

Public Comment - The Good, The Bad, and the Legal



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Public Comment

- People, now more then ever, feel entitled to say whatever they want whenever they want.
- Including at council/board meetings.



Public Comment and the Constitution



The First Amendment and First Amendment Claims



42 U.S.C. § 1983

No one shall be deprived "of any rights, privileges, or immunities secured by the Constitution and laws…"

Public Comment and the First Amendment

- Does the First Amendment apply to public meetings?
- **On one hand:** "The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271 (1984).
- **On the other hand:** States can mandate public comment, and councils can (and often do) impose public comment periods on themselves.
  - E.g., Texas requires municipalities to allow comment on agenda items; Utah requires public comment at school board meetings.

Court's Analysis: Step 1 – Protected Speech

- **Step One:** Whether the speech is protected by the First Amendment.
- The answer to this question, in a public meeting setting, is almost always yes. In fact, most governmental entities concede this question.
  - *See, e.g., City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp. Rels. Comm'n*, 429 U.S. 167 (1976); *McBeairty v. Miller*, 2023 U.S. Dist. LEXIS 72379 (D.C. Me. April 26, 2023); *Pollak v. Wilson*, 2022 U.S. Dist. LEXIS 233832 (D.C. Wyo. April 26, 2022); and *Fritz v. Charter Twp. Of Comstock*, 592 F.3d 718 (6th Cir. 2010).

Exceptions to Protected Speech

- **Incitement to Imminent Lawless Action** (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)).
- **True Threats** (*Virginia v. Black*, 538 U.S. 343 (2003)).
- **Defamation** (*Gertz v. Robert Welch*, 418 U.S. 323 (1974); *and see McKee v. Cosby*, 139 S. Ct. 675 (2019)).
- **Obscenity and Child Pornography** (*Miller v. California*, 413 U.S. 15 (1973))
- **Fighting Words** (*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

GAME TIME:

PROTECTED OR NOT PROTECTED

- At a school board meeting, a parent wanted age-appropriate books in the school. The parent asked the chair about the "hardcore anal sex" books on the book list.
- Protected or Not Protected?

GAME TIME:

PROTECTED OR NOT PROTECTED



Protected or Not Protected?

GAME TIME:

PROTECTED OR NOT PROTECTED

- At a Q&A with the re-elected mayor, a resident was asked to leave by one of the officers. On her way out, the resident looked at the officer in a "fierce kind of way" and muttered "a**hole," "son of a b****," and "Opie-Taylor-looking motherf*****" to the officer.
- Protected or Not Protected?

GAME TIME:

PROTECTED OR NOT PROTECTED



Protected or Not Protected?

GAME TIME:

PROTECTED OR NOT PROTECTED



Protected or Not Protected?

Court Analysis: Step 2 - Forum

- **Step two**: If the speech is protected, the court must next "identify the nature of the forum" in which the speech occurred.
- For government property, there are four categories of forums:
  - **Traditional public forums** – public places usually associated with the ability to freely express themselves (e.g., parks and sidewalks).
  - **Designated public forums** - places not normally a traditional forum, but the government intentionally opened it up.
  - **Limited public forums** – property limited to use by certain groups or dedicated solely to the discussion of certain subjects.
  - **Nonpublic forum** – places where it is clear that the entity did not intend to create a public forum.

Designated Public Forum

- "A designated public forum 'consists of public property which the state has opened for use by the public as a place for expressive activity,' such as a meeting space in a state-run university." *McBreairty v. Sch. Bd. of RSU22*, 616 F. Supp. 3d 79 (D.C. Me. July 20, 2022) (quoting *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983).
- "Reasonable time, place and manner regulations are permissible, and a **content-based prohibition must be narrowly drawn to effectuate a compelling state interest**." *Perry*, 460 U.S. at 46.

Limited Public Forum

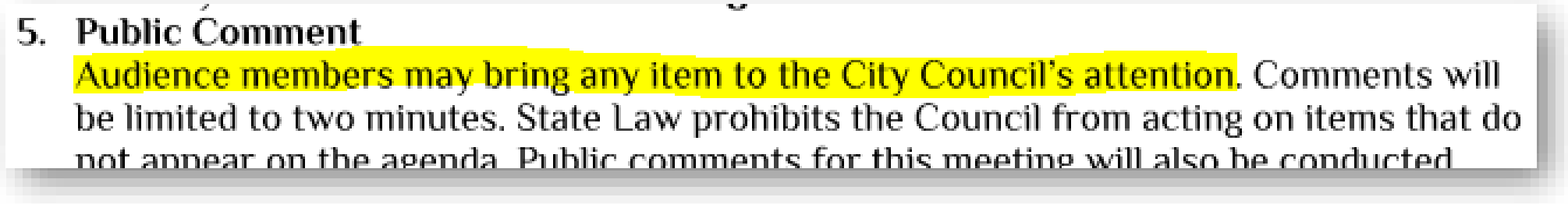
- "[A] limited public forum is created when the government opens a non-public forum for public expression, but limits expressive activity to certain kinds of speakers or the discussion of particular subjects." *Hotel Emples. & Rest. Union, Local 100 v. City of N.Y. Dep't of Parks & Rec.*, 311 F.3d 534, 552 (2nd Cir. 2002).
- Public comment restrictions "need only be **viewpoint neutral and reasonable**." *Id.* at 546.
- Such restrictions are "subject to only minimal constitutional scrutiny." *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 212 (2nd Cir. 1997)

