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# Public Comment at Meetings of Local Government Boards

## Part Two: Common Practices and Legal Standards

**A. Fleming Bell, II, John Stephens, and Christopher M. Bass**

### **Public Comment Periods Required at Meetings of City Councils, Boards of County Commissioners, and School Boards**

The 2005 General Assembly enacted S.L. 2005-170 (H 635), effective July 11, 2005, which mandates that city councils, boards of county commissioners, and boards of education provide at least one period for public comment per month at a regular meeting of the board. The history of the act, as well as case law on citizen comment periods as “limited public forums” under the First Amendment, both suggest that the board probably must allow comment on any subject that is within the jurisdiction of the local government. A board need not provide a public comment period if no regular meeting is held during the month.

The act allows boards to adopt reasonable regulations governing the conduct of the public comment period, including but not limited to rules setting time limits for speakers, and providing for (1) the designation of spokesmen for groups supporting or opposing the same position, (2) the selection of delegates from groups with the same position when the meeting hall’s capacity is exceeded, and (3) the maintenance of order and decorum in the conduct of the hearing. This authorization of regulations is taken almost verbatim from the statutes governing the conduct of public hearings by counties and municipalities, respectively (G.S. 153A-52 and G.S. 160A-81).

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- Three citizens want time at the next meeting of their local board, but the agenda is full. The board has to work on the budget and discuss how to evaluate the city manager. Does it have to put the citizens on the agenda for the next meeting, or may it delay their appearance until the following meeting?
- A board always has an agenda item for general public comment. With cable television, more and more speakers are playing to the camera. May the board just stop receiving general public comment?
- An angry group of citizens hold up signs and wear large protest buttons during a council meeting. May the council restrict the use of signs in its meeting room? What rights do citizens have to express their opinions nonverbally to the council?

**P**art One of this article offered general guidelines for constructive communication with concerned citizens at board meetings.<sup>1</sup> Part Two summarizes

common practices of North Carolina local governments in receiving citizen comment at board meetings, and it addresses legal issues. Public officials should read both parts so that they understand not only principles of effective communication but also legal requirements and prohibitions.

### Common Practices in Receiving Public Comment

#### Boards of County Commissioners

A 1996 survey of North Carolina's 100 boards of county commissioners revealed common practices among these units in receiving public comment.<sup>2</sup> 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.

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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.

### **Municipal Boards**

No formal comprehensive survey has been made of how the boards of municipalities receive citizen comment. Practices vary widely.<sup>3</sup> 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.

### **School Boards**

The state's school boards use a mix of formal and informal approaches to handling public comment.<sup>4</sup> 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.

Many school boards urge parents and other citizens to pursue complaints through regular channels before they come to the board. For example, boards' policies on public comment note that personnel or confidential matters may not be addressed in public session and that persons with complaints about personnel must follow other specific procedures. Also, boards often have a sign-up list for speakers, with a deadline of up to seven days before the meeting. Some sign-up lists ask prospective speakers to identify the topic of their comment, to state the steps they have already taken to address their concern, and to deposit relevant documents in the board's office before the meeting.

A board's practice may occasionally vary from its policies in unusual circumstances.

### **Planning Boards, Boards of Adjustment, and Other Boards**

Zoning decisions and requests for variances of land-use regulations can generate great public interest and comment. Most municipalities and two-thirds of county governments control land use through zoning regulations and site permits. Planning boards and boards of adjustment conduct their business meetings publicly but for different purposes and under different rules. The relationships between planning boards and their governing boards (that is, boards of county commissioners or municipal councils) vary greatly. Some differences are set by state statute. For example, when the twenty coastal counties are revising their comprehensive land-use plans, they must work within rules promulgated by the Coastal Resources Commission for mandated formal citizen-participation programs. Other county planning boards have similar (though not state-mandated) practices for seeking public comment (for example, neighborhood meetings, formal public hearings, and surveys of citizens).

Other local government entities (usually appointive) have varying degrees of influence on local ordinances and regulations. Social services boards; area mental health, developmental disabilities, and substance abuse boards; community or human relations commissions; public housing authorities; and agencies on aging typically have few problems with public comment at their meetings. Public health boards, though, sometimes have drawn citizens' attention on such issues as livestock operations, smoking ordinances, and permits for septic tanks.

### **Legal Requirements for Public Comment**

The legal requirements and practical guidelines that follow should be useful for all the entities discussed in the preceding section.

