

# Out of Order: Legal Strategies on How to Hold Public Meetings During Times of Controversy

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## How Did I Get Here?

- Common causes for heated public meetings
  - COVID-19 mitigation measures
  - Racial justice and equity concerns
  - Scandals
  - Constitutional issues
  - Transgender rights
  - Political campaigns
  - Removal petitions
  - Curriculum and materials
- This is serious.



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## Agenda

- Legal Obligations regarding Public Meetings
- Parameters around Public Comment
- Cautionary Tales and Practical Tips
- Questions?

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## Public Meeting Requirements in Virginia

- The business of the people must:
  - Be conducted in public; and
  - Guarantee free entry to meetings of public bodies;
- People may photograph, film, record or otherwise reproduce any portion of a meeting required to be open.
- Subject to certain exceptions, public comment is **not required**.
  - Exceptions include: (1) Redistricting school boundaries or adopting any pupil assignment plan affecting the assignment of 15 percent or more of the pupils in average daily membership in a school, per Va. Code § 22.1-79(8); and (2) Budget approval under Va. Code § 22.1-92.
  - Otherwise, public comment is typically a creation of School Board policy and can be modified via a policy change.

**"The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy."**

*Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984).*

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## Public Fora

- The Supreme Court has recognized three broad categories of fora in which free speech rights may be at issue. See *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U. S. 37 (1983).
  - **Traditional public fora**, such as parks and streets, where content-based restrictions are only permitted if they advance some "compelling governmental interest (time, place, manner) and are narrowly drawn (the "strict scrutiny test").
  - **Limited public fora** (sometimes called "designated public fora") - Limitations may be imposed on classes of speakers or topics, and "time, place, and manner" restrictions may be imposed, but any such limitation that is content-based must be both reasonable and viewpoint-neutral.
  - **Non-public fora**, such as the deliberative part of governing body debate, limited to members of the body.
- While you don't have to have a public comment period, once you do allow for a public comment period, such a comment period will be regarded as a limited public forum and may only be regulated in a manner consistent with First Amendment jurisprudence on public fora.

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## Limited Public Forum Analysis

- You don't have to have it.
- Once it's there, you (generally) cannot regulate what people put out there.
  - Once a piece of property is declared to be a "forum" by either tradition or designation, any regulation on the content of a speaker's message is presumptively unconstitutional and is likely to be struck down if challenged. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).
  - The government can enforce reasonable regulations on the use of property that are "content neutral," applying evenhandedly to all speakers. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).



Freedom of Speech Wall in Charlottesville

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## Permissible Limitations on Speech in a Limited Public Forum

- **Restrictions on time, place and manner of comments.**
  - Limitations on the schedule for when folks can speak, the duration of how long folks can speak, and the location from where folks can speak are all permissible.
- **Limitations on which citizens can provide comments.**
  - Restrictions on residency or other certain verifiable interests.
- **Limitations of speech to particular topics/issues at hand and/or how many times a citizen can comment within a defined period of time on a certain topic/issue.**
  - Proposed action items, pending litigation, certain matters involving students/staff.
- **Reasonable rules of conduct/civility for commenters.**
  - Robert's Rules of Order Newly Revised (12th ed.) sets out rules governing "protection from annoyance by non-members in a meeting; removal of an offender from the hall." Ch. 20, Sec. 61.
- **The imposition of sanctions when citizens' statements *actually* disturb or impede the meeting—and are not just a violation of decorum.**

These restrictions must be reasonable, narrowly drawn to serve some significant government interest, content neutral, and uniformly applied.