Designated vs. Limited Public Forums

- There is no case law consensus for the type of forum for when a council/school board holds a public meeting and allows for public comment. For example:
  - *Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209 (11th Cir. 2017) (limited).
  - *Mesa v. White*, 197 F.3d 1041 (10th Cir. 1999) (designated).
  - *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990) (limited).
  - *Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989) (designated).
- This range of examples may reflect a circuit split but also the fact that not all public-body meetings are operated alike, with identical provisions for public participation.

Critical Questions

- Does your municipality have a policy on public comment?
  - Is comment classified as an "open mic"? Or does the chair say something like, "if anyone wants to speak about anything, please come up?"

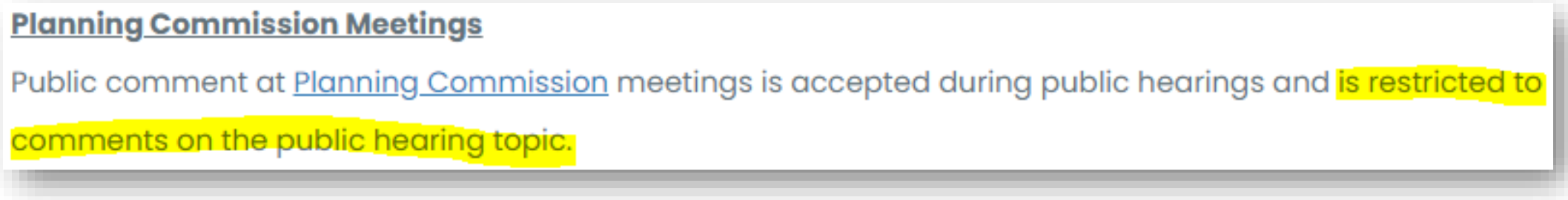


5. **Public Comment**
Audience members may bring any item to the City Council's attention. Comments will be limited to two minutes. State Law prohibits the Council from acting on items that do not appear on the agenda. Public comments for this meeting will also be conducted

  - Possible designated public forum i.e., any prohibition must be **narrowly tailored** to effectuate a **compelling state interest**.

Continued

- Is comment limited to an item on the agenda and/or limited to municipal business?



  - Likely limited public forum i.e., any prohibition needs only be viewpoint neutral and **reasonable**.

- Does your state have mandatory public comment period? If so, does it allow municipalities to create a limited public forum?

Public Comment - General Rule

"There is a significant governmental interest in conducting orderly, efficient meetings of public bodies."

- *Rowe v. City of Cocoa*, 358 F.3d 800, 803 (11th Cir. 2004).

What About Requiring Names?



- Requiring a speaker to announce their name before giving public comment does not violate the First Amendment . *See Miller v. Goggin*, _ F. Supp. 3d _ (E.D. Pa, May 5, 2023).

What About Requiring Residency?

- Courts have upheld a bona fide residency requirement as a reasonable speech restriction in a limited public forum. *See, e.g., Rowe v. City of Cocoa*, 358 F.3d 800, 803-04 (11th Cir. 2004) ("It is reasonable for a city to restrict the individuals who may speak at meetings to those individuals who have a direct stake in the business of the city—e.g., citizens of the city or those who receive a utility service from the city…").



Continued

- Some state laws specifically allow public comment to only residents, taxpayers, or parents of students. *See, e.g.*, 65 PA. CONS. STAT. §§ 710.1.
- Requiring the location of where the speaker physically resides – probably violates the First Amendment. *See Marshall v. Amuso*, 571 F. Supp. 3d 412 (E.D. Pa. Nov. 17, 2001).

What About Time Restrictions



- A time limit for speakers is a reasonable time, place and manner restriction and serves "a significant governmental interest in conserving time and in **ensuring that others had an opportunity to speak**." *Wright v. Anthony*, 733 F.2d 575 (8th Cir. 1984). *See also Shero v. City of Grove* 510 P.3d 1196 (10th Cir. 2007) (time limitations "**promote orderly and efficient meetings**.")

