Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

Worcester, ss. No. SJC-13284

Louise Barron, Jack Barron and Arthur St. Andre,
Appellants,

v.

SOUTHBOROUGH BOARD OF SELECTMEN and
TOWN OF SOUTHBOROUGH,
Appellees

On Appeal from a Judgment of the Superior Court

AMICUS BRIEF OF MASSACHUSETTS MUNICIPAL LAWYERS ASSOCIATION

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CONCISE STATEMENT OF IDENTITY OF AMICUS CURIAE AND INTEREST

The Massachusetts Municipal Lawyers Association (the "MMLA") is the oldest and largest bar association dedicated to the practice of municipal law in the Commonwealth. MMLA's mission is to promote better local government through the advancement of municipal law.

The MMLA regards the challenge to Southborough's Public Participation Policy to be significant as it highlights the tension between the work conducted by municipal officials in open public meetings and the right of the public to observe that work in a manner that allows accessible and efficient civil discourse. The scope of the rights implicated turns on a determination whether the public comment section is a traditional, designated or limited public forum.

DECLARATION OF AMICUS CURIAE

Pursuant to M.R.A.P. 17(c), amicus curiae hereby declares as follows:

(A) neither party nor counsel for either party authored this brief in whole or in part;

(B) neither party nor counsel for either party contributed funding to prepare this brief;

(C) no entity other than amicus curiae contributed funds to prepare this brief; and

(D) neither the amicus curiae nor the authors of this brief have represented one of the parties to the present appeal in another proceeding involving similar issues or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

INTRODUCTION

Louise Barron, a resident of the Town of Southborough (the "Town"), brought an action against the Town's Board of Selectmen (the "Board"), seeking in part to have the Board's policy on "Public Participation at Public Meetings" declared unconstitutional under the First Amendment. The Board argues its policy is constitutional as applied.

As a friend of the Court, MMLA submits this brief to advise the Court on the role played by Massachusetts municipal public meetings and how they are conducted, and of the First Amendment implications to those meetings depending on whether a public comment agenda item is determined to be a traditional, designated or limited public forum.

STATEMENT OF FACTS

The MMLA recites those facts relevant to its brief and urges the Court to view the last three to four minutes of the subject meeting.[1]

The Town has a "Public Participation at Public Meetings" policy (the "Participation Policy"). It

[1] The video was provided to the Court via thumb drive by the parties to this appeal. See, Appellant's Brief, page 6, fn. 1.

provides that "[a]ll remarks must be respectful and courteous, free of rude, personal or slanderous remarks." Appendix at p. 14, ("A.14"); approximately 2:33 on thumb drive video ("Video 2:33").

Pursuant to M.G.L. c. 30A, sec. 20(b), the Southborough Board of Selectmen (the "Board") posted a meeting agenda for December 4, 2018 at 6:30 in the evening. A.14. The last agenda item prior to adjournment was "Public Comment." Id.

The meeting commenced at approximately 6:30pm on a Tuesday evening. A.15. Public Comment was reached about two and one-half hours later a little past 9:00pm. A.15; Video 2:33. The Chair described public comment as a time that "town residents can bring matters to the [Board] that are not on the official agenda." He quoted the Participation Policy, comments should be "short and to the point, remarks must be respectful and courteous, free of rude, personal or slanderous remarks." He then called for Public Comment. Id. Town resident, Louise Barron, rose. Id.

Ms. Barron spoke for approximately two minutes and then posed a question to the Board. A.15; Video 2:33-35. The Chair stated that there was no discussion or back and forth during public comment. A.15; Video

2:35. During the final minute or so of Public Comment, Ms. Barron stated that she understood that the members of the Board were volunteers but they were breaking the law (the Open Meeting Law[2]). The Chair indicated that if Ms. Barron was going to slander members of the Board, he was going to stop Public Comment and go into recess. Ms. Barron responded that the Chair needed to stop being a "Hitler." The Chair called a recess. A.15; Video 2:35-2:36+.

ARGUMENT

I. A Massachusetts Municipal Public Meeting is a Statutory Forum in which a Municipal Board, Commission, Committee or Subcommittee Conducts its Business to Serve its Public Purpose.

