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Crossing the Line
Public Comment and Constitutional Issues

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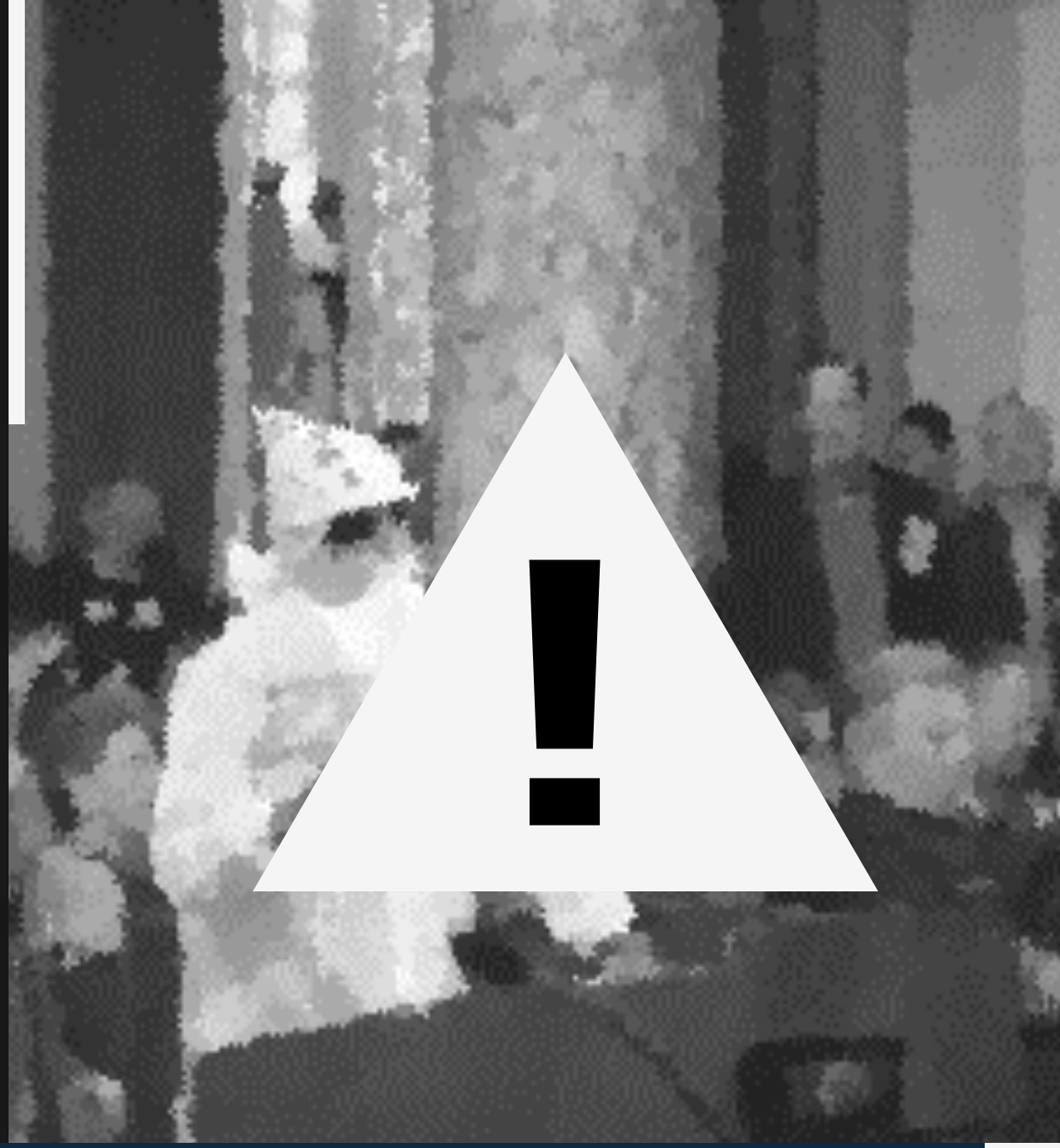
Crossing the Line

Protections and Limitations of Speech at City Council and Other Public Meetings

Disclaimer

This presentation contains disturbing images and language that may be considered extremely offensive.



LOS ANGELES CITY COUNCIL MEETINGS

DISRUPTIONS DURING VARIOUS PUBLIC HEARINGS

"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 redress of grievances."



Constitutional Protection

The First Amendment to the United States Constitution



What Type of Forum is a City Council Meeting?

Traditional Forum v. Limited Forum

Relevant case law is not uniform in the type of label applied to the forum created when a governmental entity allows the public to speak at public meetings.