#### **General Requirements**

Anyone may attend and record meetings of local public bodies in North Carolina. This right of access is guaranteed by North Carolina's open meetings law. It also may be inferred from the First and Fourteenth Amendments to the United States Constitution.<sup>5</sup>

The open meetings law specifies that, with certain limited exceptions, each official meeting of a public body is open to the public and “any person is entitled to attend such a meeting.”<sup>6</sup> It also provides that “[a]ny person may photograph, film, tape-record, or otherwise reproduce any part of a meeting required to be open.” Further, the law permits the open portions of meetings to be broadcast on radio or television.<sup>7</sup>

The only restrictions on this right of public access relate to keeping order in the meeting. Thus, under the open meetings law, a board may regulate the placement and the use of photographic, filming, recording, and broadcasting equipment in order to prevent undue interference with the meeting. But it must allow the equipment to be placed within the meeting room in a way that permits the intended use, and it may not declare the equipment’s ordinary use to be “undue interference.” In certain instances a board may require that equipment and personnel be pooled.<sup>8</sup>

In addition, a board may take action if someone disrupts its meeting. Willfully interrupting, disturbing, or disrupting an official meeting and then refusing to leave when directed to do so by the presiding officer is a misdemeanor.<sup>9</sup>

But being able to attend a meeting does not necessarily mean that one may speak at it. In general, local government bodies have no legal obligation to allow members of the public to make comments, to ask questions, or otherwise to participate actively at any particular meeting except during a required public hearing conducted as part of that meeting.<sup>10</sup> However, as discussed later, prohibiting *all* opportunities for citizen comment outside public hearings may go beyond what courts will consider reasonable.

Citizen comment is a necessary part of public hearings<sup>11</sup> because obtaining such input is the very reason for the hearings, whether they are mandated by state statute or voluntarily called by a local board. This article, however, focuses on regular board meetings and boards’ discretionary power to allow comment during those meetings at times other than during public hearings. Each board controls its regular meeting agenda, including how items are placed on the agenda, and it may choose to give citizens an opportunity to be included.<sup>12</sup> Boards often require citizens who wish to speak, to specify beforehand the subjects that they plan to discuss. A board has fairly broad discretion to decide what subjects to include on the agenda of a particular regular meeting as long as it does not discriminate among citizens on the basis of their point of view on an issue or single out one citizen for dif-

ferent treatment from all others. Many boards also set aside a time in the meeting for comment from citizens about topics of interest to them, with little limitation on subject matter.

## Free Speech and the “Public Forum” Doctrine

All public bodies must be concerned about freedom of speech and other rights of those who participate in their meetings. The First Amendment to the United States Constitution, which is applied to state and local governments through the Fourteenth Amendment, requires that government make no law abridging “the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” Freedom of speech and the press and the right to petition the government can have an effect on meetings of public bodies. Over the years, courts have fashioned rules to balance the right and the responsibility of public bodies to organize their meetings and conduct those meetings in an orderly manner, against individuals’ rights under the First and Fourteenth amendments. To understand these rules, one must start with the “public forum” doctrine developed by the United States Supreme Court.

Although the Supreme Court long followed the view that the government, just like a private landlord, may absolutely exclude speech from its own property, the Court has abandoned this ideology and created a body of public forum law. In doing so, the Court has divided government property and activities into three distinct categories: the “traditional” or “quintessential” public forum, the “designated” public forum (the focus of this article), and the “nonpublic” forum.<sup>13</sup> Different rules govern speech at different times and places on public property, depending on the category into which a location or an activity falls.

### *The Traditional Public Forum*

The Court has defined “traditional” or “quintessential” public forums as places such as streets or parks that “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>14</sup> Restrictions on speech in these forums are generally allowed only if they are concerned with the time, the place, or the manner of the speech, rather than its content. The restrictions must be content neutral and

“narrowly tailored to serve a significant government interest,” and they must “leave open ample alternative channels of communication.”<sup>15</sup>

To exclude a speaker from a traditional public forum—which has as one of its purposes the free exchange of ideas—because of the content of her or his speech, the government must show that a regulation “is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end.”<sup>16</sup> Regulations subjected to this standard, called the “strict-scrutiny test,” rarely survive a court challenge.<sup>17</sup> Similarly, censorship based on the speaker’s viewpoint usually is not allowed. The Supreme Court will generally hold that a regulation applicable to a traditional public forum violates the First Amendment when it denies access to a speaker solely to suppress the point of view she or he espouses.<sup>18</sup>

### *The Designated Public Forum*

Whenever a government opens public property other than a traditional public forum for use by the public as a place for expressive activity, it creates a designated public forum, the second category. Many of the standards that apply in this category are similar to those that apply in a traditional public forum. This is so even though the government may not have been required to create the forum in the first place and may later choose to change the open character of the property so that it is no longer a designated public forum.<sup>19</sup>

### *The Nonpublic Forum*

Nonpublic forums, the third category, are not subject to the stringent free-speech requirements that govern traditional and designated public forums. Examples of such forums include meetings of government officials that are not required to be open to the public under the open meetings law, such as meetings solely of professional staff, and closed sessions held during official meetings of public bodies.<sup>20</sup> Most government offices and facilities where day-to-day operations are carried on also are nonpublic forums.<sup>21</sup>

The same space may be used at different times as a designated public forum and a nonpublic forum. For example, a room in city hall may be the scene of a council meeting one evening and the site of a department head meeting the next day. If the council receives public comment during its meeting, a designated public forum exists while the comments are being received. The meeting of department heads, on the other hand, is probably a nonpublic forum.

## **Board Meetings as Public Forums**

Meetings of local government boards bear some resemblance to both traditional and designated public forums. They are like traditional public forums in that space and seats for the public are customarily provided, and public comment and debate often are allowed. But these meetings also resemble designated public forums in that they are held for specified purposes (to conduct the board’s business as listed on an agenda). Thus public discussion and active participation are more tightly circumscribed than they would be in a park or another traditional public forum.