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## Impermissible Limitations on Speech in a Limited Public Forum

- **Viewpoint restrictions.**
- **Limitations on expressive "speech"**
  - In *City of Dayton v. Esrafi* (Court of Appeals of Ohio, Second District, Montgomery County 1997), the court denied a motion to dismiss a lawsuit that a citizen filed after being ejected from a Commission meeting for wearing a ninja mask to express his displeasure with the public body. The court found that such gesture was a symbolic expression and was protected First Amendment speech. While the citizen was a regular attendee of meetings and a "persistent critic", on this occasion, he remained seated, made no physical gestures or any other commotion during the meeting.
  - In *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969), the Supreme Court held that wearing black arm bands to express objections to government activities is "akin to pure speech."
- **Limitations on types of speakers**
  - In *Henrico Prof. Firefighters Ass'n, Local 1568 v. Bd. of Supervisors of Henrico County*, 649 F.2d 237 (4th Cir. 1981), the court held that when a governing body opens a portion of its meeting for individuals to discuss any relevant topic, it may not exclude representatives of certain groups from speaking when other individuals and representatives of certain other groups are permitted to speak—there employee group vs. non-employee group representatives. This was found to be deprivations of both the First Amendment and Equal Protection Clause for the employee association's rights.
- **Prohibition of photographing, filming, or recording a meeting.**
  - Per Va. Code § 2.2-3707(G).
  - However, a public body can adopt rules governing the placement and use of equipment to prevent interference with the proceedings.

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## “Personal Attack” Policies pt. 1

- The jurisprudence is inconsistent.
- Virginia Beach City School Board bylaw prohibiting “personal attacks” during the public comment period of a school board meeting was ruled unconstitutional. *Bach v. School Board of the City of Virginia Beach*, 139 F. Supp. 2d (E.D. Va. 2001).
  - The bylaw specifically prohibited “attacks or accusations regarding the honesty, character, integrity or other like personal attributes of any identified individual or group.”
  - The Court found that since the Board permitted positive and neutral comments on individuals and groups, it could not limit public debate by prohibiting negative comments about members.
- The above ruling was found to have been incorrectly decided in *Steinberg v. Chesterfield County Planning Commission*, 527 F.3d 377 (4th Cir. 2008), wherein the Fourth Circuit rejected First Amendment claims of a citizen who had been removed from a public meeting for refusing to speak to the topic of a public hearing on a rezoning matter, whilst criticizing commission members, and was arrested for disorderly conduct after he pushed an officer who was attempting to remove him from the podium.
  - The plaintiff sued the commission, claiming he was removed from the meeting due to the content of his speech (at the time, the commission had a rule, since repealed, prohibiting “personal attacks”).
  - The Court found that the plaintiff was not removed from the meeting because the content of his speech, but because he would not adhere to the chair’s request that he stay on topic.
  - The Court overruled the aforementioned *Bach* case and found that content-neutral policies against personal attacks are not facially unconstitutional, because governing bodies have “a significant interest in maintaining civility and decorum during the public comment sessions of its public meetings, both to ensure the efficient conduct of the people’s business and to maximize citizen participation in the discussion.” The Court further clarified that it is reasonable to limit public comments to the topic at hand in a limited public forum.

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## “Personal Attack” Policies pt. 2

### Generally, the trend is to prohibit personal attack policies.

- A Federal court in Virginia ruled that prohibiting group defamation could not be enforced. *Draego v. City of Charlottesville*, 2016 WL 6834025 (W.D. Va. 2016)
- The interest of a school division in the privacy of school employees has been held to be an insufficient basis for barring public comment on individual employees. In *Baca v. Moreno Valley Unified School District*, 12 a federal district court held that the school district’s “interest as an employer in protecting its employees’ right of privacy cannot be characterized as a compelling government interest.”
- A 2016 opinion of the Attorney General of Virginia determined that barring ‘personal attacks’ [against school staff, including officials such as Board members] is not constitutionally permissible.” 2016 WL 1612129 (Va. A.G. April 15, 2016).
- You can recommend that people direct those comments elsewhere, but you (probably) cannot prohibit them.

