levels of government have succeeded in insulating themselves from their constituents through the use of free speech zones, electronic town hall meetings, security barriers, regulations restricting what is said at public meetings, and other tactics that run afoul of the First Amendment's safeguards for free speech, public assembly and the right to petition the government for a redress of grievances.

Until recently, local government meetings have remained one of the few legitimate forums available to citizens to personally address their government representatives about decisions that have immediate and substantial impact on their day-to-day lives.

Representative Government on a Local Level

Representative government plays out daily in towns and cities throughout the nation in the meetings of the various local boards and commissions that have been delegated the power of the state to make decisions that have significant impact on the lives and property of their constituents. Whether it is a county board considering restrictions on noise or a planning commission deciding an application for a new residential subdivision, local boards and commission as a whole hold vastly more meetings and make more decisions than Congress affecting matters that are literally and figuratively "close to home."

Under so-called "sunshine laws" adopted in most states, these meetings are usually required to be conducted in public, offering citizens the opportunity to see and hear the decision-making process of their elected representatives. And in many instances, either as a matter of law

¹ The Rutherford Institute, a national nonprofit civil liberties organization based in Charlottesville, Va., defends individuals whose constitutional rights have been violated and educates the public about threats to their freedoms. The Institute has spent more than 30 years advocating for transparency in government and championing the First Amendment right of the citizenry to speak candidly and openly to their elected representatives and other citizens.

or by virtue of a policy and practice adopted by the board, members of the public are granted the right to personally address these representatives and exercise their rights under the First Amendment² to engage in speech and to petition the government.

Because local boards, commissions and councils decide issues that have very real, personal and immediate impact on the lives of citizens, the proceedings and public speech that occurs at these meetings can become heated and the meeting environment tense. Local meetings are often the only opportunity citizens have to personally address their representatives in government on the actual issues and decisions those representatives are called on to make.

When those decisions profoundly affect the daily lives of citizens, such as by increasing traffic or the amount of taxes that will be assessed for educating children, there is the potential for the rhetoric employed at these meetings is passionate and provocative. In an attempt to “dial down” the intensity of these meetings and impose a more civil discourse, numerous local boards and commissions have attempted to establish rules and regulations governing speech at public meetings that limit the content and manner of public expression. However, these restrictions on expression often run afoul of the fundamental rights embodied in the First Amendment, making local officials self-appointed censors and arbitrary arbiters of what speech is and is not proper.

Over the past quarter century, The Rutherford Institute has seen various attempts at controlling public conduct at the meetings of their local representatives and has often been asked by citizens to assess the constitutionality on limits of public expression at and access to local public meetings.

Out of that experience, The Rutherford Institute has developed the following guidelines for local boards, commissions and councils to consider and follow in order to best assure that that fundamental rights of citizens are not sacrificed on the altar of decorum and civility.

Background Legal Principles

Local government boards and commissions exist and are created under state law in order to carry out a governmental function, such as enacting laws and ordinances governing a municipality or administration of the local public schools. State law usually establishes that the members of these boards and commissions are to meet in person for purposes of carrying out their business and governmental functions.

The particulars of how those meetings are conducted is most often left to the board/commission to determine. However, as noted above, most states have some sort of “sunshine” or open meetings law, which require governmental bodies to hold their meetings in

² “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I

Public Meeting Rules: Guidelines for Protecting First Amendment Rights

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Page 3

public and allow citizens to attend.³ Direct public participation in the proceedings is usually not mandated by open meetings laws, and unless the law requires members of the public be allowed to speak at local board and commission meetings,⁴ citizens do not have a right to speak at these meetings.

In the interest of fostering good relations with the public and increasing participation in the governmental process, boards and commissions often set aside time for the public to speak out either on matters that are a part of the meeting agenda or on other matters that members of the public would like to raise with the board/commission.

When such an opportunity to speak is provided to the public, it gives rise to First Amendment rights which the government must respect. A “limited public forum” is created when the government opens up use of specified property, such as a meeting room, at a particular time for speech on a particular subject.⁵ When a board sits in a public meeting to conduct public business and hear the views of citizens, a limited public forum is created. In such a forum, reasonable restrictions on the time, place and manner of the speech may be imposed, but the restrictions must not discriminate against speech on the basis of its viewpoint.⁶

Guidelines for Protecting First Amendment Rights at Public Meeting Rules

1. Maintaining Decorum and Order

The decisions local boards and commissions are asked to make involve matters that have a profound impact on peoples’ lives, so discussion at meetings can become heated and boisterous.