One noted First Amendment scholar, William W. Van Alstyne, asserts that local government board meetings fit a description midway between these two types of forums. He suggests that rules for citizen comment in such meetings may be more restrictive than those allowed in traditional public forums but less restrictive than those permitted in certain types of designated public forums.<sup>22</sup> This article adopts a somewhat similar view.

What meetings or parts of meetings of public bodies in North Carolina, then, are designated public forums? In a 1976 Wisconsin case, the United States Supreme Court suggested that any portion of a meeting of a public body that the body opens for public comment is such a forum.<sup>23</sup> The Court noted that Wisconsin’s open meetings law requires certain governmental decision-making bodies to hold open meetings. It explained that, although a public body may confine such meetings to specified subjects and may even hold closed sessions, “[w]here [it] has opened a forum for direct citizen involvement,” it generally cannot confine participation “in public discussion of public business . . . to one category of interested individuals.”<sup>24</sup> In a 1997 case the North Carolina Supreme Court cited the Wisconsin opinion for the idea that “once the government has opened a forum—such as a public meeting—to allow direct citizen involvement, it may not discriminate between speakers based upon the content of their speech.”<sup>25</sup>

The decision in the Wisconsin case suggests that any official meeting of a public body covered by this state’s open meetings law also may become a designated public forum. If a public body chooses to allow public comment during a portion of its meeting, it subjects that part of the meeting to the rules that apply to designated public forums.<sup>26</sup> Restrictions on speech in designated public forums may be based on either what a speaker has to say—content or view-

point—or when, where, or how the speaker says it—time, place, or manner. Very different rules apply to these two types of restrictions.

#### *Restrictions Based on Content or Viewpoint*

As noted earlier, in a traditional public forum, any restriction on speech that is based on content or viewpoint will be strictly scrutinized by the courts and will almost always be found unconstitutional.<sup>27</sup> A similar rule applies in a designated public forum. In that context, although the meeting organizers may sometimes restrict comment to the subjects for which the forum is designated, they must still allow all viewpoints to be heard.

For example, the Second Circuit Court of Appeals has held that once a board decides to take public comment in a particular meeting, it may not discriminate among speakers on the basis of what they have to say on the subject at hand. In *Musso v. Hourigan*,<sup>28</sup> the time that a local board of education had allotted to hear public comment had expired, but the board continued to permit members of the public to speak. A citizen who said something that one board member did not like was silenced and eventually arrested.<sup>29</sup> The court noted that a rational jury could infer that the plaintiff was singled out because of the board member's dislike for what he had to say. If this inference was accurate, said the court, the action against the citizen was an unconstitutional content-based restriction on protected speech.<sup>30</sup> The case points out the risk that a board may run if it fails to follow content-neutral ground rules concerning a citizen-comment period.

Even if a local governing board feels that a person is spreading untruths or arousing hostilities through his or her comments during a meeting, and even if the board members do not like what the speaker has to say, the board probably may not restrict that person's speech because of the content: "[T]he Supreme Court has frequently recognized that the disruptive or disturbing effects of expression are integrally bound up with the very political value of free speech that the first amendment was designed to safeguard and nurture."<sup>31</sup> The only relevant exceptions pertain to obscenity (which legally goes beyond mere profanity)<sup>32</sup> and "fighting words" (which "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed").<sup>33</sup> The Supreme Court has specifically explained that the protections of the First Amendment do not turn on the truth, the popularity, or the social utility of an idea or a belief.<sup>34</sup>

#### *Restrictions on Time, Place, or Manner*

The fact that restrictions on speech in designated public forums generally may not be based on what a speaker has to say about a subject does *not* mean that those who attend the meeting may speak freely whenever they wish or on whatever topic they wish. The United States Supreme Court has recognized that a public forum may be created for a limited purpose, such as discussion of certain subjects or use by certain groups.<sup>35</sup>

Restricting a meeting to particular subjects (for example, through the use of an agenda) is permitted as long as the public body is careful to allow all points of view to be presented if and when it hears from audience members about those subjects. That is, local boards may control the conduct of their meetings through the use of reasonable, content-neutral restrictions on the time, the place, and the manner of speech.<sup>36</sup> As Justice Potter Stewart stated in a concurring opinion in the Wisconsin case discussed earlier, "A public body that may make decisions in private has broad authority to structure the discussion of matters that it chooses to open to the public."<sup>37</sup>

Even if a board opens its meeting for general discussion of issues, such as during an open-public-comment period, some subject-matter restrictions are probably permissible. For example, a board might limit comments to subjects that are within its jurisdiction or on which it is competent to act.

On the other hand, the restriction on viewpoint-based regulations means that a governmental body holding a public-comment period may not use an improper reason, such as dislike for a particular speaker's viewpoint, as a basis for adjourning or moving on to the next subject on the agenda. As noted earlier, a local government board may not silence a speaker in such a designated public forum merely because it disagrees with the person's message.