Labels range from discussion of public meetings as "traditional," "designated" or "limited" public fora.

Most cases consider public meetings to be "limited" public fora. The standard applied to regulations of the forum (next slide) are, however, uniform and consistent.



A Limited Public Forum

"[C]ity commission meetings are "'limited' public fora – i.e., - 'a forum for certain groups of speakers or for the discussion of certain subjects." *Rowe v. City of Cocoa*, 358 F.3d 800 (2004), citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n.7 (1983).

"In contrast to traditional and designated public forums, a governmental entity creates a limited public forum when it provides for 'a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Galena v. Leone*, 638 F.3d 186, 198 (3d Cir. 2011).

Lawful Time, Place and Manner Restrictions

A time, place and manner restriction for a Council Meeting is valid if it is:

1. Content Neutral

2. Narrowly Tailored to serve an important governmental interest;

3. Leaves open ample alternatives for communication of information

Ward v. Rock Against Racism, 491 U.S. 781, 791-803 (1989);
Jones v. Heyman, 888 F.2d, 1328, 1331-1333 (11th Cir. 1989

Content Neutrality

NEUTRAL

- Regulations must not favor one speaker over another and must not be based upon content, ideology or viewpoint of the speaker. *Rosenberger v. Rector and Visitors of the University of Va*, 515 U.S. 819, 829 (1995).

SPECIFIC SUBJECT

- Plainly, public bodies may confine their meetings to specified subject matter . . . ." City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175 n. 8 (1976); White v. City of Norwalk, 900 F.2d 1421, 1425 (9th Cir. 1990) (same).

STANDARD

- "[U]nder contemporary public forum jurisprudence, a designated . . . forum is reviewed under a sliding standard that allows for content-related regulation so long as the content is tied to the limitations that frame the scope of the designation, and so long as the regulation is neutral as to viewpoint within the subject matter of that content." *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 281 (3rd Cir. 2004).

Significant Government Interest

ORDERLY MEETINGS

- A sufficient governmental interest in limiting a speaker's rights is the "recognized significance of the government's interest in conducting orderly, efficient meetings of public bodies." *Jones v. Heyman*, 888 F.3d 1328, 1332 (11th Cir. 1989).

REGULATED DEBATE

- "To deny the presiding officer the authority to regulate irrelevant debate and disruptive behavior at a public meeting . . . would cause such meetings to drag on interminably, and deny others the opportunity to voice their opinions." *Jones v. Heyman*, 888 F.3d 1328, 1332 (11th Cir. 1989).

EFFICIENCY

- "Meetings of a public body do not become free-for-alls simply because the body goes beyond what a member of the public believes (even correctly) to be the body's proper purview.' *Wright v. Anthony*, 733 F.2d 575, 577 (8th Cir. 1984) (restricting a public debate "may be said to have served a significant governmental interest in conserving time and in ensuring that others had an opportunity to speak.")

Narrowly Tailored

- A regulation is considered "narrowly tailored" where the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989); *Jones v. Heyman,* 888 F.2d 1328, 1331-1333 (11th Cir. 1989).

Alternative Channels of Communication

- Alternative channels of communication are present when a Council provides some time for general public comment, unrelated to a specific agenda item, but still relevant to the body's jurisdiction. *Jones v. Heyman*, 888 F.3d 1328, 1334 (11th Cir. 1989).



When is Ejection of a Disrupter Lawful?

What is a Disruption?

General Rule

- Speakers are subject to ejection only when their speech "disrupts, disturbs or otherwise impedes the orderly conduct of [a public] meeting." *White v. Norwalk*, 900 F2d 1421, 1426 (9th Cir. 1990).

- A municipality may not merely define "disturbance" in any manner it chooses, "e.g., it may not deem any violation of its rules of decorum to be a disturbance." *Acosta v. City of Costa Mesa,* 718 F.3d 800, 811 (9th Cir. 2013).

Examples

9th Circuit

"A speaker may disrupt a Council meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies. The meeting is disrupted because the Council is prevented from accomplishing its business in a reasonably efficient manner." *White v. Norwalk*, 900 F2d 1421, 1426 (9th Cir. 1990).

9th Circuit

"Although the standard for disruption is relatively low, a disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption *nunc pro tunc* disruption, or imaginary disruption. The City cannot define disruption so as to include non-disruption . . . ." *Dowd v. City of Los Angeles,* 2013 LEXIS 111435 at page 13, citing *Norse v. City of Santa Cruz,* 629 F.3d 966, 976 (9th Cir. 2010).

