International Municipal Lawyers Association's

89th Annual Conference

Florida Law Day

PUBLIC MEETINGS AND PUBLIC PARTICIPATION: BEST PRACTICES FOR KEEPING THINGS CIVIL AND COLLEGIAL

September 25, 2024

KEITH WARREN DAVIS, ESQ.

DAVIS & ASSOCIATES, P.A.

701 Northpoint Parkway, Suite 205
West Palm Beach, FL 33407
(561) 586-7116
Keith@DavisLawTeam.com

I. THE ORIGINS OF THE RIGHT TO PUBLIC PARTICIPATION IN LOCAL GOVERNMENT MEETINGS

A. No common law right to public participation in government meetings

At common law, the public had no right to attend governing body meetings. In fact, the publication of parliamentary debates could be visited with "harsh punishment" in 17th and 18th Century England.[1] The motivation for secrecy can be found in both the then perceived need for protections from the Crown and for protections from the electorate.[2] It was not until the late 18th Century that the publishing of Parliamentary debates was tolerated; but even then, there was no right for the public to attend the parliamentary meetings, and reporters could be removed upon the request of a single member.[3] Since 1874, a majority vote is required to exclude the public from a parliamentary meeting, and today the thought process has shifted to encourage public involvement in the government process.[4]

The United States House of Representatives has met in public since its inception and the Untied States Senate has met in public since 1794.[5] Nevertheless, as late as the early 1960s, only about one half of the states in the U.S. had statutory requirements for open local government meetings; Florida was NOT one of those states.[6]

B. The "Public Forum"

1. Open "traditional" public forum

Traditional public forums include places like public parks, streets and sidewalks. Within these traditional public forums, the government may not prohibit communicative activity, and any content-based restriction must be necessary to serve a compelling government interest and be narrowly tailored to do so.[7] Reasonable content neutral time, place, and manner restrictions are permissible.[8]

2. Closed public forum

"The First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[9] Rather, the government is entitled to preserve the property it controls for the use to which it is lawfully dedicated, for example, a jailhouse and its curtilage.[10]

3. Limited public forum

A limited public forum is a forum for public expression which is not a traditional open public forum, but rather is one which has been created by the government for a specific purpose. When the government opens up a nonpublic forum for a limited public purpose, it "may impose some content-based restrictions on speech."[11] The First Amendment does not guarantee persons the right to communicate their views at all times or in

---

[1] *Open meeting statutes: the press fights for the right to know*. 75 Harv. L. Rev. 1199 (1962).
[2] Id.
[3] Id.
[4] Id.
[5] Id.
[6] Id.
[7] Id.
[8] Id.
[9] Id.
[10] *Adderley v. State of Florida*, 385 U.S. 39 (1966).
[11] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. 37 (1983).

any manner that may be desired."[12] Reasonable content neutral time, place, and manner restrictions are permissible. Content based restrictions must be both reasonable and importantly, viewpoint neutral.[13]

II. CONSTITUTIONAL AND STATUTORY OPEN MEETING LAWS

A. Florida Government in the Sunshine Law

It was not until 1967, with the passage of the "Government in the Sunshine Law" that Florida first required local government meetings to be open to the public.[14] This legal requirement was placed into the Florida Constitution by Florida voters in 1992.[15]

1. Florida Constitution

ARTICLE I. Declaration of Rights.

SECTION 24. Access to public records and meetings. —

(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

(b) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution.

2. Florida Statutes

286.011 Public meetings and records; public inspection; criminal and civil penalties. —

(1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

(2) The minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded, and such

---

[12] *See*, e.g., *Adderley v. State of Florida,* 385 U.S. 39, (1966). *See also*, *Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989).

[13] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, (1995).

[14] Ch. 286, F.S. 1967.

[15] FLA. CONST. Art. I. Sec. 24.

records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state.

(3)(a) Any public officer who violates any provision of this section is guilty of a noncriminal infraction, punishable by fine not exceeding $500.

(b) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation, or political subdivision who knowingly violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

3. Sunshine Law Requirement for public participation

a. Statutory requirements

286.0114 Public meetings; reasonable opportunity to be heard; attorney fees. —

(1) For purposes of this section, “board or commission” means a board or commission of any state agency or authority or of any agency or authority of a county, municipal corporation, or political subdivision.