A 1990 case, *Collinson v. Gott*, illustrates the courts' deference to local boards' discretion concerning the organization and the conduct of their meetings, as long as no censorship based on a speaker's point of view is involved. In *Collinson* a person was cut off from speaking and subsequently asked to leave a meeting after he violated a local board's requirement that speakers confine their remarks to the question and avoid discussion of personalities. He sued in federal court.<sup>38</sup> A divided panel of the Fourth Circuit Court of Appeals (which has jurisdiction over North Carolina) held in favor of the board. Although the

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judges disagreed about the disposition of the case, they all assumed that a presiding officer has at least some discretion to make decisions concerning the appropriateness of the conduct of particular speakers.<sup>39</sup> A concurring opinion noted that the government has a substantial interest in having its meetings conducted with relative orderliness and fairness: “[O]fficials presiding over such meetings must have discretion, under the ‘reasonable time, place and manner’ constitutional principle, to set subject matter agendas, and 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 . . . ,” even though such restrictions might have some relation to the content of the speech.<sup>40</sup> (The judges disagreed on the extent to which content was or should be considered.)

An earlier North Carolina case, *Freeland v. Orange County*,<sup>41</sup> concerned time limits for public comment and limits on the number of speakers. This case involved a public hearing during a board meeting, but the same or similar principles probably apply to public comments at other times during a meeting. The Orange County Board of Commissioners held a public hearing on a proposed county zoning ordinance, and some five hundred people attended. The chair allocated an hour to each side of the issue (though opponents outnumbered supporters four to one) and allowed each side fifteen minutes more for rebuttal.

When the board later adopted the ordinance, some of the opponents sued, arguing that the ordinance had not been properly adopted—apparently because about two hundred persons who wished to speak at the hearing were not allowed to do so. The North Carolina Supreme Court held in favor of the board of commissioners, declaring that “[t]he contention that the commissioners were required to hear all persons in attendance without limitation as to number and time [was] untenable.”<sup>42</sup> It found that the “opponents as well as the proponents were at liberty to select those whom they regarded as their best advocates to speak for them. The General Assembly did not contemplate that all persons entertaining the same views would have an unqualified right to iterate and reiterate these views in endless repetition.”<sup>43</sup>

Even though *Freeland* is not specifically a First Amendment case, it teaches that a board may safely impose time limits on comments in public hearings as long as it allows enough time for each viewpoint to be heard. Boards will obviously need to use some judg-

ment in deciding how much time and how many speakers on a subject are “enough.” For example, in the *Freeland* meeting, with about 500 people in attendance, the board allowed 31 persons to speak for a total of two and one-half hours.

On the other hand, to return to the opening scenario of the three citizens who wish to discuss an agenda item at a meeting that does not include a public hearing, the board may either not hear them at all or limit each one to a few minutes of comments. Even at public hearings, five- and two-minute limits on individual comments have been upheld.<sup>44</sup>

These and cases from other jurisdictions<sup>45</sup> show that local boards have broad latitude in conducting their meetings in an orderly fashion. Whether a board is restricting the debate to a particular subject or limiting the time allotted for public comment, the court will probably uphold a restriction that is viewpoint neutral as long as it is reasonable. What the court will consider reasonable will depend on the facts in each case.

## Discretion in When to Allow Speech

Must opportunities for citizen comment be provided at *all* board meetings? Although there is little case law on the point, the latitude that the courts have given governmental bodies to control the conduct of their meetings through restrictions on the time, the place, and the manner of speech likely includes the discretion to allow public comment in some meetings but not in others.

Returning to the second scenario at the beginning of this article, what about *never* allowing citizen comment except during designated public hearings on particular topics? Nothing in North Carolina’s open meetings law or other statutes requires that public comment be allowed at meetings that do not include public hearings. This suggests that the courts might allow such a prohibition.

It is not clear, however, how the courts would rule on possible First Amendment concerns raised by this type of restriction. A court might well find it to be an unreasonable restriction on speech or on the right to petition the government for a redress of grievances. Although governing boards have a significant interest in controlling their meetings, a court might require a local board occasionally to allow people to appear personally and publicly to address their concerns directly to the board and to request some appropriate response to their grievances, as part of this right to petition.<sup>46</sup>

According to the North Carolina Supreme Court, filing written complaints, appearing at disciplinary hearings, and making critical speeches at board meetings all involve petitioning the government for a redress of grievances.<sup>47</sup>

On the other hand, it might be argued that such a restriction is permissible because boards do provide for citizen comment during public hearings, although the hearings—and hence the comment—might be limited to particular subjects. For example, the North Carolina General Assembly’s rules do not allow for public comment during its proceedings, but legislative committees occasionally hold public hearings on particular bills. It also might be asserted that a designated public forum, and hence a need to receive public comment, is created only when a board decides it wishes to create one.

Conceivably, then, a local board might decide not to take public comment at any of its meetings except during the portions that are designated as public hearings. But politically astute and legally cautious boards will probably provide at least occasional periods for general public comment or an opportunity for citizens to be placed on the agenda of regular meetings, to avoid both appearing unresponsive (thereby hurting their chances for reelection) and having the legal issue raised.

