

AGENDA
SCARBOROUGH TOWN COUNCIL
WEDNESDAY – MARCH 6, 2024
WORKSHOP RE: PUBLIC COMMENT PROCEDURES – 6:15 P.M.
HYBRID MEETING

TO VIEW TOWN COUNCIL MEETING & OFFER PUBLIC COMMENT:

<https://scarboroughmaine.zoom.us/j/82553925751>

TO VIEW TOWN COUNCIL MEETING ONLY:

<https://www.youtube.com/channel/UCD5Y8CFy5HpXMftV3xX73aw>

- Item 1.** Call to Order.
- Item 2.** Those Present.
- Item 3.** Public Comment Procedures.
- Item 4.** Adjournment.

GUIDANCE ON PUBLIC COMMENT AT BOARD MEETINGS

MMA Legal Services

In light of several recent incidents involving disruptive “remote” attendees at municipal board meetings, we thought it would be helpful to remind readers of our guidance on administering public comment at such meetings. In a nutshell, our advice is virtually the same whether members of the public attend in-person or via a “remote” method (e.g., Zoom).

Laws Governing Public Comment at Municipal Board Meetings:

Public comment at municipal board meetings in Maine is primarily governed by two authorities:

- **Maine Freedom of Access Act:**

Except at a public hearing, members of the public have no legal right to speak at a public board meeting whether they are attending in-person or via a remote means such as Zoom. Maine’s Freedom of Access Act (FOAA) entitles the public to attend and record in-person and “remote” meetings but not to speak at or otherwise participate in them (see 1 M.R.S. §§ 403, 403-B, 404).

A board may voluntarily set aside time during its meetings for public comment – when, for example, any member of the public is allowed to address the board on agenda items, matters relating to municipal business or more broadly, any matter of bona fide public concern.

If the board allows public input from those present at a board meeting, it must allow an effective means of communication from “remote” attendees. 1 M.R.S. § 403-B(2)(D).

- **Constitutional First Amendment Protections:**

Most courts view the public comment portion of a municipal board meeting as a “limited public forum” under constitutional First Amendment jurisprudence, assuming the comment period is limited to discussion of certain topics. *See e.g., McBreairty v. Sch. Bd. of RSU 22*, 616 F.Supp.3d 79 (D.Me. 2022); *Steinburg v. Chesterfield Cty. Planning Comm.*, 527 F.3d 377 (4th Cir. 2008). A limited public forum is a forum the government voluntarily creates to allow expressive activity for specified purposes. In a limited public forum, the government may restrict expression provided that the restriction (a) does not discriminate against speech on the basis of viewpoint and (b) is reasonable in light of the purpose served by the forum. *See e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, (2001). Limiting the subject matter of the speech may

be permissible if the limits are reasonable, are intended to preserve the purposes of that limited forum and are not an effort to suppress expression merely because public officials oppose the speaker's ideology, opinion or perspective. The municipality must be able to articulate a basis for its limits. *See e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

It is also possible for a board to establish a public comment period as an “open” “designated” public forum at which any matter might be discussed by the public. In those situations, the government’s ability to limit the content of the public’s speech is more limited and limits on content usually require a compelling justification. *See e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

Recommendations:

If your board establishes a public comment period for its meetings, we suggest the following:

1. Adopt A Written Policy with Clear Parameters.

We recommend that public participation guidelines be adopted in a written policy clearly stating the parameters of the comment period to make clear (if desired) that the comment period is a “limited” forum for public comment. Although an unwritten policy or custom may limit the scope of a public comment period, a written policy formally adopted by the board provides firmer and clearer support for content limits and reduces potential misunderstandings or legal claims as to the intended scope of the public comment period.

The policy should expressly state the purposes of the public comment period and any time limits or restrictions on subject matter (e.g., whether public comment will be limited to agenda items, or to concerns relating to your municipality’s government business). In addition to providing board members and members of the public, alike, with “rules of the road” for public meetings and participation, a written policy is critical to successfully enforcing limits on disruptive speech. In the event that a speaker engages in disruptive speech or other behavior during a meeting, a written policy will provide a solid basis during the meeting (if necessary) to ask a speaker to limit their comments. A clear policy also may help avoid claims that the board has opened its public comment period to discussion of any topic at all. If a policy merely specifies a time during meetings for public comment with no further limitation, it may leave the board open to claims that it has created an open (“designated”) forum for expression on any content (limits on content must meet a much higher standard in such forums).

2. Establish A Schedule and Time Limits.

We recommend the policy schedule public comment periods for regular meetings only, and at a time convenient for the public, for example, at the beginning of the meeting or after each agenda item. Some boards choose to provide a time for comment on agenda items and a separate time for comment on “non-agenda” matters of municipal concern.

It is helpful to establish reasonable time limits for each speaker (e.g., 3-5 minutes) and for the entire comment period (e.g., 20-30 minutes). If limits are established, we recommend including a process for the board to modify or extend the time limits if needed.

3. Use Available Remote Security Tools.

Use available tools to control the “remote” technology. Most videoconferencing platforms provide controls to assist the meeting’s host. For example, Zoom has security recommendations for its meeting platform. See: “[Preventing OnZoom Event Disruptions as a Host.](#)” These suggestions include disabling options for attendees to change their screen name during the meeting, disabling file sharing and screen sharing for public attendees to prevent “hijacking” or sharing of obscene material, muting public attendees, and disabling their ability to unmute themselves until public comment is allowed or they are recognized to speak. Turning off any chat function or allowing it only for hosts is also an option.

