
Coates' Canons Blog: Public Comment Period Policies: What's Legal?

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North Carolina state law requires city councils, boards of county commissioners, and local school boards, to provide at least one public comment period per month at a regular meeting. Many boards have adopted policies governing what may be said and done during the public comment period. Some of the restrictions in these policies are clearly legal. Some others...maybe not so much.

The public comment statutes are G.S. 115C-51 (local school boards), G.S. 153A-52.1 (counties), and G.S. 160A-81.1 (cities). Each statute authorizes the board to adopt "reasonable rules governing the conduct of the public comment period," which may include, but are not limited to,

- (i) fixing the maximum time allotted to each speaker,
- (ii) providing for the designation of spokesmen for groups of persons supporting or opposing the same positions,
- (iii) providing for the selection of delegates from groups of persons supporting or opposing the same positions when the number of persons wishing to attend the hearing exceeds the capacity of the hall, and
- (iv) providing for the maintenance of order and decorum in the conduct of the hearing.

The statutes indicate that this list of rules is not exclusive. Additional restrictions must not exceed the scope of the statute, which allows rules governing the *conduct* of the public comment period. So what other restrictions may be included in a local policy? May the board prohibit comments on specific topics? Could the rules allow comments only from residents or taxpayers? And what exactly does the authority to maintain order and decorum allow? In answering these questions boards must consider not only the scope of the statute, but also constitutional provisions that might apply. The state's requirement for a monthly public comment period creates a forum for public expression. This triggers constitutionally protected free speech rights that limit the extent to which the government can regulate the content of public comment.

Public Forum Analysis

Cases involving a wide variety of settings have applied a "forum" analysis to determine when private individuals have rights of expression in public places. Most public places are not inherently public forums (parks and streets being the only ones recognized as such), but governments can open a non-public forum to allow public expression for limited or designated purposes. The public comment statutes represent a state-mandated opening of a forum at monthly board meetings.

Courts have recognized public comment periods as a type of designated or limited forum. See *Surita v. Hyde*, 665 F.3d 860, 869 (7th Cir.2011); *Galena v. Leone*, 638 F.3d 186, 198–99 (3d Cir.2011); *Steinburg v. Chesterfield Cnty. Planning Com'n*, 527 F.3d 377, 384–86 (4th Cir.2008); *Eichenlaub v. Twp. of Ind.*, 385 F.3d 274, 280–81 (3d Cir.2004); *Rowe v. City of Cocoa, Fla.*, 358 F.3d 900, 802 (11th Cir.2004). In such designated or limited public forums the government may enact reasonable time, place, and manner restrictions on speech but cannot restrict the content of speech or restrict speakers based on their viewpoint. *Galena v. Leone*, 638 F.3d 186, 198 (3d Cir. 2011) (*citing Pleasant Grove City v. Summum*, 555 U.S. 460,470 (2009)).

The main part of a public meeting – that is, the part during which the board works through its agenda – is "government

speech” and is not a public forum for public expression. (See my blog post here.) In addition to the required public comment period, some boards provide opportunities for public comment on agenda items or at other times during the meeting. All of these comment periods would likely be considered designated or limited public forums. See, e.g., *Jochum v. Tuscola Cnty.*, 239 F.Supp.2d 714, 728 (E.D. Mich. 2003) (“A city council meeting is the quintessential limited public forum, especially when citizen comments are restricted to a particular part of the meeting.”)

The rules authorized in the North Carolina statute are clearly content neutral, time, place and manner restrictions that are permitted under the constitutional framework. If boards adopt additional restrictions they must adhere to the constitutional limitations.

Limiting Comments to Matters Related to the Unit of Government

May a policy limit comments to matters that are germane to or within the jurisdiction of the unit? Some courts have held that such a limitation is constitutional. *Galena v. Leone*, 638 F.3d 186, 198 (3d Cir. 2011); *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 281 (3d Cir. 2004). After all, when the government creates a designated or limited forum, “regulation of speech only need be viewpoint neutral and reasonable in light of the purpose served by the forum.” *Good New Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001). As noted by one court: “Thus, if a member of the public at the Hearing of the Public portion of a Council meeting wanted to discuss his child’s birthday party, the proposed speech, though not presenting a danger to anyone, would be so far removed from the business of the meeting, or the Council’s or County’s business in general, that the chairperson could suppress the speech without raising First Amendment issues.” *Galena v. Leone*, at 211.

It seems reasonable to assume that the North Carolina legislature intended the public comment period to provide a forum for comment on matters that are relevant to the body to which the comments are made. If this assumption is correct, a board may have both statutory and constitutional authority to require that comments must relate to matters that are within the authority or jurisdiction of the city, county, or school board. This reasoning would also support a prohibition on comments that are not germane to the unit. Under this analysis, a policy could prohibit commercial advertisements or solicitations, and comments about issues, activities or organizations that are not relevant to the work the unit of government.

Requiring Speakers to be Residents or Taxpayers of the Unit

May the board limit comment to individuals who are residents or taxpayers within the unit? There is no explicit authority for such a limitation in, and I have doubts about its legality, even though one case has held that such a restriction does not violate the constitution. See *Rowe v. City of Cocoa, Fla.* 358 F.3d 800, 803 (11th Cir. 2004) (holding that a locally established comment period limited to residents and taxpayers did not violate free speech or equal protection rights.) Although it may be assumed that the forum is limited to matters germane to the unit, there may be individuals who have comments about such matters who are not residents or taxpayers. A non-resident, for example, may own a business or conduct business inside the jurisdiction, and people who live near a unit of local government may interact with the unit’s employees, use a service provided by the unit, or take part in activities sponsored by the unit. Individuals in any of these categories might want to speak about matters within the board’s jurisdiction. In the absence of any specific statutory authority for limiting the categories of people who may speak, I think a rule restricting comments to residents or taxpayers would be on feeble legal ground.

