

Legislative #

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# MEMORANDUM

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**TO:** Mayor and City Commissioners **DATE:** August 6, 2019  
**FROM:** Nicolle M. Shalley, City Attorney *NMS*  
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**SUBJECT:** City Commission Rules - Civility and the First Amendment

During the April 25 General Policy Committee meeting, the Commission discussed its current rules. The discussion was had in response to recent Commission meetings during which Commissioners and members of the public expressed concern over the tenor of those meetings. The Commission requested guidance from the City Attorney's Office regarding how to enforce the rules without violating an individual's civil rights. To answer that question, two preliminary questions (questions 1 and 2 below) should be answered. Once those are answered, the third question, how to enforce the rules, can be answered.

**Question 1:** Can the City Commission limit speech at City Commission meetings without violating the First Amendment?

**Question 2:** If the answer to Question 1 is yes, what types of rules may the Commission adopt?

**Question 3:** How can the Commission's rules be enforced without violating an individual's civil rights?

**Short Answer 1 and 2:** Yes, the City Commission may adopt rules which are content-neutral time, place, and manner restrictions if the rules are narrowly drawn to achieve a significant governmental interest. The city must provide citizens with ample alternate channels of communication.

**Short Answer 3:** Adopted rules must be consistently and uniformly enforced.<sup>1</sup> In many of the civil rights challenges to municipal limitations on speech in public meetings, not only was the City sued for a violation of the speaker's civil rights, but the presiding officer was sued in an individual capacity. Often, the presiding officer is required to make quick judgment calls regarding the conduct of the meeting. Those judgment calls can lead to the removal of a citizen from the meeting. The citizen may then argue that his/her civil rights have been violated because he was not allowed to speak at the public meeting. Consistent and uniform application of commission rules is evidence of content-neutral speech restrictions.

<sup>1</sup> See Lozman and Cocoa Beach cases discussed on pages 10 and 11.

## Analysis

In drafting and enforcing rules of order for Commission meetings, Commissioners must be sensitive to the rights of citizen to be involved in governmental decision-making while balancing the need to effectively and efficiently conduct a business meeting of the City. Both the Florida and the US Constitution prohibit a governmental entity from abridging a citizen's right to free speech; however, that right is not unlimited.

The freedom of expression protected by the First Amendment is not inviolate; the Supreme Court has established that **the First Amendment does not guarantee persons the right to communicate their views "at all times or in any manner that may be desired."**<sup>2</sup>

Courts have considered and accepted certain governmental limitations on speech. The types of acceptable government limitation on speech are based on the forum in which the speech occurs.

Courts use 'forum analysis' to evaluate government restrictions on purely private speech that occurs on government property. In forum analysis, we identify the type of government forum involved and then apply the test specific to that type of forum in evaluating whether a restriction violates the First Amendment.<sup>3</sup>

There are four recognized categories of public fora: 1) the **traditional public forum**; 2) the **designated public forum**; 3) the **limited public forum** and 4) the **nonpublic forum**.<sup>4</sup> Traditional public fora are those spaces that have been traditionally and historically used by the public to express themselves, such as public parks and public streets. In a **traditional public forum**, any limitation by the government on the freedom of expression is strictly scrutinized.

For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. . . . The State may also enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.<sup>5</sup>

A **designated public forum** is one that is not traditionally recognized as being open to the public for speech but, by action of the governmental body, has been intentionally opened for the purpose of public speech. While this forum is similar to a traditional public forum, it is distinct:

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<sup>2</sup> Jones at 1331

<sup>3</sup> Barrett v. Walker County School District, 872 F. 3d 1209 (United States Court of Appeals, 11<sup>th</sup> Circuit, 2017).

<sup>4</sup> Non-public fora are those areas reserved for daily management and internal operations of the government.

<sup>5</sup> Jones at 1331

a designated public forum differs from a traditional public forum in an important way: unlike in a traditional public forum, expressive activity in a designated public forum can be limited to a particular class of speakers instead of being opened to the general public. But once the designated public forum has been limited to that particular class, all members of that class must receive general access.<sup>6</sup>

The third type of public fora is a **limited public forum**. Much like the designated public forum, a limited public forum “exists where a government has reserved a forum for certain groups or for the discussion of certain topics.”<sup>7</sup> The distinctions between a designated public forum and a limited public forum are

Unlike a designated public forum, then, a limited public forum cannot, by definition, be open to the public at large for discussion of any and all topics. And a limited public forum differs from a designated public forum in this respect because a designated public forum grants “general access” to the designated class, while a limited public forum can be set up to grant only “selective access” to that class. Under a system of selective access, members of the class do not enjoy unhindered access to the forum; instead, each member must obtain permission from the governmental proprietor of the forum, who in turn has discretion to grant or deny permission.<sup>8</sup>

**City commission/council meetings are typically considered limited public fora.**

While the same criteria for traditional public forum are used to analyze limited public forum, the courts have recognized that the orderly conduct of a City’s business is a legitimate governmental interest of the City Commission.

