Revisiting Public Comment Decorum Rules Post-Covid

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During the pandemic, many members of the public garnered a new interest in their local governments, perhaps recognizing the profound impact a municipality can have on its constituents. While municipalities quickly adapted to the challenges that Covid posed to public meetings by utilizing technology like Zoom, many governments have now returned to in-person meetings.[3] As local governments transition away from fully remote proceedings, many are finding that the uptick in the public's local government participation has not waned. Thus, returning to the dais in person presents a prime opportunity to revisit public decorum rules and their application at public meetings.

The Sunshine Law provides broad rules on how a board or commission may limit a citizen's public comments,[4] such as limiting the amount of time an individual may speak,[5] and the First Amendment recognizes that citizens' rights to speak at public meetings is not unfettered.[6] This article presents how recent authority in Florida and the Eleventh Circuit has analyzed decorum rules and their enforcement.

Content Restrictions

The law in the Eleventh Circuit squarely recognizes that the public comment portion of a local government meeting is a limited public forum.[7] "As such, 'the government may restrict access to limited public fora by content-neutral conditions for the time, place, and manner of access, all of which must be narrowly tailored to serve a significant government interest.'"[8] This balancing test recognizes that not all types of speech must be permitted under the First Amendment.

Rules "outlining how someone may speak at a community meeting, prohibiting disruption, and requiring decorum are content-neutral policies."[9] For example, courts have upheld decorum rules prohibiting "boisterous," "disorderly," and/or "loud" comments.[10] Rules that restrict "personally directed" comments or prohibit "abusive or obscene comments" have also recently been upheld in Florida.[11] [12] Allowing such limitations recognizes that the "point of [b]oard meetings is not to air personal grievances; the purpose is to conduct [government] business."[13]

The Eleventh Circuit has also upheld rules that effectively limited citizens' clothing at council meetings based on the type or category of the message conveyed. Specifically, in *Cleveland v. City of Cocoa Beach, Fla.*, 221 F. App'x 875 (11th Cir. 2007), the council banned the display of campaign messages at council meetings. A potential speaker, who was wearing a t-shirt with a political campaign message, was asked to turn his shirt inside out to even attend the meeting.[14] The court affirmed the trial court's ruling in favor of the city, as well as the mayor and city attorney, individually, because the ban on political speech (and, thus, certain clothing) was content neutral.[15]

Selection of Speakers

Courts have also addressed the constitutionality of selective access to address a government body, which turns on the neutrality of the selection criteria. For example, in *Rowe v. City of Cocoa, Fla.*, 358 F.3d 800 (11th Cir. 2004), the Eleventh Circuit addressed the question of whether a municipality may limit the public comment of non-residents during a council meeting. Specifically, the City of Cocoa permitted its council, by majority vote, to "decline to hear any person who is not a resident or taxpayer of the City, subject to certain exceptions[,]" which the plaintiff challenged as a violation of the Equal Protection Clause.[16] In upholding the residency requirement, the Eleventh Circuit recognized,

> 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—so long as that restriction is not based on the speaker›s viewpoint.[17]

Key to the validity of the city's restriction, notably, was the fact that the restriction was viewpoint neutral and was applicable to all non-residents.[18] Residency restrictions, therefore, are one method available to a government to "regulate irrelevant debate . . . at a public meeting."[19]

On the other hand, policies that permit more subjective discretion in determining who may address the counsel have been successfully challenged under the First Amendment. For example, the Eleventh Circuit has held that a policy permitting a school board superintendent to "use[] both substantive and procedural criteria to decide who can speak" at school board meetings was

a prior restraint.[20] The challenged policy required individuals wishing to address the school board at a public meeting to first meet with the superintendent and discuss their concerns and, if they still wished to speak, provide a written request at least one week prior to the board meeting stating the topic of the speech.[21]

> "Because the government chooses how wide to swing open the gate of a limited public forum, it may allow access only to certain speakers based on their identity."[22] Thus, viewpoint neutral limitations that exclude non-stakeholders from the public comment section of a meeting are generally permitted.