Limiting Comments About Candidates or Elections

May a policy prohibit the use of public comment periods to promote specific candidates for office, or to argue for or against issues that are the subject of a referendum? These types of comments arguably do not relate to matters within the jurisdiction of the body, since it is the voters, rather than the members of the board, who make decisions in an election or referendum. It may be difficult, however, to separate comments about *issues* that candidates have identified in their campaigns from direct campaigning. A candidate – or a supporter of a candidate — may urge the board to adopt a policy without mentioning in the comment that she is anything more than a concerned citizen.

Limiting Comments About Employees

May a policy prohibit complaints or disparaging remarks about specific public officials or employees during the public

comment period? Such a restriction may seem desirable for several reasons. A board might wish to protect its employees from being subject to criticism in a venue in which there is no opportunity for them to respond. Additionally, boards might mistakenly assume that public statements about individual employees violate statutory provisions concerning confidentiality of personnel records, and that such information may be discussed only in closed session. As I noted in my blog post here, there is no legal basis for prohibiting criticism of employees in open session. A rule requiring decorum and prohibiting personal attacks (discussed below) might prevent defamatory or inappropriate remarks directed at specific public officials or employees. Boards can request or encourage citizens who have complaints to report them to a supervisor or board member, or a board may offer to meet with the citizen in closed session to hear their complaints as authorized under G.S. 143-318.11(a)(6). A public comment period remains open, however, for both praise and criticism of public officials and employees.

Limiting Comment About Closed Session Matters

May a policy prohibit public comment on matters that may or must be discussed in closed session? I know of no authority for this restriction. Public bodies are authorized to meet in closed sessions, and in some cases, are required to do so in order to preserve legally mandated confidentiality. It would be a rare circumstance in which a member of the public would be commenting on something that the board is *required* to hear about in closed session. See *Mesa v. White*, 197 F.3d 1041, 1046 (10th Cir.1999) (“The commissioners may well have an interest in discussing among themselves sensitive personnel or litigation matters, and the exceptions allow them to do that in certain situations. It is difficult to see, however, how that interest translates into a significant interest in restricting the public’s ability to present its views on personnel or litigation matters at a public meeting.”). It might make sense to include a statement that members of the public should not discuss confidential information in the public comment period, but the list of matters that may be discussed closed sessions does not double as a list of topics that are off limits for public comment.

Maintaining “Order and Decorum”

The public comment statutes explicitly authorize rules designed to “maintain order and decorum.” Maintaining order presumably includes things like keeping speakers to their allotted time, controlling others from interrupting the speaker who has the floor, and preventing speakers from otherwise disrupting the meeting. The state open meetings law provides additional authority for the presiding officer of a public body to remove any person from a meeting if the person is interrupting or disrupting the meeting. See G.S. 143-318.17 (“A person who willfully interrupts, disturbs, or disrupts an official meeting and who, upon being directed to leave the meeting by the presiding officer, willfully refuses to leave the meeting is guilty of a Class 2 misdemeanor.”).

What does it mean to maintain decorum? A common definition of “decorum” is “correct or proper behavior that shows respect and good manners.” Comment policies use various words to describe the decorum standard, including prohibitions on vulgar language, profanity, inappropriate gestures, insults, personal attacks, or accusations. Policies may also take the positive approach, encouraging speakers to be courteous and respectful.

Presiding officers have a challenging task in balancing the constitutional restriction on viewpoint discrimination with rules requiring speakers to be respectful. The facts of many cases involving this issue indicate that speakers who regularly criticize their governments often become plaintiffs in lawsuits alleging that they were removed or silenced during public comment periods because of the content of their comments. An unpopular message can seem disrespectful to the target of the message, and exchanges can quickly escalate so that it becomes difficult to separate the content from the tone of the comment. As described in one case, “[i]f a ruling is made ‘to keep a meeting under control, and free from irrelevant disruption, then it may be permissible,’ but ‘if there was no reasonable basis for fearing disruption, or the purpose of the enforcement was to prevent or punish an expression or opinion,’ the ruling is unconstitutional.” *Barna v. Bd. of Sch. Directors of the Panther Valley Sch. Dist.*, No. 3:12-CV-638, 2015 WL 6797388, at *9 (M.D. Pa. Jan. 26, 2015) (citations omitted). In a lawsuit, a jury may be given the job of determining whether the facts indicate that the motivation for silencing or removing a speaker was decorum or viewpoint discrimination. An example of this is described in *Besler v. Bd. of Educ. of W. Windsor-Plainsboro Reg'l Sch. Dist.* (201 N.J. 544, 575, 993 A.2d 805, 823 (2010)), as follows:

The jury was required to engage in a highly fact-sensitive analysis. Ultimately, in rendering its verdict, the jury found that the Board did not prove that Dr. Bynum interrupted Besler’s “speech for a significant or compelling governmental reason.” The jury obviously determined that Dr. Bynum’s motivation was not content-neutral, rejecting his claim that he silenced Besler because of the sheer repetitiveness of his remarks. Furthermore, the



jury rejected the Board's argument that it muzzled Besler for the purpose of conducting an "orderly and efficient" meeting.

In the end, order and decorum may be hard to define in a policy, but what may be most important is that the presiding officer applies the standard consistently to all speakers, no matter how unpleasant it is to hear what they have to say.

Related topics are discussed in the following blog posts:

When Board Members Won't Talk Back

Criticizing Public Employees in Public

The "Government Speech" Doctrine and Local Government Meetings: Can the Government Take Sides?

Statutorily Required Public Comment Periods: What Are They and How Do They Work?

Links

- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=115c-51
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