To better understand how a court analyzes whether a governmental restriction on speech violates the First Amendment, consider the case involving the February 5, 1989, Key West City Commission meeting.

On February 5, 1985, Jones (a private citizen) attended a meeting of the Key West City Commission. As the mayor of the city, Heyman presided at the meeting. . . . [Jones] submitted his name and the topic on which he wished to speak – senior citizen discounts for garbage removal.

The meeting began at approximately 8:00 p.m. Two and one half hours later, the city commissioners turned to this topic, and the mayor recognized Jones’ request to speak. Jones approached the podium, and began by criticizing the commission’s general spending habits. The mayor quickly rebuked Jones, advising him to confine his comments to the topic at hand. Jones retorted in a raised voice: “Let me tell you something Mister, I am on

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<sup>6</sup> Barrett at 1224

<sup>7</sup> Barrett at 1224

<sup>8</sup> Barrett at 1224-1225

the subject. If you can't stay germane in your mind, that's your problem not mine." At this point, Jones' attitude was decidedly antagonistic. The mayor warned Jones that any further outbursts would result in his removal from the meeting. Jones responded by saying, "I don't think you're big enough," and the mayor ordered his expulsion.<sup>9</sup>

In addition to removing Mr. Jones from the meeting room, the officers took Jones to another room and handcuffed him to the wall. The mayor later clarified that he did not want Jones arrested but merely removed from the meeting room. The Key West City Commission meetings are broadcast live. The incident was broadcast, and subsequently rebroadcast several times as well as publicized in the local newspaper. Jones filed a lawsuit against the city and the mayor individually for violating Jones' civil rights, alleging that his removal from the meeting violated his First and Fourteenth Amendment rights to free speech.

Key West and Mayor Heyman ultimately prevailed in the United States Court of Appeals for the Eleventh Circuit Court. But before the appellate court ruled in their favor, the United States District Court for the Southern District of Florida found in favor of Mr. Jones and awarded him compensatory and punitive damages. Thus, the city and the mayor incurred legal fees and costs for a trial and an appeal before the circuit court found in their favor, stating:

We agree with the district court that the city commission designated their meeting a public forum when the commission intentionally opened it to the public and permitted public discourse on the agenda items. As noted by the district court, although the commission need not have created this forum in the first place, once it did so, the commission became bound by the same standards that apply in the case of a traditional public forum. **Content-neutral time, place and manner restrictions are permissible if they are narrowly drawn to achieve a significant governmental interest and if they allow communication through other channels. Content-based exclusions must be narrowly tailored to effectuate a compelling government interest.**<sup>10</sup>

The court first analyzed whether the restriction was content neutral. The test for determining whether a restriction is content neutral is

[a] regulation that serves purposes unrelated to the content of expression is deemed neutral.... Government regulation of expressive activity is content-neutral so long as it is 'justified without reference to the content of the regulated speech.'<sup>11</sup>

The circuit court, disagreeing with the district court, found that Jones' removal was not based on the content of his speech. According to the circuit court, Jones' speeches

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<sup>9</sup> Jones at 1329 -1330

<sup>10</sup> Jones at 1331

<sup>11</sup> Jones at 1332

regarding the commission's general spending habits, and the mayor's supposed inability to understand Jones were irrelevant to the topic of garbage discounts for senior citizens. Jones was warned twice to keep his speech on topic before he was removed. The court stated that while it could be inferred from the mannerisms and comments that Jones would be critical of the city commission and that the mayor disapproved of its speech, the court relied on the mayor's testimony regarding removal of Jones from the meeting. The mayor had testified that Jones' disruptive behavior would continue and worsen if the mayor did not act. The mayor was also concerned that Jones posed a possible threat of violence to the commission. And the mayor was concerned that Jones was questioning the mayor's authority to preside over the meeting.

