ALAN WILSON
ATTORNEY GENERAL

June 05, 2023

Terry A. Finger
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Dear Mr. Finger:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

> The Town of Bluffton, through its Town Attorney, respectfully requests an advisory opinion addressing a public body's ability to regulate public participation and disruptions at local government meetings (e.g., council meetings, planning commission meetings, board of zoning appeals meetings, etc.). In particular, guidance from your office is requested on the following questions:
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> 1. Are the following regulations facially valid/invalid restrictions regulating public conduct at public meetings under South Carolina law?
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>   a. All speakers shall confine their comments to issues under the jurisdiction of the Town Council. Speakers shall not use the public comment period to promote or advertise awards, businesses, services, goods, or candidates for public office.
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>   b. During public comment, each speaker is limited to a total of three (3) minutes per meeting, regardless of whether the person is speaking on their own behalf or as an agent for others.
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>   c. Meeting attendees may not donate, transfer, yield, or give all or any portion of their speaking time to another person.

2. If a public body offers a designated period for general public comment during its meeting, can it adopt "time, place and manner restrictions" on such public comment by resolution rather than ordinance?

3. If the regulations are insufficient to curb public meeting disruptions, can a public body eliminate any public comment during its meeting unless the matter before the body requires a public hearing by statute or local ordinance (e.g., budget adoption). In other words, does South Carolina recognize an absolute right to speak at a public meeting?

4. What can a governing body do if persons are disrupting a public meeting? Would a speaker refusing to conform with time limits set by the public body and/or yield the floor once his or her allotted speaking time is over be considered disrupting the meeting? In the event of a disruption, can sworn law enforcement officers remove the individual from a meeting?

Law/Analysis

In order to address the questions presented in your letter, this opinion will address relevant state statutes and First Amendment considerations. Initially, we reiterate your caveat that the questions presented only apply to public meetings. When a public body otherwise sits in a quasi-judicial capacity, additional procedures and allowances for public input will often need to be implemented.

Municipal councils are directed to "determine [their] own rules and order of business" which establish the procedures for conducting public meetings. S.C. Code § 5-7-250(b). Municipal councils have wide discretion over their rules of order so long as they do "not conflict with the general laws of the state" and more specifically the South Carolina Freedom of Information Act ("S.C. FOIA"). S.C. Code § 5-7-250(c).

The S.C. FOIA provides that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 of this chapter." S.C. Code § 30-4-60. While these meetings are open to the public, the S.C. FOIA clarifies that an individual may still be removed if he "wilfully disrupts a meeting to the extent that orderly conduct of the meeting is seriously compromised." S.C. Code § 30-4-70(d). This Office previously found these statutes do not establish "a per se right to speak at a public meeting under FOIA." Op. S.C. Att'y Gen., 2019 WL 5669045, at 5 (October 17, 2019). Although the Freedom of Information Act may not require

providing an opportunity to speak at a public meeting, we stress that this point should not be construed to deny interested parties an opportunity to be heard at a public hearing.[1]

A municipal council can adopt rules of order by ordinance or resolution. Section 5-7-260 of the South Carolina Code lists those acts which must be adopted by ordinance. Included therein, subsection (2) states that establishing "a fine or other penalty or establish a rule or regulation in which a fine or other penalty is imposed for violations" is one such act that must be adopted by ordinance. S.C. Code § 5-7-260. Matters other than those listed may be adopted "either by ordinance or resolution." Id. While bodies other than the council cannot act by ordinance, such as boards and commissions, they may adopt their respective rules of order and define what would constitute a material disruption or serious violation by resolution. Additionally, these resolutions may cite to relevant ordinances which establish penalties therein.[2]

When adopting rules and procedures for meetings, a municipal council should consider the impact restrictions will have on speech under the state and federal constitutions. See S.C. CONST Art. I, § 2; U.S. Const. amend. I. Federal courts have consistently held that the public meetings of public bodies are "limited public forums." White v. City of Norwalk, 900 F.2d 1421, 1425 (9th Cir. 1990).

> "[W]hen the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified in reserving [its forum] for certain groups or for the discussion of certain topics." In a limited public forum, however, the government still "must not

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[1] See Kurschner v. City of Camden Plan. Comm'n, 376 S.C. 165, 171–72, 656 S.E.2d 346, 350 (2008) (citations omitted).

> The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest. Rather, due process is flexible and calls for such procedural protections as the particular situation demands.
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> ... The legislature expressly granted this discretionary authority in the area of local planning to the Commission. *See* S.C. Code Ann. § 6–29–340 (2005) (conferring municipal planning commissions with the power to implement and to oversee the administration of regulations for the growth and development of land).