Time Limitations

Of the few specifically delineated guidelines for public comment, the Sunshine Law recognizes that a government must "[p]rovide guidelines regarding the amount of time an individual has to address" the governing body.[23] The statute, however, sets neither a threshold nor a ceiling. Prior to the enactment of Section 286.0114, moreover, the Florida Attorney General recognized that "a rule limiting the amount of time an individual could address a board" may "ensure the orderly conduct of a public meeting."[24]

Recent cases in Florida's federal and state courts have not explicitly addressed time limitations in public decorum rules. However, decorum rules imposing a three-minute limitation have been litigated without challenges to this specific aspect of the rules.[25] In other forums, limits ranging from three to five minutes have been upheld.[26]

Applying and Enforcing Decorum Rules

Typically, the presiding officer at a public meeting is responsible for enforcing decorum and public comment rules. Even if a local government's decorum rules comply with the guidelines outlined above, legal challenges may arise from the application and enforcement of the rules themselves. Below we consider three recent cases analyzing decorum rules and their enforcement:

In *Hill v. City of Homestead No. 18-20412-CV, 2020 WL 1077545 (S.D. Fla. Mar. 6, 2020),* the plaintiff challenged his removal from a city council meeting, following his public comments to the city council, in which he referred to one councilmember as a "racist" and called the meeting itself "fascism." The meeting's sergeant-at-arms informed the plaintiff, while outside of city hall, that he was being trespassed from the premises after the plaintiff became loud and irate exiting the council chamber.[27] The district court found that the record did not establish the deprivation of a protected right under the First Amendment because the plaintiff was allowed to speak "for the full three minutes;" "was removed only after having the opportunity to speak and return to his seat;" and was "never told that he needed permission to return to future city council meetings."[28] The district court reasoned, "[t]hat, without more, does not establish the deprivation of the right to free speech under the First Amendment."[29]

In *Dayton v. City of Marco Island, No. 2:20-cv-307-FtM-38MRM, 2020 WL 2735169 (M.D. Fla. May 26, 2020),* two individuals filed First Amendment claims against the City of Marco Island and the council chairman who presided over the meeting, individually.[30] The two speakers both sought to make statements about a particular city councilor, specifically regarding the council member's operation of a website that published negative articles about various city officials.[31] Marco Island's decorum rules permitted the council chairperson to conduct the meeting "firmly and courteously while maintaining order at all times" and to "limit immaterial or redundant presentations or requests."[32]

At the motion to dismiss stage, the district court found that the plaintiffs had not sufficiently alleged a custom, policy or practice of First Amendment violations at city council meetings against Marco Island.[33] The plaintiffs had alleged merely a single instance where citizens were prevented from speaking on a particular topic, namely, about a specific council member.[34] On summary judgment, the district court found that the chairman was entitled to qualified immunity because he "did not clearly engage in unlawful viewpoint discrimination by simply telling [the p]laintiffs not to personally attack Councilmembers."[35]

Most recently, in *Moms for Liberty v.*

Brevard Public Schools, 582 F. Supp. 3d 1214, *aff'd* 2022 WL 17091924 (11th Cir. Nov. 21, 2022), the Eleventh Circuit affirmed the denial of the plaintiff's motion for preliminary injunction, which sought to preclude the school district's enforcement of its "public participation policy." The plaintiffs, members of a nonprofit parental rights group, also asserted as-applied challenges to the policy under the First Amendment, claiming that the school board unconstitutionally discriminated against their views by impeding their participation at school board meetings.[36]

The plaintiffs identified four instances over an eight-month period in which the board chair interrupted Moms for Liberty members and, in one instance, asked a member to leave the meeting.[37] The record reflected, however, that the few interruptions "were regularly brief and respectful, and [the p]laintiffs freely finished speaking[]" after the interruption.[38] When one member was ejected from the meeting, the record reflects that his removal followed comments such as "the Democratic party accepts 'the murder of full-term babies with abortion' and believes 'white babies are born racist and oppressive,'" and that the speaker "veered into other topics irrelevant to the discussion, and refused to stop after more warnings."[39] The district court reasoned that the speaker was, therefore "permissibly excluded" because his speech was "abusive and disruptive."[40] [41]