What about Irrelevant Comments?



Continued

- Public comment trolling is becoming a major internet sensation and a problem for municipalities.
- Subject to state law, a municipality may (**and should**) limit discussion during the comment period to topics related to municipal business.
  - *See Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176 n. 8 (1976); *see also Gagnon-Smith v. City of Middletown*, 2004 U.S. Dist. LEXIS 5560 (D.C. Conn. 2004); and *White v. Norwalk*, 900 F.2d 1421 (9th Cir. 1990).

Continued

- Generally precluding "irrelevant" comments in a limited public forum has been found to be vague and overbroad. *See Marshall v. Amuso*, 571 F. Supp. 3d 412, 424-26 (E.D. Pa. Nov. 17, 2021).
- To avoid constitutional pitfalls, clearly state that **topics must relate to the specific agenda items** and, for those entities that allow for a general public comment period, state that **comments must relate to municipal business**.

What About Criticisms of Public Officials



Continued

Courts have said this about criticizing public officials:



- Actually, courts have said this:
  - "Public officials may need to have **thicker skin** than the ordinary citizen when it comes to attacks…"

    - *Mattox v. City of Forest Park*, 183 F.3d 515, 522, (6th Cir. 1999)

- And this:
  - "It is asking much of City Council members, who have given themselves to public service, to tolerate profanities and personal attacks, but **that is what is required by the First Amendment**."

    - *Dowd v. City of L.A.*, 2013 U.S. Dist. LEXIS 111435, p. 61 (C.D. Cal. Aug. 7, 2013)

What About Signs During Public Meetings?

- In *Tyler v. City of Kingston*, 74 F.4th 57 (2nd Cir. 2023), the council was scheduled to hold a public meeting to discuss whether the City would purchase an armored rescue vehicle. Several activists planned to protest the purchase and bring non vulgar or obscene signs (e.g., "No Tanks No Thanks!" and "Oh my God! No Tank! Move on!!")
- Getting word of the protest, the council (a few days earlier) passed a No Signs policy for city hall.
- The court held that "Plaintiffs have not adequately alleged that the sign prohibition was unreasonable in relation to the City's common-sense interest in running efficient and orderly meetings."

Profanity / Vulgarity

- Courts are split on the question of whether profane remarks constitute protected speech.
- One court observed that "whether profane speech is constitutionally protected may in fact depend on its context and thus, it is not categorically protected or unprotected."