Rules and regulations on speech at meetings often arise out of attempts to impose control upon the rhetoric and conduct at meetings and impose a level of decorum deemed appropriate by the board members. However, these attempts run a high risk of running afoul of the First Amendment’s protection of freedom of speech by restricting the content or viewpoint of the message conveyed. Additionally, in an attempt to provide flexibility, decorum and order regulations tend to provide the presiding officer with unbridled discretion to censor speakers, using vague standards that are contrary to the idea that citizen speech must be protected “against general restrictions or *ad hoc* parliamentary rulings by presiding officials.”⁷

In adopting rules on meeting order and decorum, the following guidelines should be followed in order to avoid stifling speech unconstitutionally:

³ See, e.g., Tex. Gov’t Code § 551.002 (“Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter.”).

⁴ State or local law might give a right to particular persons to speak at a meeting. For example, if a land use matter is being considered, property owners affected by the matter before the board/commission may be given a right to express their views and objections.

⁵ *Steinburg v. Chesterfield County Planning Comm’n*, 527 F.3d 377, 384-85 (4th Cir. 2008).

⁶ *City of Madison, Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm’n*, 429 U.S. 167, 175-76 (1976).

⁷ *Steinburg*, 527 F.3d at 385.

- Restrictions on the content of speech should be limited to speech that is not protected by the First Amendment, such as threats, fighting words (i.e., word that naturally tend to cause a breach of the peace), incitement to unlawful action and obscene language;
- Vague terms, such as “improper comments”, “vulgar”, “impertinent” or the like should not be used as they vest entirely too much discretion with the presiding official and create a danger that a speaker will be censored because of the official’s disagreement with the speaker’s viewpoint. Vague restrictions also have the tendency to chill speech as speakers will try to steer clear of the prohibited zone;⁸
- Criticism of public officials should not be forbidden--officials must be accountable for their actions and citizens have the right to publicly state their objections on their official actions;
- Regulations that do not rely on the content of the speech, such as restrictions on noise and yelling or actions that create a breach of the peace, should be used in order to maintain order and decorum;
- Speakers who have violated a proper rule may be expelled from a meeting, but only after receiving a warning that their conduct is improper.

2. Subject-Matter Regulations

Boards and commissions sometimes try to limit the subjects a citizen may address when recognized to speak. In doing so, rules should follow these guidelines:

- If the board/commission is addressing a particular subject that is on the agenda, a speaker’s comments may be limited to those that are relevant to that agenda topic so that the business at hand may be addressed;
- During open comment periods established by the board/commission, a citizen should be allowed to address any topic of public interest;

3. Limits on Who May Be Addressed

Meeting rules sometimes provide that speakers may only address comments to the chair or to the board commission as a whole. Such restrictions are unduly restrictive and prevent the speaker from effectively communicating his or her message to the appropriate official. Because this kind of limitation has no compelling justification, it should not be adopted.

4. Limits on Recording of Proceedings

Some states protect the right of citizens to record public meetings in their open meetings laws.⁹ But even in the absence of such protections, the First Amendment protects the right to record

⁸ *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

⁹ See, e.g., Vas Code § 2.2-3707(H).

what transpires at meetings of government bodies open to the public.¹⁰ Rules that restrict this right are constitutionally invalid and should not be adopted.

Conclusion

The goal of order and decorum at public meetings need not be achieved only at the expense of the right of citizens to speak and be heard. Indeed, it is the alienation of citizens and their belief that their representatives are out of touch and will not listen to them that breeds the kind of anger and resentment that leads to uncivil discourse.

In pursuing more civility at public meetings, boards and commissions and their constituents are better served in the long run by adopting rules that respect the rights of expression and petition and foster open and transparent government.

¹⁰ *Tisdale v. Gravitt*, 51 F. Supp. 3d 1378, 1392 (N.D. Ga. 2014).