4. Require Recognition/Identification.

Require speakers to be recognized by the chair before speaking. “Remote” speakers should be muted until recognized. The policy may require speakers to identify themselves but should not require speakers to provide home addresses. Some boards find it helpful to ask whether commenters are municipal residents or from a particular district within the municipality, but someone who refuses to provide the information should not be prohibited from speaking. (In contrast, there is no basis in the FOAA to require those merely *attending* the meeting --whether remote or in-person -- to identify themselves.) Require all comments and questions to be directed to the chair or through the chair to others. It is also helpful for the chair to summarize participation rules for the public before each comment period.

5. Immediate Response to Comments Not Required.

Do not feel compelled to respond to comments or answer questions immediately; feel free to take matters under advisement. Most boards use a public comment period simply as a forum to hear from constituents.

6. Define Limits on Speech Carefully.

As discussed above, a written policy may establish the public comment period as a limited forum and limit speech to specific subject-matter (e.g., agenda items, municipal business issues, etc.). A board may prohibit public comments on topics outside the scope of those policy limits. A policy may also prohibit obscene, threatening, disruptive or overly repetitive comments. As noted above, muting remote attendees until recognized to speak and disabling screensharing for remote attendees are acceptable ways to limit sharing of “off-topic” comments or material prohibited by the policy.

However, a policy may not limit public comment based on the viewpoint or ideology of the speaker; even if that viewpoint is offensive or upsetting. For example, comments that *are germane to the topic under discussion* may not be prohibited merely because they are critical, reflect opposing opinions, are discriminatory, extreme or offensive. Generally, we advise that a policy should not state that it prohibits comments that are “offensive,” “intolerant,” “abusive,” or “inappropriate,” as these terms are likely too broad to meet constitutional requirements. (It is, however, likely appropriate to indicate that personnel complaints pertaining to misconduct of individual employees are handled through a different, confidential process.)

Remember that there is a distinction between an offensive or unpopular viewpoint that is offered as part of comments within the scope of the allowed subject-matter and comments that are outside allowed content limits, disruptive or prohibited.

7. Focus on Disruptive, Not Offensive, Behavior.

A policy may prohibit disruption and disorderly behavior that interferes with the orderly conduct of the meeting. For example, a policy may prohibit repeated shouting, yelling, interrupting other speakers, stomping feet, blocking the view of others, jeering or booing that disrupts the meeting. Remember, however, that activity that is distracting or offensive, but not necessarily disruptive, may require a different response. For example, persons that stand in the back of the room, or who (via “remote” access or in-person) make faces or offensive hand gestures (e.g., middle finger, Nazi salute) might not actually disrupt the meeting or require removal (see below).

Courts have recognized that boards have a legitimate interest in conducting meetings with relative orderliness and fairness. Although it is permissible to request and

encourage proper decorum and respectful behavior necessary for the board to conduct public business, commenters should not be muted or removed from the meeting simply for being rude or disrespectful in their comments if the comments are germane to the topic under discussion and not disruptive. This includes comments or viewpoints that may be racist, discriminatory, or extreme. In contrast, a person that simply shouts slurs or insults when they are unmuted or recognized to speak should be told to cease on the basis that the comments are outside the subject matter allowed during the public comment period (assuming this is consistent with the board's written policy). Such comments may also be prohibited as disruptive if, for example, they engender outbursts by others or create such a distraction that the board is unable to conduct its business effectively. Likewise, someone whose comments stray from the topic under discussion into commentary on political or social issues may be asked to refrain at that time on the basis the comments are outside the allowed topic.

8. Apply The Policy Uniformly.

During board meetings, the board's policy should be applied fairly and uniformly regardless of who is speaking and without distinction between members of the public attending in-person or via remote means. State/federal constitutional principles apply equally to viewpoints expressed in-person or via "remote" means.

9. Take a Measured Enforcement Approach.

Drawing the line between protected speech and speech that may be prohibited can be extremely difficult, particularly when the speech is rude or offensive. It is helpful to focus on (1) whether disruption is occurring, (2) whether the speech is within or outside the topic allowed, and (3) whether it is the speaker's viewpoint alone that is the issue.

In most cases, we recommend using the least extreme initial response and progressing to greater response if needed. For example, if a member of the public is violating the policy or disrupting the meeting, politely but firmly remind the person of the policy requirements and ask the person to limit their comments and/or sit down and be quiet. If they refuse, ask them to leave or mute "remote" speakers. In many cases, simply muting a remote speaker may be sufficient to end the disruption. If muting is sufficient, it is not necessary to remove the person from the remote meeting platform. If disruption continues, ask a police officer, if available, to escort the person(s) out or call a recess until matters are under control and/or tempers have cooled. The board may also consider adjourning the meeting to another time. Since members of the public have a right to attend a public meeting, removing someone

from the meeting should be done only when necessary for orderly conduct of the meeting.

10. Consult the Municipality's Attorney.

We strongly recommend that boards work with their municipal attorney to draft a public comment policy. The legal issues surrounding public speech rights are very complex and because constitutional rights are implicated, there is potential municipal liability for infringement of those rights. Developing a policy will require a number of judgments and choices. For this reason, there is no “one-size fits all” public comment policy; a board and its attorney will need to discuss the objectives and risks of various approaches.

Similarly, because decisions about when and how to limit public comment – even with a written policy in place – are very fact specific and the line between offensive and disruptive speech is often nuanced, MMA strongly recommends that board chairs talk with their town attorneys about how best to administer the policy during public meetings.

Summary:

As discussed above, this is a complicated area of the law. As each situation involving public comments is unique, the written guidance above cannot address every fact pattern or potential circumstance. We encourage members to contact MMA Legal Services to discuss their own meetings and concerns individually with our attorneys or to discuss these issues with their municipal attorney.

Contact MMA Legal Services:

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