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Free Speech and Civility: A View of Public Meeting Participation

by Richard M. Gardella[1]

Editor's Note: This is the first in a two-part series of articles on public meeting participation. The series comes from a paper originally submitted and published at the International Municipal Lawyers Association's (IMLA) 65th Annual Conference, San Francisco, California, August 2000 and is reproduced with the permission of the Association. The first installment deals with public participation practice and the application of state statutes to that practice. The second installment examines First Amendment implications in regard to public participation rules and practice.

As I drove up to the driveway to Town Hall, my stomach began to churn. All the parking spaces were already filled at the Hall and I had to park in the lower lot.

That could mean the neighbors of my client, a sports facility, had turned out in force to oppose the facility's variance request. When I got inside, my suspicions were confirmed. Over 100 apartment dwellers were there in opposition to the variance application. Even I was asked to sign a petition against the proposed variance.

Since I had never appeared before this Town's Zoning Board of Appeals, my apprehensions were heightened. In addition, the Board's sessions were televised on the local government channel, so a measure of demagogy and playing to the camera had to be expected.

However, my fears quieted somewhat as I watched the Board handle the cases on its agenda before ours. The Board operated by a set of rules which were applied fairly, but with necessary flexibility. To deal with its crowded agenda, the Board limited discussion on each item. Its chairman explained the limits and observed them. Because of the crowd drawn by my client's application, the time limit was expanded for our matter. Many of the opposers who wanted to speak, but not all, were given an opportunity to comment. The control of the Board was accepted.

While the rules did not ensure civility and comment accuracy, or bar demagogy, those rules and their fair application led to an orderly process. It also helped that our matter was adjourned without decision to a future date.

Of course, no deliberative body can efficiently perform without rules. There is nothing new about agenda control and speaking limits. Benjamin Franklin wrote in admiration of the civility a local Indian tribe showed in conducting their meetings. Each speaker was given the same amount of time to speak without interruption. After the speaker completed his argument, he was given additional undisturbed minutes to review in his mind what he said and to add to or revise his argument accordingly.

Such civility can not be found in today's Town, Village or City Halls. Our system of government with its belief in a robust, free exchange of ideas and the fundamental protections provided by the First Amendment of the United States Constitution militates against controlled civil discourse. Certainly, civility can not be mandated, but order has to be maintained.

THE RULES

A limited jurisdiction Board, such as the one I appeared before, has an easier time of sticking to its agenda and controlling subject matter discussion. Local governing bodies have to provide a broader opportunity for public participation. As a result, their rules of procedure governing public participation are more complicated than the rules successfully applied in my case.

Local governing body procedure rules generally provide for speaker registration, speaking time limits, and offer an open comment period at the beginning or the end of a meeting. Three New York governing bodies I am familiar with have such rules.

For example, the Village of Scarsdale schedules an open public comment period early in its agenda. It recently dropped the practice of another comment period toward the end of the agenda for public comment on agenda items. Speakers are limited to five minutes, but the mayor, who presides, exercises reasonable flexibility.

The City of Rye asks speakers to sign in for the open comment period at the beginning of the City Council's calendar. There are no general time limits and the Council almost never denies public comment opportunity.

In White Plains, Common Council rules provide:

"...Request by members of the public to address the common council may be in writing, stating: (i) name and address of the applicant; (ii) subject matter; and (iii) approximate time requested to address the council which shall not exceed five (5) minutes. At the council meeting, it is recommended that the applicant submit to the city clerk a written copy of his or her statement to the common council."[2]

Similar rules can be found in other jurisdictions. An article in the Fall 1997 issue of *Popular Government*, published by the Institute of Government in North Carolina,[3] reported:

"A 1996 Survey of North Carolina's 100 boards of county commissioners revealed common practices among these units in receiving public comment. Ninety boards responded to the survey. Of these, 60 have a specific place in the regular meeting agenda for public comment; 30 do not. Among the latter, 20 allow the chair to decide whether and when to receive citizen comment; 7 allow comment if the request to speak is made before the meeting and the item is placed on the agenda; and 3 normally take comment at the close of the business meeting.

"In 55 counties the commissioners regularly limit how long each speaker may address the board. Several of these counties apply their limits flexibly, however, often allowing speakers to continue and letting the chair decide when to ask a speaker to finish. Twenty-nine counties have no formal limit.