3rd Circuit

"If even only one member of the public objects during a time when public comments are not allowed, the Council's procedure in conducting business is affected even if the member of the public interrupts the meeting in a conversational, nonthreatening tone of voice. The interruption of the order of business is itself the disturbance." *Galena v. Leone,* 638 F.3d 186, 212 (3d Cir. 2011).

U.S. Supreme Court

However, listeners' reaction (audience members and public officials, alike) to speech cannot form the basis for concluding that a disruption has occurred. *Forsyth City, Ga. V. National Movement,* 505 U.S. 123, 124 (1992).

The Government May

- Limit the class of speakers to the jurisdiction's residents. *Rowe v. City of Cocoa,* 358 F.3d 800, 802 (11th Cir. 2004).
- Limit the time a speaker may speak. *Wright v. Anthony,* 733 F.2d 575, 577 (8th Cir. 1984).
- Ban Signs? Likely, yes if all signs are banned or ban is related to size or sign or whether the sign may obstruct others in attendance. *Hunt v. City of Los Angeles,* 2012 U.S. Dist. LEXIS 191441 at p. 2.
- Exclude a disrupter from future meetings? Not for a lengthy or indefinite amount of time. *Walsh v. Enge*, 154 F.Supp. 1113, 1119 (D. Oregon 2015).

Speakers May

- Be critical of officials if the criticism is on topic. *Luckett v. City of Grand Prairie,* 2002 U.S. Dist. LEXIS 3102 at p. 15.
- Threaten Litigation. *Rowe v. City of Cocoa,* 358 F.3d 800, 802 (11th Cir. 2004).
- Use Profanity. *Cohen*, 403 U.S. 15, 21 ("Fuck the Draft T-shirt); Hunt T-shirt bearing the message "Fuck White Niggar [sic] too"; *Dowd v. City of Los Angeles,* 2013 U.S. Dist. LEXIS 11435 (C.D. Cal. 2013) (using profanity "in service of making a point that is related to the issue at hand" is acceptable as an "intensifier").
- Make obscene and offensive gestures. *Norse v. City of Santa Cruz,* 629 F.3d 966, 971 (9th Cir. 2010) (Nazi salute).
- Defame persons or groups, if the content is otherwise on topic. *Draego v. City of Charlottesville,* 2016 U.S. Dist. Lexis 159910
- Wear a mask. *City of Dayton v. Esrati,* 707 N.E.2d 1140, 1148 (1997) (government failed to demonstrate sufficient government interest in banning masks and violated the First Amendment in ejecting a speaker wearing a Ninja mask).

Illustrative Cases

7th Circuit

Surita v. Hyde, 665 F.3d 860, 871 (7th Cir. 2011) (Mayor informed Mr. Surita before Mr. Surita attempted to speak at a City Council regarding a towing ordinance that Mr. Surita would not be able to speak until he apologized to a city employee for what the emoloyee perceived to be threatening criticism at a rally two days previously; court held the Mayor violated Mr. Suita's first amendment rights in barring him from speaking).

3rd Circuit

Galena v. Leone, 638 F.3d 186, 213 (3d Cir. 2011) (court upheld ejection by Mr. Leone who objected, out of turn, to the County Council proceedings and persisted after being called out of order).

6th Circuit

Leonard v. Robinson, 477 F.3d 347, 361 (6th Cir. 2007) (arrest of speaker invalid because speaker sat down after accusing City officials of "screwing" his company and stating "[t]hat's why you're in a God damn lawsuit," and arrest by a peace officer occurred before speaker was called out of order).

Illustrative Cases

9th Circuit

Kindt v. Santa Monica Rent Control Bd., 67 F.3d 266 (9th Cir. 1995) (speaker lawfully ejected for distrupting the proceeding by yelling and speaking out of turn).

11th Circuit

Galena v. Leone, 638 F.3d *Jones v. Heyman,* 888 F.2d 1388 (11th Cir. 1989) (speaker deemed off topic, yelled and continued talking after being warned that he would be ejected if speaking continued).