(2) Members of the public shall be given a reasonable opportunity to be heard on a proposition before a board or commission. The opportunity to be heard need not occur at the same meeting at which the board or commission takes official action on the proposition if the opportunity occurs at a meeting that is during the decision-making process and is within reasonable proximity in time before the meeting at which the board or commission takes the official action…

b. Statutory exceptions

286.0114 Public meetings; reasonable opportunity to be heard; attorney fees. —

(3) The requirements in subsection (2) do not apply to:

(a) An official act that must be taken to deal with an emergency situation affecting the public health, welfare, or safety, if compliance with the requirements would cause an unreasonable delay in the ability of the board or commission to act;

(b) An official act involving no more than a ministerial act, including, but not limited to, approval of minutes and ceremonial proclamations;

(c) A meeting that is exempt from s. 286.011; or

(d) A meeting during which the board or commission is acting in a quasi-judicial capacity. This paragraph does not affect the right of a person to be heard as otherwise provided by law.

c. Rules of procedure and decorum are permitted

286.0114 Public meetings; reasonable opportunity to be heard; attorney fees. —

(2) …This section does not prohibit a board or commission from maintaining orderly conduct or proper decorum in a public meeting. The opportunity to be heard is subject to rules or policies adopted by the board or commission, as provided in subsection (4).

(4) Rules or policies of a board or commission which govern the opportunity to be heard are limited to those that:

(a) Provide guidelines regarding the amount of time an individual has to address the board or commission;

(b) Prescribe procedures for allowing representatives of groups or factions on a proposition to address the board or commission, rather than all members of such groups or factions, at meetings in which a large number of individuals wish to be heard;

(c) Prescribe procedures or forms for an individual to use in order to inform the board or commission of a desire to be heard; to indicate his or her support, opposition, or neutrality on a proposition; and to indicate his or her designation of a representative to speak for him or her or his or her group on a proposition if he or she so chooses; or

(d) Designate a specified period of time for public comment.

(5) If a board or commission adopts rules or policies in compliance with this section and follows such rules or policies when providing an opportunity for members of the public to be heard, the board or commission is deemed to be acting in compliance with this section.

B. An alternative point of view: *Barron v. Kolenda*, 203 N.E.3d 1125 (Mass. 2023).



Southborough, Massachusetts Board of Selectmen adopted rules of public participation for local government meetings. Included within the rules were public comment policies and a civility code:

> All remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal, or slanderous remarks. Inappropriate language and/or shouting will not be tolerated. Furthermore, no person may offer comment without permission of the Chair, and all persons shall at the request of the Chair, be silent. No person shall disrupt the proceedings of a meeting.

Looking to the writings of both Samuel and John Adams, as still contained in the Massachusetts Constitution's Declaration of Rights, the Court referenced Article 19 which states in pertinent part:

> The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request the legislative body, by the way of address, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

The Court went on to cite other writings of the Adams cousins and the passion with which they advocated for the necessity of the right of the people to procure a redress of grievances, and have available to them the right to the "fullest and freest" discussion of public matters.[16] Finding that the Southborough civility code violated Article 19 of the Massachusetts Constitution's Declaration of Rights,[17] the Court explained that the "orderly and peaceable" requirement of

[16] *Barron v. Kolenda*, 203 N.E.3d 1125 (Mass. 2023). See also https://www.youtube.com/watch?v=IF6GQafHGL8

[17] The Court also ruled that Kolenda was not entitled to qualified immunity, since his own behavior violated clearly established constitutional rights of which a reasonable person would have known.

Article 19 does not require "respectful or courteous" behavior as required by the Southborough civility code: "there was nothing respectful or courteous about the public assemblies of the revolutionary period. There was also much that was rude and personal, especially when it was directed at the representatives of the King and the King himself."[18]

III. A LOCAL GOVERNMENT CASE STUDY – TEQUESTA, FL

A. Adopted Rules of Public Participation and Decorum

RESOLUTION NO. 26-18

A RESOLUTION OF THE VILLAGE COUNCIL OF THE VILLAGE OF TEQUESTA, FLORIDA, UPDATING THE VILLAGE'S PUBLIC PARTICIPATION RULES AND POLICIES TO INCLUDE GENERAL MEETING DECORUM RULES AND POLICIES AND A PROCESS FOR ADDRESSING AND HANDLING DISRUPTIONS DURING PUBLIC MEETINGS; PROVIDING AN EFFECTIVE DATE, AND FOR OTHER PURPOSES.