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## “Actual” Disruptive Conduct may be regulated

- “While a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing . . . It certainly may stop him if his speech becomes irrelevant or repetitious . . . The nature of a Council meeting means that a speaker can become ‘disruptive’ in ways that would not meet the test of actual breach of peace . . . Or of “fighting words” likely to provoke immediate combat . . . 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 matter. Indeed, such conduct may interfere with rights of other speakers. *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990).
- The Sixth Circuit found a Michigan state law making it illegal for any person to “make or excite any disturbance or contention . . . at any . . . public meeting where citizens are peaceably and lawfully assembled” overbroad and unconstitutional as applied, where a plaintiff sued a police officer for arresting him for saying “god damn” while speaking a township board meeting (despite the fact that the chair had not ruled the plaintiff out of order). *Leonard v. Robinson*, 477 F.3d 347 (6th Cir. 2007).
- Similarly, the Supreme Court of the United States vacated the conviction of a speaker who used profanity (saying m\*f\* four times) during a school board meeting at which children were present. The case was remanded with no new resulting conviction.

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## “Actual” Disruptive Conduct, continued

- The conviction for the disorderly conduct of a citizen for being disruptive during a council hearing was upheld, where he was one of 54 scheduled speakers on a controversial city issue, and after he had spoken, returned to his seat, from where he proceeded to heckle the council by cupping his hands around his mouth and yelling while the mayor attempted to speak, despite being asked to refrain from doing so. The citizen claimed his yelling was protected “speech”, but the Virginia Court of Appeals found that the totality of circumstances must be examined, and the mere fact that words were spoken by the citizen while he was yelling did not prohibit his conviction. *Howard v. City of Roanoke*, 51 Va. App. 36 (2007).
- The conviction of a citizen for disorderly conduct and obstructing justice was upheld after the citizen appeared at a board of supervisors meeting and spoke, but refused to stick to the agenda item being discussed, tried to “interrogate” the county attorney, and refused to be seated after his permitted time to speak had elapsed. The trial court rejected the defendant’s assertion that his legal counsel should have been permitted to question the board’s chair regarding his familiarity with the rules of parliamentary procedure relating to limiting debate) *Mannix v. Commonwealth*, 31 Va. App. 271 (2000).
- The removal of a citizen from a public meeting of county commissioners for interruptions and truculence upheld, and the defendants found to have qualified immunity, due to the fast moving nature of public meetings, and the need to make split-second decisions in running meetings. *Collinson v. Gott*, 895 F.2d 994 (4th Cir. 1990).

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## One Man's Trash...

- A school board's decision to adjourn the meeting while a citizen was speaking was not violative of his First Amendment rights, nor did it constitute "viewpoint discrimination," where a citizen was arrested for dumping a pile of trash on the floor to illustrate a point while speaking during a school board meeting in a school cafeteria—and refusing to give up the microphone. The Court ruled that the board's decision to adjourn was not due to the "content of his views . . . But rather his dumping of potentially hazardous trash in a school cafeteria that caused concern for student safety." *McMahon v. Riffer*, 2002 WL 1067808 (Cal. Ct. App. 2002).

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## Reflections from Loudoun, pt .1

- Have clear rules for commenters and enforce them uniformly
  - Speech and conduct that you prohibit
  - Speech and conduct that is discouraged
- Have a plan
  - Oftentimes, crowds are planning events for media impact
  - Be prepared for:
    - Synchronized demonstrations
    - Attempts to be removed by security
    - Attempts to serve lawsuits
    - Disruption of the meeting
  - How to respond?
    - Recess
    - Adjourn
    - Direct the members elsewhere or have them removed
    - Ignore the disruption

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## Just remember...

- FOIA applies no matter what
  - Remember that while you're adjourned, you cannot discuss public business
  - You must make sure the meeting is open to the public once you recommence
- Litigation is likely
- Restrictions made during times of public controversy can exacerbate the problem

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## Recap

- Generally, citizens do not have a right to comment during school board meetings.
- If boards do offer such a forum, they can and should set restrictions surrounding public comment.
- Such restrictions must be reasonable, narrowly drawn to serve some significant government interest, and be content neutral.
- Adopt a policy for dealing with unruly citizens that does not discriminate on the basis of viewpoint.
- Limitations and guidelines should be provided to the public in advance of meetings and must be enforced consistently.
- Have a plan.

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# Questions?