"In 22 counties the board typically allows each speaker five minutes, and in 21 counties there is a three-minute limit. Even the counties that normally do not restrict the length of speeches do use limits if the issue is controversial and several people wish to speak. In this instance most counties ask the concerned groups to pick one or more spokespersons and/or limit each speaker to two or three minutes."[4]

The *Popular Government* article could not point to survey results for

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boards of municipalities or school boards in North Carolina, but stated:

"...Practices vary widely. Most city and town councils have a specific point in the agenda at which they hear citizens, commonly at the beginning or the end of the meeting. They also have a time limit on presentations and may require groups with the same concern to designate one or two spokespersons....

"The state's school boards use a mix of formal and informal approaches to handling public comment. Most boards have a specific place on the agenda for citizens to speak and a time limit for each speaker. Groups are asked to designate a single spokesperson. Boards usually receive citizens' comments but are not obliged to give an immediate response.

"School boards struggle with the problem of allowing citizens' comments while preserving the efficiency and decorum of their meetings. Some of them take comments at the beginning of the meeting. This practice, however, can cause business deliberations to last until late in the evening. But holding citizens' comments until the end of the meeting taxes people's patience and delays their speaking to a time when many board members are weary and eager to conclude the meeting...."[5]

In Texas, the San Antonio City Council requires speakers to register and limits them to five minutes on all consent agenda items at the beginning of that agenda and five minutes for all consideration agenda items at the beginning of that agenda. A "citizens to be heard" opportunity is provided at the end of the regular agenda with a five minute speakers limit.

Austin limits agenda item speakers to ten with each speaker given three minutes to discuss any item on the entire agenda. Dallas and El Paso, like Austin, allow speakers three minutes. However, El Paso limits speakers to agenda items and does not provide a citizens to be heard segment. Dallas limits the number of speakers at the beginning of the meeting and gives preference to speakers who have not spoken before the council in the last thirty days. Corpus Christi has no speaker time limits, but speakers can only address agenda items.

Phoenix, Arizona, requires speakers to sign up for agenda items and the mayor sets time limits. Citizens can be heard at the end of council meeting on any subject with a three minute maximum per citizen. San Diego, California, limits speakers to three minutes per agenda item and two minutes during the citizens to be heard portion. Houston does not have a citizens to be heard place on its agenda limiting speakers to agenda items and to one to three minutes. Those requesting one minute will be heard first and a speaker who has addressed the council at any of the four prior meetings will be limited to one minute.

Special rules are also provided for public hearings. The following 1994 rule from San Antonio is an example:

"For officially called Public Hearings, each speaker shall be limited to five minutes (unless otherwise set by the Chair) with a cumulative limit of thirty minutes for each side (those for a proposal and those against a proposal). Proponents shall speak first followed by opponents. At the end of the hearing, the proponents shall be given an additional five minutes for rebuttal."[6]

Oklahoma City rules provide:

"Citizens may address the Council on individual concerns as well as during public hearings. Those who wish to address the council on matters other than a scheduled public hearing may place their names on the agenda by calling the City Manager's office....

"Time is also set aside at the end of the meeting for citizens who are not scheduled to speak to the Council. Citizens not scheduled to speak are requested to turn in a request form from the table outside Council Chambers. Submitting this form to the City Clerk assures being called on by the Mayor and not missing the opportunity to address Council.

"When addressing the Council, go to the rostrum at the front of the Council Chambers. Give your name and address for the record. Identify your subject and make your presentation. Remarks should be limited to five minutes or less."[7]

In some communities, rules of procedure go beyond speaker registration and time limits in an attempt to ensure a certain measure of decorum and civility. Dallas' detailed rules covering public participation provide for the removal of any person "making personal, impertinent, profane or slanderous remarks or who becomes boisterous while addressing the City Council."[8] Those rules also bar placards, banners or signs.[9] San Antonio's rules prohibit "personal attacks" and the carrying of "signs, placards or other items which block the view of those behind them."[10] Houston's rules bar clapping, booing or other audible expression of approval or disapproval in the council chambers. Citizen speakers can not carry bags, briefcases or tape recorders to the speakers podium.