WHEREAS, the Village Council of the Village of Tequesta adopted Resolution 25-13 in September 2013 pursuant to newly enacted Section 286.0114, *Florida Statutes,* in order to provide for basic public participation rules and procedures at public meetings of the Village Council and its appointed boards as required by law; and

WHEREAS, the Village Council now desires to update and enhance these rules and procedures to include rules and procedures for the keeping and maintaining of decorum during public meetings, and rules and procedures for addressing and handling disruptions; and

WHEREAS, the Village Council believes that it is in the best interests of the Village and its residents and businesses to provide these updated rules and procedures for the keeping and maintaining of decorum during public meetings of the Village Council and its appointed boards.

NOW, THEREFORE, BE IT RESOLVED BY THE VILLAGE COUNCIL OF THE VILLAGE OF TEQUESTA, FLORIDA THAT:

Section 1: The Village Council of the Village of Tequesta, Florida, hereby adopts the following updated public participation rules and procedures to be followed at public meetings of the Village Council and its appointed boards:

PUBLIC PARTICIPATION AND OPPORTUNITY TO BE HEARD.

A. GENERALLY. Public participation rules and procedures are to be posted and/or read aloud at the appropriate time during the meeting so that everyone in attendance is aware of them in advance. The rules and procedures contained in this Resolution are deemed to be reasonably related to the important government interest of public bodies in confining their meetings to specified subject matters while rationing their time for decision making; and the rules and procedures herein are supported by the holding in the case of *Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989).

B. PUBLIC COMMENT PROCEDURES. The Village of Tequesta welcomes comments from the public. Members of the public shall be given a reasonable opportunity to make general comments, and also to speak and be heard on items placed on the agenda in accordance with Section 286.0114, *Florida Statutes*:

1. Each speaker is allowed one (1) opportunity per agenda item to speak for a maximum of three (3) minutes, unless the speaker is allowed additional time by the presiding officer. By

---

[18] Id. In this case, Barron was a Southborough resident who regularly attended local government meetings. Kolenda was the Chair of the Board of Selectmen. During public comment at the December 4, 2018 meeting, Barron publicly criticized the budget process and spending practices of the Town "spending like drunken sailors." Barron also alleged that the Board had broken the law by violating open meeting requirements. Kolenda countered that no law had been broken and advised Barron to cease "slandering" town officials. Barron disputed that any slander had occurred, Kolenda attempted to recess the meeting and Barron called him "a Hitler." The meeting was recessed and Kolenda pointed to Barron calling her "disgusting" and threatened to have her removed from the meeting. Kolenda left of her own accord and filed suit.

way of example, speakers may not yield their allotted three (3) minutes to a second speaker in order to allow that second speaker an opportunity to speak for six (6) minutes.

2. When called to speak by the presiding officer, all comments shall be made from the appropriate podium. Speakers shall identify themselves by name and address; and if the speaker is representing a group or organization, said group or organization should also be identified.
3. All comments shall be directed to the council or board as a body, through its presiding officer. Comments shall not be addressed to a single member of the council or board, or to Village staff including the attorney, the manager or the clerk, unless a majority of the members present on the council or board shall so agree.
4. Council or board members are free to ask a speaker questions in order to clarify the comments made; however, speakers shall not attempt to engage members of the council or board, or staff, in debate over any issue raised. Rather, speakers shall simply make their comments and request that the council or board consider them.

   TOPICS ON THE AGENDA. Any member of the public shall be allowed to address the council or board on any item on the meeting agenda in accordance with the rules set forth in this Resolution, except as specified below. In order to speak, the speaker must first complete a comment card and provide it to the meeting clerk before the agenda item is considered and discussed by the council or board. According to state law, this right to speak does not apply to the following:

   a. An official act that must be taken to deal with an emergency situation affecting the public health, welfare, or safety, if compliance with the requirements would cause an unreasonable delay in the ability of the council or board to act;
   b. An official act involving no more than a ministerial act, including, but not limited to, approval of minutes and ceremonial proclamations;
   c. A meeting that is exempt from Section 286.011, *Florida Statutes,* (the "Florida Sunshine Law"); or
   d. A meeting during which the Village Council or one of its appointed boards is acting in a quasi-judicial capacity. This paragraph does not affect the right of a person to be heard as otherwise provided by law.

   TOPICS NOT ON THE AGENDA. Any person wishing to address the Village Council or one of its appointed boards on topics not on the meeting agenda may speak under the portion of the agenda entitled "Public Comments" or words/intent to that effect in accordance with the rules set forth in this Resolution.