[2] This Office understands that the Town of Bluffton adopted such ordinances which make interruptions of any public meetings within the town illegal. See Code of Ordinances for the Town of Bluffton, South Carolina §§ 2-49 ("It shall be unlawful for any person to interrupt the proceedings of the Town Council or violate the rules of protocol, the Court, or any other official body while in session."); 18-84 ("It shall be unlawful for any person to materially interrupt the proceedings of the Municipal Court or any official Public meeting, or be guilty of disorderly conduct therein, or to commit any contempt thereof.") (emphasis added).

> discriminate against speech on the basis of viewpoint, and any restriction must be reasonable in light of the purpose served by the forum."
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> ... Accordingly, a government entity such as the Commission is justified in limiting its meeting to discussion of specified agenda items and in imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose of conducting public business. But any restriction must not discriminate on the basis of a speaker's viewpoint.

Steinburg v. Chesterfield Cnty. Plan. Comm'n, 527 F.3d 377, 384–85 (internal citations omitted). This Office has opined that courts generally uphold content neutral restrictions that "regulate the time, place and manner of speech." Op. S.C. Att'y Gen., 2016 WL 3946154, at 8 (July 7, 2016); see Wright v. Anthony, 733 F.2d 575, 577 (8th Cir. 1984) ("Reasonable time, place and manner restrictions on the exercise of First Amendment rights are not repugnant to the Constitution.").

Your letter lists several regulations and asks whether they are facially valid. This opinion will address each of the regulations in turn, but it should be noted even a facially valid regulation "does not preclude a challenge premised on misuse of the policy to chill or silence speech in a given circumstance." Steinburg, 527 F.3d at 387.

The first regulation would restrict comments "to issues under the jurisdiction of the Town Council." This Office understands the regulation is intended to limit public comment to the topic under discussion. Courts have upheld such regulations that restrict speech to matters at hand.

> [A] City Council meeting is still just that, a governmental process with a governmental purpose. The Council has an agenda to be addressed and dealt with. Public forum or not, the usual first amendment antipathy to content-oriented control of speech cannot be imported into the Council chambers intact. In the first place, in dealing with agenda items, the Council does not violate the first amendment when it restricts public speakers to the subject at hand. While a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing, it certainly may stop him if his speech becomes irrelevant or repetitious.
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> Similarly, the nature of a Council meeting means that a speaker can become "disruptive" in ways that would not meet the test of actual breach of the peace, or of "fighting words" likely to provoke immediate combat. A speaker may disrupt a Council meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies. The meeting is disrupted because the Council is prevented from accomplishing its business in a reasonably efficient manner. Indeed, such conduct may interfere with the rights of other speakers.

White v. City of Norwalk, 900 F.2d 1421, 1425–26 (9th Cir. 1990) (internal citations omitted); see also Steinburg, 527 F.3d at 380 (finding no First Amendment violation where "the Commission was authorized to set its subject matter agenda and to cut off speech that was reasonably perceived to threaten disruption of the orderly and fair progress of the meeting."). Accordingly, it is this Office's opinion that a court would likely hold a regulation directing speakers to "confine their comments to issues under the jurisdiction of the Town Council" does not violate the First Amendment of the Federal Constitution nor Article I, section 2 of the South Carolina Constitution.

The second regulation restricts a speaker to "a total of three (3) minutes per meeting, regardless of whether the person is speaking on their own behalf or as an agent for others." "Reasonable" time restrictions have been upheld as comments which last too long can disrupt a meeting. City of Norwalk, supra. For instance, in Wright, the Eighth Circuit found an informal five-minute time restriction was a reasonable content neutral restriction. Wright v. Anthony, 733 F.2d 575, 577 (8th Cir. 1984) ("[The time] restriction may be said to have served a significant governmental interest in conserving time and in ensuring that others had an opportunity to speak."). This Office cannot definitively state when the amount of time permitted is so short a court would find it unreasonable. See White, 900 F.2d at, 1426 ("Of course the point at which speech becomes unduly repetitious or largely irrelevant is not mathematically determinable. The role of a moderator involves a great deal of discretion."); but cf. Norse v. City of Santa Cruz, 629 F.3d 966, 975–76 (9th Cir. 2010) ("But the fact that a city may impose reasonable time limitations on speech does not mean it can transform the nature of the forum by doing so, much less extinguish all First Amendment rights."). Broadly speaking, however, a court may well hold a three-minute time restriction per speaker is a reasonable restriction that does not violate the First Amendment.