In view of this [the mayor's] testimony and the plain fact that Jones did fail to address the subject of senior citizen discounts, we conclude that Jones has not demonstrated that the mayor's actions resulted from disapproval of Jones' message rather than from the need to continue the orderly progression of an already lengthy commission meeting.<sup>12</sup>

The court next considered whether there was a **significant governmental interest** in restricting Jones' speech to the topic at hand. The circuit court, relying on U.S. Supreme Court rulings, stated:

[t]he Supreme Court has recognized the significance of the government's interest in conducting orderly, efficient meetings of public bodies.<sup>13</sup>

The circuit court found that the mayor's interest and purpose in controlling the agenda and preventing disruption satisfied the governmental interest prong of the test.

To hold otherwise - 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.<sup>14</sup>

Next the circuit court reviewed whether Key West's mayor's restriction on Jones' speech was **narrowly tailored** to meet the governmental interest. Citing the US Supreme Court, the circuit court stated:

The requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'<sup>15</sup>

The court found that the mayor's decision was a judgment call and, applying the above test, the mayor's decisions regarding Jones' speech were narrowly tailored to meet the governmental interest.

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<sup>12</sup> Jones at 1332.

<sup>13</sup> Jones at 1332

<sup>14</sup> Jones at 1333

<sup>15</sup> Jones at 1333

The final prong of the analysis was whether there were alternative channels of communication provided to Mr. Jones to speak to issues not on the agenda. Key West easily met that requirement as it provided an opportunity at the end of every city commission meeting for citizens to address topics that were not on the meeting agenda.

### Legal Guidance

When adopting and enforcing its rules, the Commission must be certain that any restrictions on speech at a Commission meeting:

1. Are content-neutral;
2. Serve a significant governmental interest;
3. Are narrowly tailored to achieve that interest; and
4. That the City has provided ample alternate means for a citizen to communicate the speech that was restricted during the meeting.

Below are topics for further Commission discussion and suggested rules updates that may facilitate efficient meetings, robust citizen involvement, and, perhaps, civil discourse.

### Civility

Some state agencies and governmental entities have attempted to include civility or decorum in their rules of conduct. Civility is defined as courtesy; politeness; a polite action or expression. Civility should be an aspirational goal of the commission, city staff, and citizens. However, it is difficult to regulate civility without regulating content. And as discussed above, regulation of speech may not be based on the content of that speech.

Compare the previously discussed Key West case to that of Lozman v. North Bay Village.<sup>16</sup> In Lozman, the mayor and city did not fare as well as Key West. In Lozman, the city had two rules on civil conduct. One rule prohibited any person from making personal, impertinent, or slanderous remarks . . . and the other rule required decorum. Mr. Lozman was removed from multiple city commission meetings based on these two rules. In an interim ruling, allowing Mr. Lozman to continue his lawsuit, the district court indicated that North Bay Village's decorum rule would likely not be found constitutional as follows:

In Essen v. Mellon, the court held a similar decorum rule – which barred the use of disparaging personal remarks or conduct toward any person, state, agency, or other body – to be a “clear violation of the First Amendment.”<sup>17</sup>

Accordingly, this Office advises against a civility rule or a rule on decorum. Such a rule would likely not survive a First Amendment challenge because it will almost always address the content of the speech. Any restriction on speech must be content-neutral.

<sup>16</sup> Lozman v. City of North Bay Village, 2009 WL 10700001 (USDC, S.D. FL, 2009)

<sup>17</sup> Lozman at \*7

### Commission and city staff response to citizen comment

If the Commission cannot regulate civility, then what can be done to encourage civil discourse at Commission meetings? Civility begins with each person. While public comment cannot be compelled to be civil, the manner in which the Commission and City staff interact with citizens can set a good example and may have a positive effect on citizen comment time.

For instance, the Commission's current practice is to immediately respond to citizen's comments and questions. There is no legal requirement that a response be given to citizen comments. Commission responses often include answers to questions and statements intended to correct a misstatement made by a citizen. While the Commission and City staff may want to respond to questions, the public forum may not be the most appropriate venue for conversations between citizens and Commissioners or City staff. Many questions that are raised during Commission meetings require investigation before a complete response can be given. And if a citizen makes a misstatement during his presentation, a more civil approach may be to address the citizen's misstatement in a one-on-one conversation.

In addition, it must be recognized that some people do not want to be civil and/or do not want a response, so perhaps the best approach is to simply listen.