C. RULES OF DECORUM. The presiding officer of the council or board shall preserve order and decorum at all public meetings as follows:

1. Meetings of the council or board shall be conducted in a professional, business-like manner. Decorum and courtesy shall be observed both by the members of the council or board and by all persons in attendance.
2. In conducting the public's business, the Village Council and all of its appointed boards are committed to the principles of civility, honor, and dignity. Individuals appearing before the council or board are required to observe the same principles when making public comments.
3. All persons in attendance at any public meeting are required to afford the utmost courtesy to members of the council or board, as well as to the public meeting process as a whole. It is never appropriate to make rude or derogatory remarks, cause disruptions or interruptions, comment on anyone's integrity, make defamatory or abusive comments, use profanity or vulgarities, or make statements about individual personalities. Vulgar language, threats, "fighting words", and encouragement to disrupt the meeting are all strictly prohibited.
4. Constructive criticism is welcome; however, personal attacks directed at anyone are prohibited. This prohibition extends to statements from council and board members, as well as staff, consultants and everyone who is in attendance at the public meeting.
5. Unauthorized remarks from the audience, outbursts, and yelling and/or similar demonstrations shall not be tolerated under any circumstances.

D. ENFORCEMENT OF RULES AND PROCEDURES. The presiding officer shall be responsible for determining whether a rule of procedure or decorum has been violated, and for enforcement of the procedures and rules set forth in this Resolution:

1. Should the presiding officer make a determination that a rule of procedure or decorum has been violated, the presiding officer shall interrupt the meeting and the violator shall be given a verbal warning to immediately cease and desist from any further violations. The presiding officer shall warn the violator that any subsequent violation shall result in their being removed from the meeting. The meeting shall then resume and proceed.
2. Following the issuance of a verbal warning, should the presiding officer make a determination that a rule of procedure or decorum has subsequently been violated by the same person at the same meeting, the violator shall be directed to leave the meeting. In the event that the violator fails to comply with this direction, Village law enforcement shall be directed by the presiding officer to assist.
3. Any determination made by the presiding officer regarding enforcement of the rules and procedures of this Resolution may only be overruled by a majority of the council or board then present at the public meeting.

Section 2: This Resolution shall take effect immediately upon adoption.

PASSED AND ADOPTED this _____ day of July, 2018.[19]



B. October 4, 2021 Public Workshop meeting[20]

IV. SOCIAL MEDIA AS A PUBLIC FORUM

A. State Action Doctrine

The State Action Doctrine stands for the proposition that if an individual is possessed of government authority, and he purports to act pursuant to that authority, his action is attributed to the government. Such authority may come from sources such as statute or by a custom having the force of law. Further, actions by a political subdivision of the state taken under color of the political subdivision's law, custom, or usage, are "state action" for purposes of a Sec. 1983 claim.[21]

B. Current State of the Law: *Lindke v. Freed*

James Freed is the City Manager for the City of Port Huron, Michigan. Prior to being hired as the City Manager, Freed created and used a personal Facebook page upon which he posted all manner of personal and family comments and photographs. He identified himself by name and by marriage and family. After becoming the City Manager, he added this as an identifying feature as well. Thereafter, he also used his Facebook page to solicit input from citizens regarding matters of concern to the City, and to post items of interest from his work as City Manager, not the least of which, included posts regarding the City's responses and policies during the COVID-19 pandemic.

Freed would, from time to time, delete posts he felt were "derogatory" or "stupid." Among these were posts made by Kevin Lindke which were critical of Freed and of the City of Port Huron. Lindke sued Freed for Sec. 1983 violations of his First Amendment rights.

HELD: A public official who prevents someone from commenting on the official's social media page engages in government action only if the official both

---

[19] Subsequently, the Village Council also adopted an Executive Policy that mirrors, ratifies and implements the Rules of Public Participation and Decorum contained in the Resolution.

[20] YouTube, https://www.youtube.com/watch?v=yOMvtJeQ69s

[21] See: Griffin v. State of Maryland, 378 U.S. 130 (1964); Adickes v. H.Kress & Co., 398 U.S. 144 (1970); and Lindke v. Freed, 601 U.S. 187 (2024).

(1) possessed actual authority to speak on the government's behalf on a particular matter, and (2) purported to exercise that government authority when speaking in the relevant social media posts.