## Other Types of Expressive Activity

What about other types of expressive activities, like carrying signs and wearing buttons, as in the third opening scenario? May restrictions be placed on these behaviors in designated public forums? It is important to realize that the “speech” the First Amendment protects involves more than the spoken word. The United States Supreme Court has recognized that freedom of speech encompasses communication through nonverbal symbols.<sup>48</sup> For example, in *Tinker v. Des Moines Independent Community School District*,<sup>49</sup> the Court upheld the right of high school students to wear black armbands to protest the Vietnam War, stating that this was “the type of symbolic act that is within the Free Speech Clause of the First Amendment.”<sup>50</sup> Similarly a concurring opinion in *Smith v. Goguen*<sup>51</sup> explained that “[a]lthough neither written nor spoken, an act may be sufficiently communicative to invoke the protection of the First Amendment. . . .”<sup>52</sup>

The Supreme Court sometimes uses the term “freedom of expression” as a synonym for “freedom of speech,” indicating that the scope of constitutional

protection extends beyond verbal communication. But not every activity is considered “speech.” For actions to be considered expressive, a “speaker” must intend that they communicate.<sup>53</sup> Most symbolic gestures by a citizen during any portion of a local board meeting that has been opened for public comment will be considered expressive conduct under the First Amendment because they will involve an intent to communicate. Included is everything from actually addressing the board to wearing a sticker on one’s shirt or carrying a placard.<sup>54</sup>

Because carrying signs and wearing buttons are expressive activities protected by the First Amendment, a board must justify restrictions on them in the same way that it justifies restrictions on verbal speech, and under the same standards. Thus reasonable controls on the time, the place, and the manner of such expression will be allowed.

Suppose a board is concerned that citizens might use signs to strike the opposition or to block the view of others at a meeting. It may impose reasonable restrictions on the size of signs or on signs that are attached to wooden or other solid handles, both to ensure safety and to avoid disruption. Or it may limit the use of signs to certain meetings and not others.

A restriction on what a sign or a button may say about a given subject, on the other hand, will cause difficulties. Comments are generally protected even if they are hostile or vulgar or disagreeable to board members. As noted earlier, censorship of unpleasant messages is a type of restriction that the courts generally do not allow.

May a board prohibit signs entirely in a designated public forum such as the public-comment portion of a meeting? In perhaps the only reported case on this point, Louisiana’s supreme court concluded that a local school board could do so.<sup>55</sup> The court upheld the board’s rule banning hand-held signs from its office building or any of its rooms. The court explained that the board’s rule was content neutral and that the board’s interest in orderly and dignified meetings was sufficient to justify this type of restriction on time, place, and manner of expression. The court also noted that there were ample alternative channels for communicating the information, including public-comment times at the board’s meetings.<sup>56</sup>

The United States Supreme Court agreed with the Louisiana court’s conclusion. Without issuing an opinion, it dismissed an appeal of the Louisiana court’s ruling on the ground that the case involved no substantial federal question.<sup>57</sup> Such a dismissal is a

decision on the merits; that is, if the Court had thought that the case raised a significant issue under the First Amendment, it probably would have heard the case. The Supreme Court's dismissal of the appeal suggests that local officials may ban hand-held signs in meeting rooms. A board should be careful, however, to ensure that people have adequate alternative ways to present their views to the board.

### Other Constitutional Claims

As local boards decide who may speak in their meetings, they also should take care not to violate the provisions of the federal and state constitutions that require equal protection of the laws.<sup>58</sup> That is, a board must not restrict someone's speech on the basis of an impermissible reason like race, religion, or national origin. And if the board has an open-public-comment period, the equal protection clause may prevent it from allowing to speak only those who wish to address topics favored by the board.

Boards also may have concerns when speakers deal with religious topics. In general, United States Supreme Court cases indicate that people who wish to speak on religious issues will be subject to the same limitations that are placed on others.<sup>59</sup> But a board should be careful not to appear to favor one religion over another. Such favoritism is unacceptable under the establishment clause of the First Amendment, which forbids government from making laws "respecting an establishment of religion."

### Summary

Local government boards are free to make reasonable rules governing public comments during their meetings. They may choose to allow comments only at certain times, on certain subjects, or in certain meetings, and they may impose time limits and limits on the number of persons who may address a particular issue. They must take care, however, not to exclude or silence a person because of that person's point of view, what he or she has to say about an issue, or, to some extent, how he or she says it. Boards also may not limit a speaker on the basis of his or her race or religion. During periods of open public comment, boards may limit discussion to subjects within their jurisdiction, but they should not restrict a speaker during such a period simply because his or her subject is not popular with the board. Further, if

boards choose to exclude visual expressions of opinion such as signs and banners from their meetings, they should make certain that there are adequate alternative means for communicating ideas to the board.

Helping citizens be involved with their local government is an important role of public officials in a democracy. Becoming knowledgeable about practical ways of encouraging positive discussion with citizens (see Part One of this article) and becoming informed about the legal standards just presented will assist public officials in performing that role.

