

THE RUTHERFORD INSTITUTE

Post Office Box 7482
Charlottesville, Virginia 22906-7482

JOHN W. WHITEHEAD
Founder and President

TELEPHONE 434 / 978 - 3888
FACSIMILE 434/ 978 - 1789
www.rutherford.org

August 11, 2015

Greene County Board of Supervisors
Administration Building
40 Celt Road
Stanardsville, Virginia 22973

VIA ELECTRONIC MAIL AND CERTIFIED MAIL

Dear Board Members:

The Rutherford Institute¹ has been asked to provide its analysis of the rules and regulations on the open forum public comment period that were adopted by the Greene County Board of Supervisors on July 28, 2015. For the reasons set forth below, the Board should revisit these rules and policies and eliminate provisions that are contrary to freedom generally allowed for speech at public meetings.

As the elected representatives of the citizens of Greene County charged with establishing the policies of the County, it is crucial that you remain open to communications from your constituents both individually and when acting as a collective Board. Public meetings of local legislative boards have historically served as the quintessential citizens forum—giving individuals the opportunity to be speak on the issues important to the community and to address directly those who have the authority to take action on those matters. As such, it is beyond question that the First Amendment's protection of the freedom of speech and the right to petition the government apply with full and special force at the public meetings of bodies such as the Greene County Board of Supervisors.²

However, the rules and regulations on the open forum public comment period that were adopted by the Board on July 28, 2015 have the potential, if not actual effect, of violating the constitutional rights of citizens to expression at Board meetings.

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.

² *Steinburg v. Chesterfield County Planning Commission*, 527 F.3d 377, 385 (4th Cir. 2008).

This open forum section of the meetings had been held to allow the public to express themselves on matters of concern that might not otherwise be included on the Board's agenda. While such open comment periods are extremely important in allowing individuals to make both representatives and the public-at-large aware of concerns that might be "under the radar," the recently adopted rules will unwisely restrict this forum and might be used to censor unpopular but constitutionally protected, speech.

Authority of the Chair

Of immediate concern is this rule: "Any person desiring to speak shall sign up prior to the meeting and write down the subject of their comments. **The Chair will decide whether the comments will be heard.**" A fundamental principle of First Amendment jurisprudence is that laws and rules must not grant unfettered discretion to a governmental person or entity which determines whether and who may engage in protected expression. Indeed, citizen speech at public meetings must be protected against general restrictions or *ad hoc* parliamentary rulings by presiding officials.³ But this rule appears to do exactly that, allowing the Board Chair the right to determine whether a person will be allowed to speak in the open comment period. This opens the door to viewpoint discrimination by the Chair and violates the Constitution.

Subject Matter Restriction

Another rule requires that "[c]omments must be directly related to the services, programs or policies of the County[.]" While this might seem to be a reasonable restriction, when considered in light of the diversity of matters with which the County is involved, in practice it may be extremely difficult to determine what subjects are relevant to the County and what subjects are not germane. When considered in context, the idea of something being "related to the services, programs or policies of the County" is quite vague and ambiguous. Such ambiguity is again inconsistent with the First Amendment because it allows censorship of speech by government officials on the basis of disagreement with the speaker's message instead of on some principled basis.⁴

Limitation on Who May Be Addressed

The rules also provide that the comments must only be addressed to the Chair of the Board. This also is unduly restrictive and not necessary to keep the public comments pertinent and within the bounds of decorum. A speaker might have a particular issue with the official conduct and/or vote of a particular Board member and desire to address it with that member. While it certainly could be attempted by only addressing the Chair, no compelling reason has been raised to justify a prohibition on directing such comments to a different member or members of the Board.

³ *Steinburg*, 527 F.3d at 385.

⁴ *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

“Disrespectful” Comments

The new rules also forbid addressing staff in a “disrespectful” manner or making “personal attacks or accusations” against others. Clearly, this rule on its face imposes a form of unconstitutional viewpoint discrimination, because comments which praise or commend Board members or staff are not prohibited, but those comments criticizing them might be deemed personal attacks. Although courts have upheld a public meeting policy against personal attacks, such attacks would have to affect the order and decorum of a meeting in order to be prohibited. Moreover, such a policy could be used to chill or suppress speech of legitimate relevance to a public meeting. The rule at issue here is entirely too broad because it is not aimed solely at maintaining the order and decorum of the meeting. Instead, it includes any speech a particular Board member considers “disrespectful” and thus makes it vulnerable to censorship.

Punishment for Violations

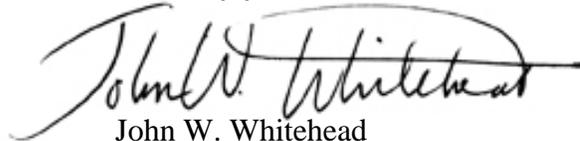
The rules also provide as follows: **“Any person who does not follow the rules listed above will be directed by the Chair to end their comments immediately and will not be allowed to comment at the next scheduled meeting of the Board of Supervisors. If necessary, speakers may be removed from the room if violations of the rule above persist.”** This rule is draconian. A better policy would be to have the Chair advise the speaker of the rule he/she is running afoul of and ask them to limit their comments accordingly. Banning the person from speaking at the next meeting results in an unconstitutional censorship of speech and thus violates the core precepts of the First Amendment.

Conclusion

Instead of seeking to restrict the ability of citizens to communicate with their representatives, the Board should be seeking to maintain an open and robust exchange of views with the people of the County. The limits on speech imposed by the recently adopted rules are not only contrary to the First Amendment, but are unwise. For citizens to feel vested in their government, they must know that they are free to express their views and be heard by their representatives.

We urge the Board to revoke the rules it has adopted and reopen the public comment period as a free forum for speech.

Sincerely yours,

A handwritten signature in cursive script that reads "John W. Whitehead". The signature is written in black ink and is positioned above the printed name and title.

John W. Whitehead
President