### Citizen Comment prior to each commission vote on agenda items

The Commission's current practice is to permit citizen comment after a motion is made but prior to a vote being taken. At times, if the vote fails, a new motion is made, additional citizen comment is taken and another vote is taken. Section 286.0114, Florida Statutes, requires that

**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.** 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).

Thus, the Commission could take citizen comment on an agenda item at other times in the meeting, or even at other meetings, as long as citizens are given an opportunity to speak about the topic before the vote has been taken. Some options to consider:

- Schedule citizen comment for all items on the agenda (except public hearing and quasi-judicial matters) at the beginning of the meeting.



- Schedule citizen comment for each agenda item after the staff presentation but before the motion is made.

Both of the above suggestions would also address a recurring citizen complaint that commissioners do not listen to citizens. There is a perception by citizens that because a motion has been made, the Commissioners have already made up their mind on a vote.

#### Citizen Comment on purely procedural matters

Purely procedural matters within the control of the presiding officer, need not be put to a vote for the Commission as a whole. The adoption of the regular agenda is a procedural formality. If no modifications are made to the agenda, by staff or Commissioners, then the Commission does not have to adopt the regular agenda.

Consent agenda adoption is not a procedural matter. Public comment must be taken before the consent agenda is adopted. If the Commission were to revise its rules to schedule citizen comment on all items on the agenda at the beginning of the meeting, the Commission would not need a separate public comment period for consent agenda.

#### Citizen Comment on informational items

Section 286.0114, Florida Statutes only requires that citizen comment be taken for items on which the Commission is taking official action. Thus, the Commission is not required to take citizen comment on informational items. The Commission rules could define informational items and items for which the Commission will take official action. The rules could require that staff identify "informational agenda items" and "official action requested agenda items."

#### Televised Meeting

There is no legal requirement that a Commission meeting be televised. If a meeting is televised, there is no legal requirement that the entire meeting must be televised. Thus, the Commission can determine whether or what portion of its meeting is televised on the public channel.

#### Alternate channels of communication

There is no legal requirement that the Commission take general public comment at its meetings. Case law interpreting the Constitution requires the government to provide ample alternate means for a citizen, whose speech is restricted during a business meeting, to communicate with the government. With today's technology, there are many available alternate means for citizens to communicate with the Commission.

#### Interfering with the orderly efficient conduct of meeting

The Commission may consider clarifying its rules to clearly describe conduct that interferes with the orderly, efficient conduct of its meetings, such as:

1. Citizen comment must be on-topic to the agenda item. Comment that is off-topic of the agenda item being discussed will not be permitted. In the Key West case discussed in the legal analysis above, the citizen was deemed off-topic because he discussed the general spending habits of the government rather than the senior citizen discount for trash removal.
2. Disruptive or threatening behavior or behavior that poses a public safety concern is prohibited, such as:
  - a. Refusing to yield the podium once instructed to do so by the presiding officer;
  - b. Clapping or cheering or outbursts that interrupt a speaker or prevent further speaking;
  - c. Yelling;
  - d. Positioning oneself in walkways or aisles such that ingress or egress is obstructed; or
  - e. Threatening any person with violence.

Describing the conduct that interferes with the orderly, efficient conduct of the meeting informs citizens of their responsibilities during the meeting and may assist in consistent application and enforcement of the rules.

### Enforcement

Consistency in enforcement of the rules is important to defending a civil rights challenge. Inconsistent enforcement may lead the court to conclude that enforcement was based on the content of the speech rather than a reasonable time, place and manner restriction. For example, the former mayor of Cocoa Beach prohibited campaign wear during commission meetings. She applied the rule to both her campaign supporter and a supporter of her opponent.<sup>18</sup> The court was impressed with her even-handed application of the "no political campaign" rule.<sup>19</sup> Compare the Cocoa Beach decision to a decision involving North Bay Village.<sup>20</sup> In the North Bay Village case, Mr. Lozman was removed from the commission meeting when he stated that one commissioner had just been arrested for felony bribery charges and another commissioner would soon be charged as well. The court noted that at the same meeting another citizen discussed the removal of a commissioner for corruption charges and that the Vice Mayor had been arrested. The other citizen was not removed from the meeting. Because the case was settled, it is not possible to determine if the inconsistency in treatment of the two citizens was the determinative factor in the court's decision. However, the inconsistent treatment was discussed by the court.

A final suggestion which may enhance consistent enforcement efforts is to hold training sessions with all involved in enforcement, including the mayor, mayor pro tem, sergeant at arms, and police officers.

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<sup>18</sup> Cleveland v. Cocoa Beach, 221 Fed. Appx. 875 (2007)

<sup>19</sup> Cleveland at 879.

<sup>20</sup> Lozman v. North Bay Village, 2009 WL 10700001 (S.D. Miami, 2009).