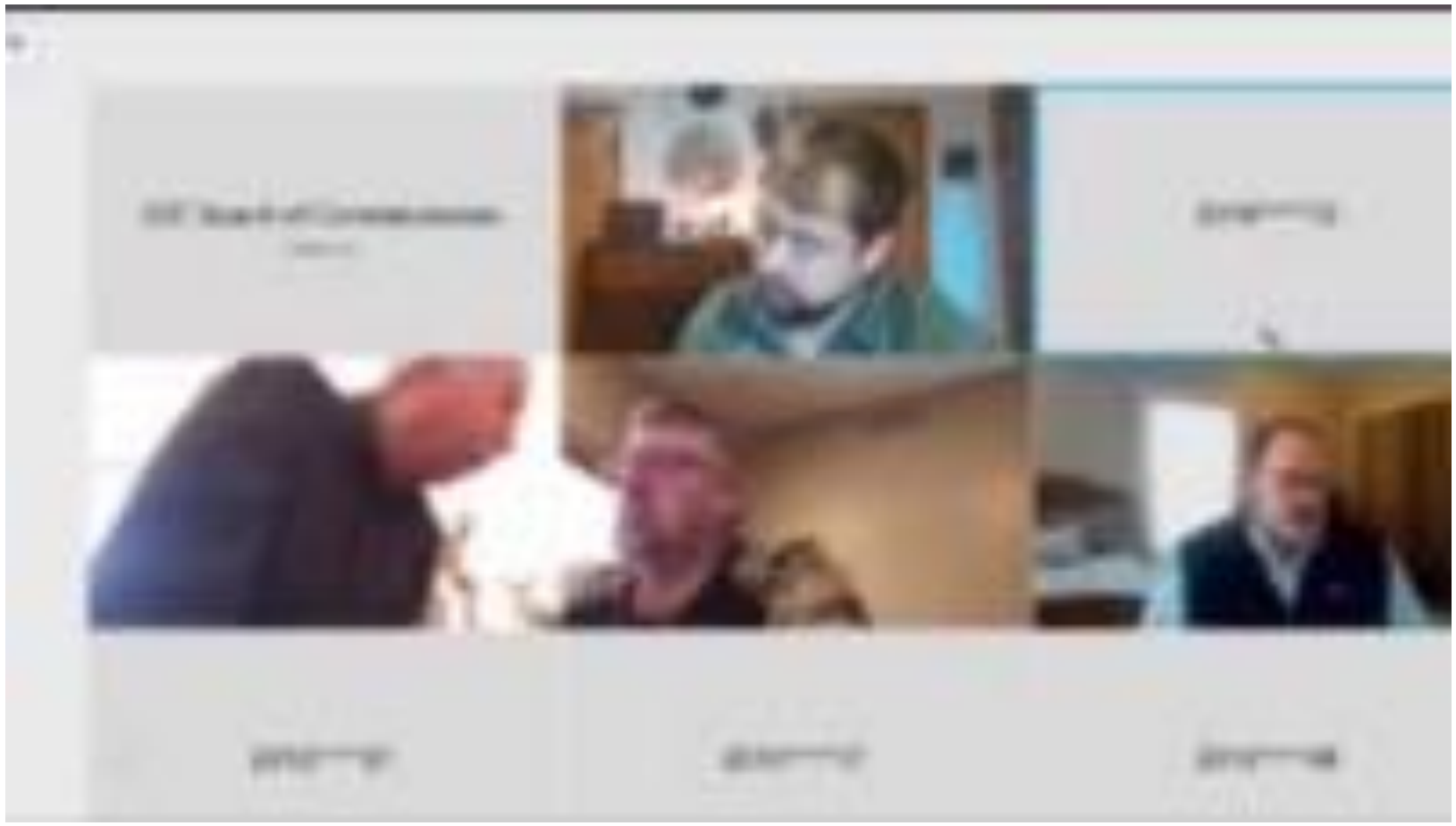
Beware of Retaliation Claims

- Many claims of First Amendment violations also include a "retaliation" claim.
- To make out a First Amendment retaliation claim, the plaintiff must show:
  - (1) the plaintiff engaged in First Amendment protected activity;
  - (2) the defendant undertook "an adverse action" that would deter "a person of ordinary firmness from continuing to engage in that conduct"; and
  - (3) that there is a "causal connection" between the plaintiff's protected activity and the defendant's adverse action.

Retaliation - *MacIntosh v. Clous* (6th Cir. 2023)

- Patricia MacIntosh expressed her concern about the Commission's prior invitation to and endorsement of the Proud Boys, a group that has been designated an extremist group and a hate group. She requested that the Commissioners make a public statement condemning the group's violent behavior.
- In response, Commissioner Ron Clous produced a high-powered rifle and displayed it on the video hearing.

MacIntosh v. Clous - Clip



MacIntosh v. Clous

- After the district court denied Clous' motion to dismiss, Clous appealed the decision to the Sixth Circuit.
- The Sixth Circuit held that the "facts alleged in the Complaint also demonstrate that **Clous's threat would deter a person of ordinary firmness from speaking at future meetings**" and its plausible that "**Clous is not entitled to qualified immunity** because it was clearly established that Clous's conduct violated MacIntosh's First Amendment rights."

What About Not Recording or Broadcasting the Comment Period?

- In *Potanovic v. Town of Stony Point*, 2023 U.S. Dist. LEXIS 8045 (S.D. N.Y. Jan. 17, 2023), the town ceased broadcasting its public comment item on Facebook Live. Thus, people watching the public meeting were left at odds on what happened/said during this portion of the meeting.
- The plaintiff claimed (1) this change violated his freedom of speech by preventing his remarks during public input sessions from being heard by at-home viewers, and (2) this change violated his right to access public meetings by preventing him from remotely observing public input sessions.
- The Court held that denying the listening of public comments online does not violate the First Amendment. It also held that there is no First Amendment right to observe public comment outside of the physical location provided by the town.

Pro Tips – Dealing with Controversial Agenda Items

- Strategy meetings between Mayor & City Manager prior to meetings
  - Anticipate issues and appropriate responses
  - Can staff help clarify informational issues?
  - Can/Should and issue be separated into parts?
  - Is further work needed?

Continued

- Consider holding meetings between staff & stakeholders
  - Public has all info the municipality has
  - Public knows the governing body understands their concerns
  - Possible resolutions can be explored
- Staff encourages public respect of officials
  - Take breaks when issues get heated
  - Use humor, as appropriate

Continued

- Time limits do not represent lack of interest
  - Mutual respect of all speakers
  - Key points heard
- Coaching public on participation can be helpful
  - Where emotion, conviction (including intimidation) have been effective before.

Questions?

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