E.D.N.Y

Devine v. Village of Port Jefferson, 849 F.Supp. 185, 190 (E.D.N.Y 1994) (ejection upheld as lawful where speaker became disruptive, raised his voice, interrogated Board members and prevented others from speaking)

Retaliatory Ejection: Case Study

Lozman v. City of Riviera Beach, Fla, 585 U.S. ___ (2018)

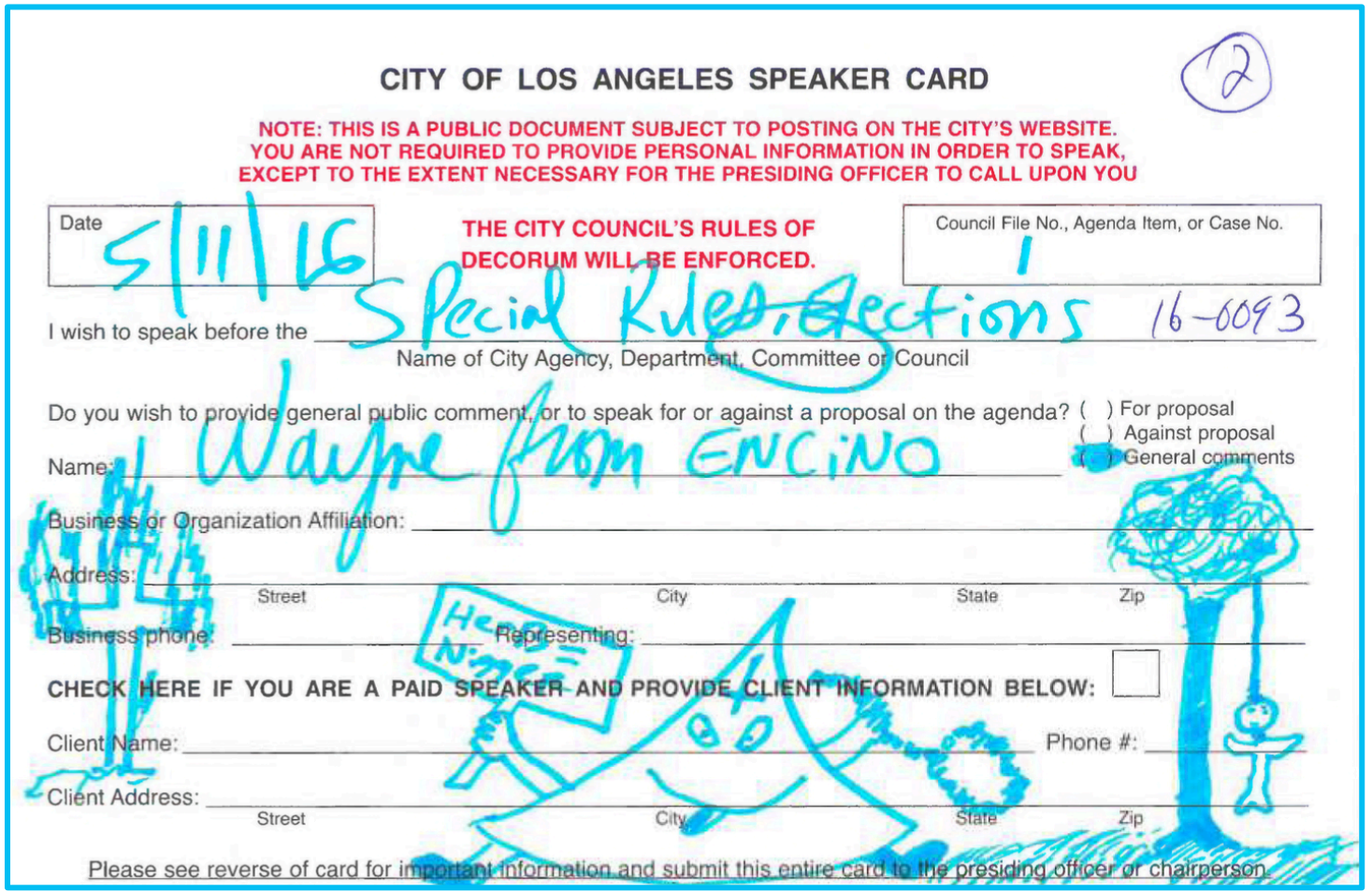
- *Lozman* stands for the principle that the First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech.
- Mr. Lozman was a resident of a house boat in the City of Riviera Beach. Mr. Lozman became active in local politics and filed a lawsuit against the City in response to the City's plan to use its eminent domain power to seize homes along the waterfront for private development. The City Council members developed a plan in closed session to use City resources to "intimidate" Mr. Lozman and others who had filed suit.
- During a Council meeting after the intimidation plan was in place, Mr. Lozman spoke during the "citizen comment period." Mr. Lozman veered off topic and began criticizing the arrest of a County official, i.e., an official in a different jurisdiction. A Council member asked Mr. Lozman to stop speaking. Mr. Lozman continued. A peace officer asked Mr. Lozman to leave the speaker's podium, but Mr. Lozman refused. A Council member asked an officer to "carry out" Mr. Lozman. Mr. Lozman was handcuffed and ushered out. Mr. Lozman agreed that the City had probable cause to eject him from the meeting for speaking off topic, but filed a lawsuit under 42 U.S.C. Section 1983 for retaliation.
- The Supreme Court held that notwithstanding the present of probable cause, Mr. Lozman's arrest at the City Council meeting violated the First Amendment because the arrest was ordered in retaliation for his earlier, protected speech: his open meetings lawsuit and his prior pubic criticisms of city officials. *Id.* See also, *Eichenlaub v. Township of Indiana,* 385 F.3d 274 (3rd Cir. 2004) (Mr. Eichenlaub, a litigant against the Township, was ejected from a Township meeting for being repetitive, truculent and interrupting the chairman at the meeting. Mr. Eichenlaub's restraint of speech and petition claims were dismissed but the retaliation claim survived).