### Notes

1. Part One appeared in *Popular Government* 62 (Summer 1997): 2-14.

2. Susan Moran, "Report on the NC Clerks Survey: Public Addresses to Boards," Pitt County, N.C., April 25, 1996. Moran was Pitt County's public information officer from August 1994 to October 1996. At the time of the survey, the Pitt County Board of County Commissioners was considering how best to receive public comment during its meetings.

3. E. H. ("Woody") Underwood, director of operations and membership services, North Carolina League of Municipalities, telephone conversations with John Stephens, October 1996.

4. Ann McColl, legal counsel, North Carolina School Boards Association, telephone conversation with John Stephens, June 2, 1996.

5. *See generally* *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555 (1980), in which the Supreme Court held that, under the First and Fourteenth amendments, the public and the press have a right of access to criminal trials. Some of the reasons that the Court gave for finding such a right of access also may apply to meetings of local government boards. For example, Chief Justice Warren Burger noted that the freedoms of speech and the press and the rights to assemble and to petition the government for a redress of grievances

share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. . . . "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." Free speech carries with it some freedom to listen.

*Richmond*, 448 U.S. at 575-76 (citation omitted). This freedom to listen and to receive information and ideas is enhanced if proceedings are open.

6. N.C. Gen. Stat. § 143-318.10(a) (hereinafter the General Statutes will be cited as G.S.). The terms "official meet-

ing” and “public body” are defined in G.S. 143-318.10(b) through (d). The main exceptions to the law applicable to local governments are the authorizations for closed sessions, found in G.S. 143-318.11.

7. G.S. 143-318.14(a).

8. G.S. 143-318.14(b).

9. G.S. 143-318.17.

10. For a detailed description of the types of public hearings allowed and required under North Carolina city and county law, see David W. Owens, “Zoning Hearings: Knowing Which Rules to Apply,” *Popular Government* 58 (Spring 1993): 26–35.

11. A “public hearing” is a portion of a public meeting specifically devoted to hearing from interested citizens, businesses, and civic groups about a specific subject. At the hearing, governmental officials may offer background information, but the goal is for them to receive information, viewpoints, concerns, questions, and so on from citizens. The public officials generally end the hearing before they take any action.

Under North Carolina law, public bodies must hold public hearings before they act only if they are specifically required to do so by statute or case law. The most common statutory instances for cities and counties involve consideration of various land-related and financial matters. Thus city councils and boards of county commissioners, under G.S. 160A-364 and 153A-323 respectively, must hold public hearings, advertised in a specific way, when they wish to take action adopting, amending, or repealing zoning, subdivision, housing, or other types of ordinances specified in G.S. Chapter 160A, Article 19, or G.S. Chapter 153A, Article 18.

Cities and counties also must give published notice and hold hearings before they may engage in certain types of economic development activities [G.S. 158-7.1(c)], and cities must hold hearings with specified notice before they adopt annexation ordinances [G.S. 160A-31(c), (d); -37(a) through (d); -49(a) through (d); -58.2]. Both cities and counties must advertise and hold public hearings on the annual budget [G.S. 159-12], on proposed general-obligation bond orders (G.S. 159-54, -56, -57), and on installment-financing transactions involving real property [G.S. 160A-20(g)].

12. A different rule applies to agendas of special meetings of local government boards. Special meetings of most boards are called to deal with specific topics, so their agendas are usually set in advance. Although the agendas of special meetings can sometimes be changed, doing so is often difficult. *See, e.g.*, G.S. 153A-40(b) and 160A-71(b)(1), which require all members of a board of county commissioners or a city council, as appropriate, to be present or to sign a written waiver before items may be added to the stated agenda of a special meeting.

13. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

14. *Perry*, 460 U.S. at 45, quoting *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939).

15. *Perry*, 460 U.S. at 45.

16. *Perry*, 460 U.S. at 45, quoting *Carey v. Brown*, 447 U.S. 455, 461 (1980).

17. *See, e.g., Carey*, 447 U.S. at 455, in which the Court applied the strict-scrutiny test under the equal protection clause of the Fourteenth Amendment (Section 1), as well as under the First Amendment, in a case involving content-based discrimination among types of speech.

18. *See, e.g., Perry*, 460 U.S. at 48–49 (text and n.9), in which the Court assumed that discrimination on the basis of viewpoint is generally forbidden by the First Amendment.

19. *Perry*, 460 U.S. at 45–46.

20. G.S. 143-318.10(a), -318.11. As noted earlier, the open meetings law allows public bodies to close their meetings for certain limited purposes, and the United States Supreme Court has approved the holding of such closed, nonpublic sessions: “Plainly, public bodies . . . may hold nonpublic sessions to transact business.” *City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm’n*, 429 U.S. 167, 175, n.8 (1976).

21. Public property that “is not by tradition or designation a forum for public communication” also is considered to be a nonpublic forum. *Perry*, 460 U.S. at 46. As noted in the text, most government offices and facilities used in daily operations fall into this category. Even though much communication obviously takes place in such locations, citizens have no general right to express themselves in most government-owned facilities unless the facilities are traditional public forums or are serving as designated public forums.