One council requires speakers to address the council as a whole and not individual councilpersons. Another gives speaker preference to residents over nonresidents.

Of course, rules of decorum are not limited to citizen participation. Dallas meeting regulations also provide detailed standards for councilpersons as well as staff. Grand Prairie's rules state: "*Getting the floor: improper references to be avoided.* Every member desiring to speak shall address the chair, and, upon recognition by the presiding officer, shall confine the speaking to the question under debate, avoiding all personalities and indecorous language."[11]

While all governing body members are required to help maintain order and decorum at meetings, the main responsibility rests with the presiding officer — generally, the mayor. To enforce his control, including orders of removal, a sergeant-at-arms is provided for or reliance is placed on the police. Often police serve as the sergeant-at-arms.

STATE REGULATIONS

In New York State, the Open Meetings Law, which is found in Article 7 of the Public Officers Law, sections 100 to 111, covers meetings held by public bodies. Its legislative declaration states:

"It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."[12]

In keeping with the above purpose, the law requires public meeting notice and limits the use of executive sessions by public bodies. It also provides for advisory opinions on public meeting issues by the Committee on Open Government, a state agency established as part of the state freedom of information legislation.

While some state open meetings laws require public comment periods, New York's law is silent with respect to the issue of public participation. Further, unlike North Carolina's law, it does not provide for citizen tape recording or filming of meetings. This failure has led to litigation resulting in a general standard for judging citizen participation rules.

In 1963, a citizen activist in White Plains challenged the city's prohibition against citizen tape recording of council meetings and lost in State Supreme Court. In *Matter of Davidson v. Comm. Council*, Justice Frank S. McCullough wrote:

"The legislative process should not be turned into a show where portions of tape-recorded material can be played on radio or television between the trumpeters of modern merchandising expounding the virtues of tooth paste, cigarettes, soap powder or the mellowness of a new beer.

"It is essential that a legislative body have the right to regulate its own halls in the same manner as a Judge must control the conduct of his courtroom.

"The fact that legislative halls or courtrooms are open to the public does not give the public a vested right to televise, photograph or use recording devices. The reasons such places are open to the public is to prevent the possibility of star chamber proceedings. It is unquestioned that people should have the right to see the

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Executive Session Disclosure

by James D. Cole

Editor's Note: In a recent informal opinion (2000-2), reprinted below, James D. Cole, Assistant Solicitor General of the New York State Attorney General's Office, addressed the validity of local legislation prohibiting disclosure of matters discussed in executive session.

In our view, a municipality, in its code of ethics or through a local law enacted under section 10 of the Municipal Home Rule Law, has statutory authority to prohibit members of its legislative body from disclosing matters discussed in executive session. Although nothing in the Public Officers Law directly prohibits such disclosure, such a prohibition is entirely consistent with the provisions of the Freedom of Information Law and the Open Meetings Law. *See* Public Officers Law, Articles 6 and 7. Any such restriction on speech would, of course, be subject to further state and federal constitutional requirements.

Section 806 of the General Municipal Law requires that the governing body of a county, city, town, village and school district must adopt a code of ethics setting forth, for the guidance of its officers and employees, the standards of conduct reasonably expected of them. Section 806(1)(a) states that codes of ethics may prohibit disclosure of information.

A local government also is authorized by the Municipal Home Rule Law to enact local laws relating to powers, duties and other terms and conditions of employment of its employees; its property, affairs or government; and the public health, safety and welfare. Municipal Home Rule Law § 10(1)(i) and (ii)(a)(1), (12).

A restriction on disclosure of information discussed in an executive session would further the statutory purposes of executive sessions, as set forth in the Public Officers Law. The "executive session" of the meeting of a public body is "that portion of a meeting not open to the general public." Public Officers Law § 102(3). A local legislative body may conduct an executive session upon a majority vote of its total membership taken in an open meeting pursuant to a motion identifying the general area or areas of subjects to be considered. Public Officers Law § 105(1). The purpose of an executive session is to permit members of public bodies to discuss sensitive matters in private. A review of the subjects that may be discussed in executive session clearly reveals that these are matters which, if disclosed, could jeopardize sensitive negotiations, personal privacy, law enforcement and public safety.