In this case, since Freed's Facebook page was neither purely personal nor purely a City page, a fact specific inquiry was necessary to determine whether the above test was met. A Facebook post that expressly invokes government authority to make an announcement that is not available elsewhere is official; a post that repeats information readily available from other sources is likely personal. Since Lindke failed to make this showing in the lower court, the case was remanded for further proceedings to the extent that the lower court used a different test than the one explained above.

While public officials or employees can act on behalf of the government, they are also private citizens with their own constitutional rights, and by excluding from liability acts of officers in the ambit of their personal pursuits, the state action doctrine protects a robust sphere of individual liberty for those who serve as public officials or employees.[22]

In a parting comment, the Court also noted that there is a difference between deleting a Facebook post, and completely blocking someone from access the the Facebook page all together. While the legal test remains the same, the factual inquiry regarding the possession and use of state authority expands from the deleted posts (deletion) to the entirety of the Facebook page (blocking).

V. MISCELLANEOUS RELATED TOPICS

A. Recording of meetings by the public

Although the Sunshine Law does not explicitly allow for the video recording of public meetings, refusal to allow such recording violates the "statute's spirit, intent, and purpose" if the recording is non-disruptive.[23]

B. Speech vs. non-speech conduct

Communication by signs, placards, or posters is closely akin to "pure speech" and is entitled to comprehensive protection under the First Amendment.[24] Such activity, however, is subject to reasonable content and viewpoint neutral time, place, and manner restrictions the same as verbal speech.[25]

C. Penalties for Violating Public Participation Requirements

1. 286.0114 Public meetings; reasonable opportunity to be heard; attorney fees. —

(6) A circuit court has jurisdiction to issue an injunction for the purpose of enforcing this section upon the filing of an application for such injunction by a citizen of this state.

(7)(a) Whenever an action is filed against a board or commission to enforce this section, the court shall assess reasonable attorney fees against such board or commission if the court determines that the defendant to such action acted in violation of this section. The court may assess reasonable attorney fees against the individual filing such an action

---

[22] *Lindke v. Freed*, 601 U.S. 187 (2024).

[23] *Pinellas Cnty. Sch. Bd. v. Suncam, Inc.*, 829 So. 2d 989 (Fla. 2d DCA 2002).

[24] *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

[25] *See, e.g. Godwin v. East Baton Rouge Parish School Board, et al*, 408 So.2d 1214 (1981).

if the court finds that the action was filed in bad faith or was frivolous. This paragraph does not apply to a state attorney or his or her duly authorized assistants or an officer charged with enforcing this section.

(b) Whenever a board or commission appeals a court order that has found the board or commission to have violated this section, and such order is affirmed, the court shall assess reasonable attorney fees for the appeal against such board or commission.

(8) An action taken by a board or commission which is found to be in violation of this section is not void as a result of that violation.

2. Criminal Arrests of Disruptive Citizens

Fact specific example – A defendant's brief shouts for recognition during a public meeting were not sufficient to violate statute prohibiting the disruption of a public meeting, and defendant could not be convicted of resisting arrest when police removed him from the meeting without announcement of police action.[26]

Fact specific example – Six defendants disrupted a city council meeting from the audience on multiple occasions, preventing speakers from being heard. The Chair of the meeting gave several warnings and demands for quiet. One defendant indicated "we haven't started to disrupt your meeting yet!" The Chair directed law enforcement to remove the disrupting citizens. The six defendants, upon being removed from the meeting room, sat intertwined at the door and blocked the meeting room exit. Convictions for disrupting the meeting were affirmed.[27]

3. Immunity for presiding officer in enforcing rules of decorum

Presiding officer generally enjoys qualified immunity in the lawful enforcement of rules of decorum. "It is within the discretionary capacity of a presiding officer of a public body to insist upon the orderly recognition of speakers, and to make quick judgments as to what method to use to maintain order at emotionally charged meetings."[28] But, remember the Barron v. Kolenda case out of Massachusetts where the court found that the Chair was not entitled to immunity due to his own bad behavior.[29]

D. Disruptive Board Members; Overbroad Rules

One final example of going from bad to worse…the July 2, 2024 City of Boynton Beach Commission meeting.

---

[26] *State of New Jersey v. Kane*, 303 N. J. Super. 167 (1997).

[27] *State of New Jersey v. Smith*, 46 N.J. 510 (1966).

[28] *See e.g. Arrington v. Moore*, 31 Md. App. 448 (1976).

[29] *Barron v. Kolenda*, 203 N.E.3d 1125 (Mass. 2023). *See also* Footnote 17 above.