Control over access to nonpublic forums may be based on subject matter. For example, a speaker who wishes to address a topic not encompassed in the intended purpose of a nonpublic forum may be prevented from doing so. Control also may be based on a speaker’s identity. For example, if a speaker is not a member of the class of speakers for whose special benefit the nonpublic forum was created, he or she may be kept from speaking. The distinctions drawn must be reasonable in light of the purpose that the nonpublic forum at issue serves. *Perry*, 460 U.S. at 49. But it is not necessary to use the *most reasonable* limitation. *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 808 (1985).

22. Letter from William W. Van Alstyne, William R. and Thomas C. Perkins Professor of Law, Duke University, to A. Fleming Bell, II, April 11, 1997. We are grateful to Professor Van Alstyne for his helpful ideas and suggestions concerning this article.

23. *Madison*, 429 U.S. at 174–75.

24. *Madison*, 429 U.S. at 174–75 and nn.6, 8.

25. *Moore v. City of Creedmoor*, 345 N.C. 356, 369, 481 S.E.2d 14, 22 (1997) (citing *Madison*, 429 U.S. at 176).

26. *See Devine v. Village of Port Jefferson*, 849 F. Supp. 185 (E.D.N.Y. 1994) (holding that open meetings in which public discourse is invited on “matters at hand” are limited public forums for First Amendment analysis).

27. One of the few areas in which the Court has allowed content-based restrictions is pornography and obscenity. *See, e.g., Young v. American Mini Theatres*, 427 U.S. 50 (1976) (concluding that a city’s interest in the present and future character of its neighborhoods adequately supported its classification of motion pictures according to their

“adult” content); and *Ginsberg v. New York*, 390 U.S. 629 (1968) (finding that a state’s interest in the well-being of its youth justified a regulation that defined obscene material on the basis of its appeal to minors).

28. *Musso v. Hourigan*, 836 F.2d 736 (2d Cir. 1988).

29. *Musso*, 836 F.2d at 738–39.

30. *Musso*, 836 F.2d at 742–43.

31. *Thompson v. City of Clio*, 765 F. Supp. 1066, 1072 (M.D. Ala. 1991) (citations omitted).

32. See, e.g., *State v. Rosenfeld*, N.J. App. Div. (no opinion), cert. denied, 283 A.2d 535 (N.J. 1971), vacated mem. sub nom. *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972) [remanded for reconsideration in light of *Cohen v. California*, 403 U.S. 15 (1971), and *Gooding v. Wilson*, 405 U.S. 518 (1972)], vacated per curiam sub nom. *State v. Rosenfeld*, 295 A.2d 1 (N.J. App. Div. 1972), modified and aff’d, 303 A.2d 889 (N.J. 1973). *Rosenfeld* involved a person who used a profane descriptive adjective four times during his remarks at a public meeting of a local school board held to discuss racial conflicts. He was convicted of violating a statute that, as interpreted by the New Jersey Supreme Court, prohibited indecent words spoken loudly in a public place that were of such a nature as “to be likely, in the light of the gender and age of the listener and the setting of the utterance, to affect the sensibilities of a hearer.” The words had to be “spoken with the intent to have the above effect or with a reckless disregard of the probability of the above consequences.” *Rosenfeld*, 303 A.2d at 890–91 [quoting *State v. Profaci*, 266 A.2d 579, 583–84 (N.J. 1970)]. (The lower court did not find *Rosenfeld*’s words to be “fighting words,” which the state also prohibited. *Rosenfeld*, 303 A.2d at 892.)

The United States Supreme Court vacated this judgment without expressing an opinion and remanded the case to the Appellate Division of the New Jersey Superior Court. Four justices dissented with opinions. *Rosenfeld*, 408 U.S. at 901. The Supreme Court’s vacation and remand order may indicate that the Court probably considered a prohibition on language affecting a hearer’s sensibilities to be unconstitutional. In a later opinion in the case, the New Jersey Supreme Court recognized that the statutory provision under which *Rosenfeld* was convicted was no longer viable under the Supreme Court decisions cited in the remand order. *Rosenfeld*, 303 A.2d at 893, 894–95.

33. See, e.g., *Gooding*, 405 U.S. at 524.

34. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964).

35. *Madison*, 429 U.S. at 175, n.8; *Perry*, 460 U.S. at 46, n.7 [citing *Madison* and *Widmar v. Vincent*, 454 U.S. 263 (1981)].

36. Compare the broad grant of authority for the conduct of public hearings in G.S. 153A-52 and 160A-81: “The [board of county commissioners/city council] may adopt reasonable rules governing the conduct of public hearings, including but not limited to rules (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.”

37. *Madison*, 429 U.S. at 180 (Stewart, J., concurring).

38. *Collinson v. Gott*, 895 F.2d 994 (4th Cir. 1990).

39. See *Collinson*, 895 F.2d at 1000, 1005–06, 1011.

40. *Collinson*, 895 F.2d at 1000. Similarly, in *Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989), the Eleventh Circuit Court of Appeals found in favor of the mayor and the city council when the mayor rebuked and subsequently removed a citizen from a meeting for speaking on the council’s general spending habits instead of the topic at hand. It explained, “[W]e . . . consider the mayor’s interest in controlling the agenda and preventing the disruption of the commission meeting sufficiently significant to satisfy” the requirement that a valid regulation of time, place, and manner serve a significant governmental interest. *Jones*, 888 F.2d at 1333.