Conclusion

As the district court acknowledged in *Dayton*, "law on decorum restrictions at government meetings is inherently fact dependent."[42] The caselaw reflects a few, common themes, however. One, content- and viewpoint-neutral decorum requirements are constitutional and, two, the application of decorum rules must be done uniformly and with common sense as to what is disruptive behavior.

Endnotes

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3 *See* Op. Att'y Gen. Fla. 2020-03 (Mar. 19, 2020) (discussing the requirements for compliance with the Sunshine Law when holding remote meetings).

4 In 2013, the Florida legislature amended the Sunshine Law to require that "[m]embers of the public shall be given a reasonable opportunity to be heard on a proposition before a board or commission." Fla. Stat. § 286.0114(2) (2022). Many local governments have portions of public meetings dedicated to public comment, generally, as opposed to opportunities to address the council or commission during specific agenda items. Section 286.0114(4), nonetheless, provides minimum standards whenever the public is given an opportunity to be heard at a public meeting.

5 Fla. Stat. § 286.0114(a) (2022).

6 *See Dyer v. Atlanta Indep. Sch. Sys.*, 426 F. Supp. 3d 1350, 1359 (N.D. Ga. 2019) (recognizing the First Amendment does not immunize speech that causes a material disruption to government meetings); *see also Jones v. Heyman*, 888 F.2d 1328, 1331 (11th Cir. 1989) (finding removal of speaker who became disruptive during public comment did not violate his First Amendment rights because freedom of expression is not "inviolate").

7 *Rowe v. City of Cocoa, Fla.*, 358 F.3d 800, 802–03 (11th Cir. 2004).

8 *Id.* (quoting *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46 n.7 (1983)).

9 *Dyer v. Atlanta Indep. Sch. Sys.*, 852 F. App'x 397, 402 (11th Cir. 2021), *cert. denied*, 142 S.Ct. 484 (2021).

10 *Mama Bears of Forsyth Cnty. v. McCall*, No. 2:22-CV-142-RWS 2022 WL 18110246, at **12–13 (N.D. Ga. Nov. 16, 2022) (collecting cases recognizing that the prohibition on "loud," "boisterous," or "disorderly" conduct is not facially unconstitutional).

11 *Moms for Liberty v. Brevard Cnty. Public Schs.*, 582 F. Supp. 3d 1214, 1218-19, *aff'd* 2022 WL 17091924 (11th Cir. Nov. 21, 2022).

12 However, other circuits and even other districts within the Eleventh Circuit have found that restrictions on "personal attacks" of individual officials may violate the First Amendment. *See, e.g.*, *Mama Bears of Forsyth Cnty.*, 2022 WL 18110246 at **7-8 (enjoining the enforcement of the "personal attack" prohibition of the school board's decorum policy and stating that requiring speakers to address the board in a "respectful manner" impermissibly target[ed] speech unfavorable to or crucial of the [b]oard while permitting other, positive praiseworthy, and complimentary speech.); *Ison v. Madison Local Sch. Dist. Bd. of Educ.*, 3 F.4th 887, 893-95 (6th Cir. 2021) (finding that decorum policy's restriction on personally directed speech violated the First Amendment); *Marshall v. Amuso*, 571 F. Supp. 3d 412, 422-26 (E.D. Pa. 2021) (concluding that provision allowing for the interruption or termination of public comments deemed "personally directed" was facially unconstitutional).

13 *Dayton v. Brechnitz*, No. 2:20-cv-307-SPC-MRM, 2021 WL 5163225, at *8 (M.D. Fla. Nov. 5, 2021).

14 *Cleveland*, 221 F. App'x 875 at 879-80.