* * *

Disclosure of matters discussed in executive session would defeat the apparent legislative intent of authorizing local legislative bodies to discuss these limited matters in private. Disclosure would be contrary to the public welfare. A locally enacted provision prohibiting disclosure would thus further the statutory purpose of executive sessions and would promote the public interest. A recent decision of the Appellate Division is instructive in this regard. In that decision, the court held that tape recordings, transcripts and minutes of discussions conducted in executive session may be withheld by the legislative body from the public. *Kline v. County of Hamilton,* 235 A.D.2d 44 (3d Dept. 1997). The Appellate Division recognized that both the Open Meetings Law and the Freedom of Information Law guarantee public access to governmental deliberations and decisions. *Id.* at 45. The court also noted, however, that topics discussed in executive session are circumscribed by statute, and that under the Freedom of Information Law (Public Officers Law art 6) a public agency may deny access to records if they are specifically exempted from disclosure by state or federal statutes. *Id.* at 46, *citing* Public Officers Law ' 87(2)(a). The Appellate Division reasoned that

"[i]t makes little sense to permit governmental bodies to meet in private under clearly defined circumstances only to subsequently allow the minutes of those private meetings to be publicly accessed under FOIL. Only in the event that action is taken by a formal vote at an executive session do both FOIL and the Open Meetings Law require a public record of the manner in which each Board member voted." *Id.*

The court held:

"In our view, memorialized discussions at duly convened executive sessions, which do not result in a formal vote, whether consisting of privileged attorney-client communications or otherwise (*see*, Public Officers Law § 105), are not the type of governmental records to which the public has to be given access. While the purpose of FOIL is to lift 'the cloak of secrecy or confidentiality' (Public Officers Law § 84) from governmental records which are part of the governmental process, where, as here, confidentiality has been specifically sanctioned by Public Officers Law ' 105 and 106, the records at issue fall within the exemption of Public Officers Law § 87(2)(a) and are to be shielded from public disclosure." *Id.*

As the Appellate Division noted, minutes are required at executive sessions of any action that is taken by formal vote. Minutes consist of a record or summary of the final determination of such action and the date and vote taken. Public Officers Law § 106(2). A summary need not include any matter which is not required to be made public under the Freedom of Information Law. *Id.*

Thus, it seems clear that under the Public Officers Law a governing body of a municipality may withhold any records of discussions properly taking place in executive session. Section 806(1)(a) of the General Municipal Law, authorizing municipal codes of ethics that prohibit, *inter alia*, disclosure of information, is consistent with and reinforces this fact. Accordingly, we conclude that a local legislative body, by local law or in its code of ethics, has statutory authority to prohibit a legislator from disclosing matters discussed in executive session. We emphasize that the decision to go into executive session is discretionary, and that any such prohibition on speech would be subject to state and federal constitutional requirements.

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legislative process in action and there is no denial of that right involved in this proceeding. If in the judgement of the legislative body the recording distracts from the true deliberative process of the body it is within their power to forbid the use of mechanical recording devices."[13]

The *Davidson* decision remained the only court decision on the use of tape recorders by citizens at government body meetings until 1979. However, the Committee on Open Government advised that unobtrusive tape recorders, which would not distract from the deliberative process, should not be prohibited. The committee view was affirmed 15 years after *Davidson* in *People v. Ystueta.*[14] That court cited *Davidson*, but found that case:

"....was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in *Davidson* to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happend over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence, and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."[15]

In 1985, the Appellate Division, Second Department, unanimously affirmed a Nassau County Supreme Court decision annulling a board of education resolution barring tape recorders. The appellate court, ruling in *Mitchell v. Board of Educ. of Garden City School Dist.* wrote:

"...While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording devices is inconsistent with the goal of a fully informed citizenry, we accordingly affirm the judgment annulling the resolution of the respondent board of education...."[16]

The *Mitchell* court also rejected a concern entertained by Judge McCullough twenty-two years before. The appellate bench stated:

"....[t]hose who attend such meetings, who

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decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious...."[17]

In *Mitchell*, the Committee on Public Access found a standard to apply in judging the procedural rules for public participation before governing bodies.