The third and final regulation states, "Meeting attendees may not donate, transfer, yield, or give all or any portion of their speaking time to another person." Based on our follow up conversation, this Office understands that this regulation is intended to be read in conjunction with the second regulation above which establishes a time limit "whether the person is speaking on their own behalf or as an agent for others." A speaker would be allowed to speak on behalf of another, but, even if speaking on behalf of multiple people, the speaker would not be permitted to stack each person's allotted time and defeat the intended three-minute time restriction. This Office has not found a case directly confronting such a rule in the context of a public meeting of a public body. The First Amendment case law discussed above counsels that restrictions on speech should be content neutral. Steinburg, supra. Additionally, presiding officers "have *discretion* ... to cut off speech which they *reasonably* perceive to be, or imminently to threaten, a disruption of the orderly and fair progress of the discussion, whether by virtue of its irrelevance, its duration, or its very tone and manner." Steinburg, 527 F.3d at 390 (internal quotations omitted). Because the regulation is content neutral and appears reasonably related to maintaining order and fair progress of a meeting, a court would likely find it does not facially violate the First Amendment protections of speech.

Finally, your letter asks what a governing body can do if a person disrupts a meeting. Generally, we recommend adopting rules of order, as discussed above, and publicizing them so the public is appraised of the rules so they may conform their conduct. However, when a person violates the rules governing such a meeting and impedes the body from conducting its business, the presiding officer has discretion to enforce the body's rules.

> In fact, as to a legislative body's rule making authority, Joseph Story's Commentaries on the Constitution of the United States provides as follows: "the power to make rules would be nugatory, unless it was coupled with a power to punish for disorderly behavior, or disobedience to those rules." Joseph Story, Commentaries on the Constitution of the United States § 419.
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> ... There is a fine line between First Amendment rights of free speech and disruption of a meeting. The members of council must thus be very careful to avoid infringing upon First Amendment rights.

Op. S.C. Att'y Gen., 2016 WL 3355910, at 3 (May 31, 2016). This Office has cautioned that removing a person from a meeting should be rare and limited to instances of actual disruption.[3] Courts have rejected the contention that council may define any violation of its rules as a disruption and thereby justify removing a member of the public.

> [T]he fact that a city may impose reasonable time limitations on speech does not mean it can transform the nature of the forum by doing so, much less extinguish all First Amendment rights. A limited public forum is a limited public forum. Perhaps nothing more, but certainly nothing less. The City's theory would turn the entire concept on its head.
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> ...
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> In this case, the City argues that cities may define "disturbance" in any way they choose. Specifically, the City argues that it has defined any violation of its decorum

[3] See Op. S.C. Att'y Gen., 2016 WL 3946154, at 8 (July 7, 2016).

> Thus, because of these First Amendment restrictions, a municipal council should rarely utilize its power to eject a person, particularly a member, from a meeting. If the ejection is based upon the content of speech, such action could well subject the Council and those officers who enforce Council's instructions to § 1983 and state tort liability.
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> Clearly, courts hold also that the members of council do not have absolute immunity from liability because removal is an administrative rather than a legislative act.

> rules to be a "disturbance." Therefore, it reasons, Norwalk permits the City to eject anyone for violation of the City's rules—rules that were only held to be facially valid to the extent that they require a person actually to disturb a meeting before being ejected. We must respectfully reject the City's attempt to engage us in doublespeak. Actual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption. The City cannot define disruption so as to include non-disruption to invoke the aid of Norwalk.

Norse v. City of Santa Cruz, 629 F.3d 966, 975–76 (9th Cir. 2010). We take this opportunity to reiterate that presiding officers are granted authority to enforce the body's rules, including by removal of a person, but "such power should be exercised with great caution to prevent abuse and a potential infringement of one's First Amendment rights." Op. S.C. Att'y Gen., 2016 WL 3355910, at 4 (May 31, 2016).

Conclusion

As is discussed more fully above, it is this Office's opinion that municipal councils have wide discretion over their rules of order so long as they do "not conflict with the general laws of the state" and more specifically the South Carolina Freedom of Information Act ("S.C. FOIA"). S.C. Code § 5-7-250(c). When adopting rules and procedures for meetings, a municipal council should consider the impact restrictions will have on speech under the state and federal constitutions. See S.C. CONST Art. I, § 2; U.S. Const. amend. I. While presiding officers are granted authority to enforce the body's rules, including by removal of a person, "such power should be exercised with great caution to prevent abuse and a potential infringement of one's First Amendment rights." Op. S.C. Att'y Gen., 2016 WL 3355910, at 4 (May 31, 2016).

Sincerely,

Matthew Houck
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REVIEWED AND APPROVED BY:

Robert D. Cook
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