The court also found that the means employed by the mayor to achieve the stated interest were tailored narrowly enough to meet the “narrow tailoring” requirement for restrictions on time, place, and manner, and that ample alternative channels of communication were available. The citizen could have spoken on general spending policies of the commission during a regular period for public discussion of non-agenda items at the end of the meeting. *Jones*, 888 F.2d at 1333–34.

Another illustrative case, *Wright v. Anthony*, 733 F.2d 575 (8th Cir. 1984), involved a public hearing at which a speaker, Albert R. Wright, was interrupted after his allotted time of five minutes had elapsed. Wright sued. The court again held in favor of the defendants, United States Representative Beryl Anthony and others, explaining that Representative Anthony’s action was not caused by the content of Wright’s message and that “the restriction may be said to have served a significant governmental interest in conserving time and in ensuring that others had an opportunity to speak. Thus, it does not appear that the limitation placed on Wright’s speech was unreasonable.” *Wright*, 733 F.2d at 577. The court also noted that Wright “was not prevented from introducing all of his prepared text into the written record; he was merely prevented from reading all of it aloud.” *Wright*, 733 F.2d at 577.

41. *Freeland v. Orange County*, 273 N.C. 452, 160 S.E.2d 282 (1968).

42. *Freeland*, 273 N.C. at 457, 160 S.E.2d at 286.

43. *Freeland*, 273 N.C. at 457, 160 S.E.2d at 286.

44. See *Wright*, 733 F.2d at 575; *Collinson*, 895 F.2d at 994; respectively.

45. See, e.g., *Tannenbaum v. City of Richmond Heights*, 663 F. Supp. 995 (E.D. Mo. 1987) (finding in favor of the city when the plaintiff was removed from a city council meeting and arrested for refusing to confine her comments to the citizen-comment portion of the meeting); *Kalk v. Village of Woodmere*, 500 N.E.2d 384, 388–89 (Ohio Ct. App. 1985) (citation omitted) (holding that “[t]he right to regulate its own meetings and hearing is an inherent part of the [municipal] legislature’s power to make decisions, pass laws and, in the instant case, to determine the merits of a complaint lodged against an official of the municipality”); *New Jersey v. Smith*, 218 A.2d 147 (N.J. 1966) (upholding the conviction of

a person who was removed from a city council meeting and convicted of violating a state statute that prohibited disturbing or interfering with the "quiet or good order" of a place of assembly by noisy or disorderly conduct).

46. Professor Van Alstyne thinks it "a virtual certainty" that a qualified right of this sort will be recognized when a suitable case is presented to the Supreme Court, even though the courts in certain federal district court cases have held to the contrary—*e.g.*, *Stengel v. City of Columbus*, 737 F. Supp. 1457 (S.D. Ohio 1988); *Green v. City of Moberly*, 576 F. Supp. 540 (E.D. Mo. 1983). Letter from Van Alstyne to Bell, April 11, 1997 (see note 22).

47. *Moore*, 345 N.C. at 369, 481 S.E.2d at 23. The court also noted that when Moore spoke at the hearings and the meetings, he was using a public forum. *Moore*, 345 N.C. at 369, 481 S.E.2d at 23.

48. See Melville B. Nimmer, "The Meaning of Symbolic Speech under the First Amendment," *UCLA Law Review* 21, no. 1 (1973-74): 29.

49. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).

50. *Tinker*, 393 U.S. at 505 (citations omitted).

51. *Smith v. Goguen*, 415 U.S. 566 (1974).

52. *Smith*, 415 U.S. at 589 (White, J., concurring) (citation omitted). See also *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (noting that First Amendment rights "are not confined to verbal expression").

53. See *Wooley v. Maynard*, 430 U.S. 705, 713, n.10 and accompanying text (1977).

54. As a practical matter, when items of apparel are concerned, it may be difficult to distinguish between public-comment portions and other parts of a meeting.

55. *Godwin v. East Baton Rouge Parish School Bd.*, 408 So. 2d 1214 (La. 1981), *appeal dismissed for want of a substantial federal question*, 459 U.S. 807 (1982).

56. *Godwin*, 408 So. 2d at 1217-19.

57. *Godwin*, 459 U.S. 807 (1982).

58. U.S. Const. amend. XIV, § 1; N.C. Const. art. I, § 19.

59. When the exercise of freedom of speech involves speech concerning religious matters, the United States Supreme Court will be particularly protective:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.

Employment Div., Dep't of Human Resources of Ore. v. *Smith*, 494 U.S. 872, 881 (1990) (citations omitted). But the Court will balance this notion of protection with the idea that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878-79. Similarly the Supreme Court has stated that "proponents of ideas cannot determine entirely for themselves the time and place and manner for the diffusion of knowledge or for their evangelism. . . ." *Jones v. Opelika*, 316 U.S. 584, 594 (1942). ☐

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