Robert J. Freeman, who has served as executive director of the Committee on Open Government from its inception in the early seventies, has advised that those rules must be reasonable.

In 1997, Freeman explained to a village planning official that:

"By way of background, the Open Meetings Law clearly provides the public with the right 'to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy' (see Open Meetings Law, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally."[18]

Other Freeman opinions have questioned rules limiting video cameras which are not based on meeting disruption and criticized resident speaker preference. In regard to placards, signs or posters, he has written:

"Based on the foregoing, relevant in my opinion is the extent to which the use of signs or posters would disrupt or interfere with meetings. I believe that the Board could clearly adopt rules to prevent verbal interruptions, shouting or other outbursts, as well as slanderous or obscene language or signs; similarly, I believe that the Board could regulate movement on the part of those carrying signs or posters so as not to interfere with meetings or prevent those in attendance from observing or hearing the deliberative process. Whether the Board could, however, prohibit the use of all signs or protesters, or perhaps symbolic gestures (i.e., wearing armbands) is, in my view, questionable."[19]

In finding support for a "hand clapping" law, Mr. Freeman stated:

"Based on the foregoing, I believe that the Board could clearly adopt rules pursuant to §63 of the Town Law to prevent verbal interruptions, shouting or other outbursts, as well as slanderous or obscene language or signs; similarly, I believe that the Board could regulate movement so as not to interfere with meetings or prevent those in attendance from observing or hearing the deliberative process."[20]

Unlike New York's silence on the issue of citizen's participation, California's Brown Act provides:

"(a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body, provided that no action shall be taken on any item not appearing on the agenda unless action is otherwise authorized by subdivision (b) of Section 54954.2....

"(b) The legislative body of a local agency may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.

"(c) The legislative body of a local agency shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law."[21]

Of course, review of open meeting legislation covers just part of the public meeting participation issue. First Amendment implications of public meeting participation will be dealt with in the second installment of this two-part series in the next edition of the *Municipal Lawyer*.

Mr. Gardella is a former corporation counsel for the City of Rye and former village attorney for the Village of Scarsdale. Mr. Gardella now serves as of counsel for the firm of Bertine, Hufnagel, Headley, Zeltner, Drummond & Dohn, LLP in Scarsdale, New York.

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2. WHITE PLAINS, N.Y., CODE ch. 2-3, art. II, § 2-3-20(b).
3. *See generally*, A. Fleming Bell II, John Stephens and Christopher M. Bass, *Public Comment at Meetings of Local Government Boards*, POPULAR GOV'T, Fall 1997, at 27. The article, part II of a series of articles, is obtainable by contacting the staff of IMLA. It is an excellent piece on public participation at meetings.
4. Bell et al., *supra* note 4 at 27-28 (citations omitted).
5. Bell et al., *supra* note 4, at 28 (citations omitted).
6. San Antonio, Tex., Ordinance Establishing New Rules, Times and Procedures for Conducting Council Meetings § 2 (May 11, 1994).
7. The City of Oklahoma City, *City Council* (visited August 17, 2000) <http://www.okc-cityhall.org/Mayor-Council/index.html>.
8. City of Dallas, City Secretary, *City Council Rules of Procedure*, § 3.3 (last modified Oct. 31, 1996) <http://www.ci.dallas.tx.us/cso/cc_rules.html>.
9. *See id.*
10. San Antonio, Tex., Ordinance Establishing New Rules, Times and Procedures for Conducting Council Meetings § 2.
11. GRAND PRAIRIE, TEX., CODE ch. 2, art. II, § 2-28 (2000).
12. N.Y. PUB. OFF. LAW art. 7, § 100.
13. *In re* Davidson v. Common Council, 40 Misc.2d 1053, 1055 and 1056 (Westchester County Ct. 1963).
14. *See* People v. Ystueta, 418 N.Y.S.2d 508. (Suffolk County Ct. 1979).
15. *Id.*
16. Mitchell v. Board of Educ. of Garden City School Dist., 113 A.D.2d 924, 925 (2d Dep't 1985).
17. *Id.*
18. OML-AO-2798
19. OML-AO-2090
20. OML-AO-2794
21. Baca v. Moreno Valley Unified School Dist., 936 F.Supp. 719, 729 n. 9 (1996).

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Disclosure

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