15 *Id.*

16 As described by the Eleventh Circuit, these exceptions included matters involving "user[s] of the city's water or sewer system [who] wishes to be heard on a related matter." 358 F.3d at 801.

17 *Id.* at 803.

18 *Id.* at 803-04 ("A bona fide residency requirement, as we have here, does not restrict speech based on a speaker's *viewpoint* but instead restricts speech at meetings on the basis of residency.") (emphasis in original).

19 *Id.* at 804.

20 *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1223 (11th Cir. 2017).

21 *Id.* at 1217.

22 *Jenner v. Sch. Bd. of Lee Cnty., Fla.*, No. 2:22-cv-85-SPC-NPM, 2022 WL 1747522, at *4 (M.D. Fla. May 31, 2022) (finding that limiting comments during the board's reorganization vote to the members themselves was a reasonable limitation on the "class of speakers allowed"); *see also Bloedorn v. Grube*, 631 F.3d 1218, 1231 (11th Cir. 2011) (noting that a "a speaker may be excluded from a limited public forum if he is not a member of the class of speakers for whose especial benefit the forum was created.") (internal citations and quotations omitted).

23 Fla. Stat. § 286.0114(a) (2022).

24 Op. Att'y Gen. Fla. 2004-53 (Oct. 14, 2004) (recognizing reasonable time limits on public comment do not restrict the public's right of access under Government in the

Sunshine Law).

25 *Williamson v. Brevard Cnty.*, 928 F.3d 1296, 1301 (11th Cir. 2019) (discussing the constitutionality on the board's limitations in invocations given before board meetings and noting the three minutes allotted per speaker during public comment); *Hill v. City of Homestead*, No. 18-20412-CV, 2020 WL 1077545, at *1 (S.D. Fla. Mar. 6, 2020) (noting the plaintiff had always been provided the full three minutes of his allotted public comment time when he spoke); *Charnley v. Town of S. Palm Beach*, No. 13-81203-CIV, 2015 WL 12999749, at *1 (S.D. Fla. Mar. 23, 2015), *report and recommendation adopted sub nom. Charnley v. Town of S. Palm Beach Fla.*, No. 9:13-CV-81203, 2015 WL 12999750 (S.D. Fla. Apr. 9, 2015), *aff'd*, 649 F. App'x 874 (11th Cir. 2016) (noting the decorum rules provided participants three minutes to speak on any agenda item).

26 *Griffin v. Bryant*, 677 F. App'x 458 (10th Cir. 2017) (finding five-minute time limit imposed during the public input portion of village council meeting a valid restriction appropriately designed to promote orderly and efficient meetings); *Wright v. Anthony*, 733 F.2d 575, 576 (8th Cir. 1984) (upholding a five-minute limit for speech at public hearings); *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007) (asserting that three-minute time limit to speak at public comment portion of city council meeting did not constitute a prior restraint in violation of the First Amendment).

27 *2020 WL 1077545* at **1-2.

28 *Id.* at *5.

29 *Id.*

30 *Id.* (granting Marco Island's motion to dismiss).

31 *Id.* at *1.

32 No. 2:20-cv-307-FtM-38MRM, 2021 WL 5163224, at *6 (M.D. Fla. Nov. 5, 2021) (granting the chairman's motion for summary judgment on qualified immunity grounds).

33 2020 WL 2735169, at **4-5.

34 *Id.*

35 2021 WL 5163224, at *7. Notably, the plaintiffs did not raise a constitutional challenge to the decorum rules themselves in *Dayton*.

36 582 F. Supp. 3d at 1217-18.

37 *Id* at 1220.

38 *Id.*

39 *Id.*

40 *Id.*

41 Most recently, the district court granted summary judgment in favor of Brevard Public Schools on nearly identical grounds affirmed by the Eleventh Circuit in the order on the preliminary injunction motion. *See* Case No. 6:21-cv-08149-RBD-DAB, ECF No. 115 (M.D. Fla. Feb. 13, 2023).

42 *Id.* (collecting cases on the application of decorum rules from various federal circuits).