In Practice

Example of a threat that resulted in a restraining order



Wayne Spindler



CITY OF LOS ANGELES SPEAKER CARD

NOTE: THIS IS A PUBLIC DOCUMENT SUBJECT TO POSTING ON THE CITY'S WEBSITE.
YOU ARE NOT REQUIRED TO PROVIDE PERSONAL INFORMATION IN ORDER TO SPEAK,
EXCEPT TO THE EXTENT NECESSARY FOR THE PRESIDING OFFICER TO CALL UPON YOU

Date 5/11/16

THE CITY COUNCIL'S RULES OF DECORUM WILL BE ENFORCED.

Council File No., Agenda Item, or Case No. 1

I wish to speak before the Special Rules Elections 16-0093
Name of City Agency, Department, Committee or Council

Do you wish to provide general public comment, or to speak for or against a proposal on the agenda? ( ) For proposal ( ) Against proposal ( ) General comments

Name: Wayne from ENCINO

Business or Organization Affiliation:

Address: Street City State Zip

Business phone: Representing:

CHECK HERE IF YOU ARE A PAID SPEAKER AND PROVIDE CLIENT INFORMATION BELOW:

Client Name: Phone #:

Client Address: Street City State Zip

Please see reverse of card for important information and submit this entire card to the presiding officer or chairperson.

In Practice

Example of a threat that resulted in a restraining order



Trevor Ferguson

Aka

Trevor Gerard

TREVOR GERARD, PLEASE.

TREVOR GERARD: SO THE WORD IS THAT CHIEF, SORRY, CHARLIE BECK, MET WITH AN ACCIDENT. AS YOU CAN RECALL, I WARNED HIM THAT MEN FALL DOWN STEPS, MEN HAVE HEART ATTACKS, MEN HAVE STROKES. SEE AT SOME POINT THE UNIVERSE WILL DEAL WITH HIM, AND HE WAS BROKEN FROM THE INSIDE.

MATT JOHNSON HAS FOUR CHILDREN ONE OF WHOM, I UNDERSTAND, IS A BOY. GOD FORBID, MATT JOHNSON, THAT YOU EVER HAVE TO SUFFER AT THE HANDS OF THE VIOLENCE OF MEN LIKE CHARLIE BECK.

GOD FORBID THAT YOU EVER HAVE TO GRIEVE LIKE MS. SIMPSON AND MS. HINES HERE HAVE TO GRIEVE BECAUSE OF THE VIOLENCE OF MEN LIKE CHARLIE BECK.

GOD FORBID YOU HAVE TO SIT IN THIS AUDIENCE AND SUFFER BECAUSE YOUR BOY WHICH IS JUST ANOTHER NIGGER IN THE CROSSHAIRS.

WHEN WE'RE SILENT IN THE FACE OF INJUSTICE WE HAVE CHOSEN THE SIDE OF THE OPPRESSOR. YOU HAVE NOT ONLY CHOSEN THE SIDE OF MEN LIKE CHARLIE BECK AND ERIC GARCETTI, YOU HAVE CHOSEN TO BE THEIR ERRAND BOY.

What Can We Do?

- Adopt specific Rules of Decorum and conduct, including time limits and a ban or size restriction on signs.
- Enforce the Rules of Decorum consistently
- Counsel the Municipal Officials from interacting with speakers during public comment period
- Counsel the Municipal Officials to maintain composure
- Ensure security presence whenever possible
- Use civil restraining orders where appropriate
- Criminally prosecute speakers in extreme circumstances, as appropriate





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Thank You

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