A. Public Meeting

Massachusetts General Laws chapter 30A, section 18 defines a meeting in pertinent part:

> "Meeting", a deliberation by a public body with respect to any matter within the body's jurisdiction; …

It defines a "deliberation" and "public body" in pertinent part as follows:

…

[2] M.G.L. c. 30A, sections 18-25.

> "Deliberation", … communication … between or among a quorum of a public body on any public business within its jurisdiction; …
> …
> "Public body", a multiple-member board, commission, committee or subcommittee within the executive or legislative branch or within any county, district, city, region or town, however created, elected, appointed or otherwise constituted, established to serve a public purpose;… (*Emphasis added.)*

A public body conducts its business through a meeting.

B. Conduct of the Meeting

The chair of a public body presides over the meeting to facilitate the efficient and orderly conduct of the business before it. Massachusetts General Law chapter 30A, section 20 states in pertinent part:

> (a) Except as provided in section 21, all meetings of a public body shall be open to the public;
> …
> (f) After notifying the chair of the public body, any person may make a video or audio recording of an open session of a meeting of a public body, or may transmit the meeting through any medium, subject to reasonable requirements of the chair as to the number, placement and operation of equipment used *so as not to interfere with the conduct of the meeting*. At the beginning of the meeting the chair shall inform other attendees of any recordings.
>
> (g) No person shall address a meeting of a public body without permission of the chair, and all persons shall, at the request of the chair, be silent. No person shall disrupt the proceedings of a meeting of a public

> body. If, after clear warning from the chair, a person continues to disrupt the proceedings, the chair may order the person to withdraw from the meeting and if the person does not withdraw, the chair may authorize a constable or other officer to remove the person from the meeting. (*Emphasis added.)*

The public does have a right to *observe* an open session of a public body's meeting.[3] The public does not have a right to *participate* except in specific contexts such as public hearings.

Municipal boards can be required to hold public hearings by statute. A hearing is conducted by a quorum of a public body and involves deliberation so it is a public meeting. For example, a municipal board is required to conduct a public hearing on proposed zoning amendments pursuant to M.G.L. c. 40A, sec. 5. The public has a right to participate by commenting on the proposal. In this circumstance, the statute requiring the public hearing calls for and enables the chair to limit comment to that which is relevant to the proposed bylaw. Even in the context of a public hearing that extends participation rights,

[3] Even this right has exceptions in circumstances where the body determines that it needs to go into an "executive session" to discuss certain matters as authorized by M.G.L. c. 30A, sec. 21. Executive sessions are closed to the public. M.G.L. c. 30A, sec. 18.

the law limits the content and nature of the participation. The chair's responsibility is to conduct the hearing/meeting within the scope of its specified purpose and jurisdiction while maintaining order.

C. Meetings of Municipal Public Bodies

In the 351 communities of Massachusetts, municipal public bodies and meetings are as ubiquitous as they are varied. Some seats on boards are a struggle to fill, while others are objects of fierce competition. Some communities have large populations to draw from, while others have populations in the hundreds. The experience and legal knowledge of Boards can vary greatly from public body to public body within a single community.

Likewise, the conduct of such meetings can vary wildly. For some meetings, the chair of the public body conducts a meeting with great formality, restricting discussion to body members or planned guests of the meeting. Others regularly recognize the raised hand of an attending member of the public on whatever agenda item is being discussed. Despite differing styles, each chair conducts the business of

their public body's meeting in the fashion they think best to achieve the body's purpose.

Public Comment agenda items are an *optional* tool that some public bodies find useful to help facilitate the orderly conduct of the public business within their jurisdiction and efficiently obtain information from the public. Unfortunately, it can also be a source of statements that government officials or other individuals find insulting, hurtful or untrue. This Court's blunt and practical guidance for chairs on the extent and limits of their authority when an unqualified public comment agenda item is marked on a given night's meeting agenda would be extremely helpful. At the same time, making clear the distinction between the public participation standard to be applied to other portions of the meeting's agenda versus an optional public comment portion of an agenda also would be important. Limits set out by law, community policy and the agenda item itself must ultimately be applied by the chair in a moment.

The Open Meeting Law itself sets limits on the content to be discussed at public meetings. *See,* M.G.L. c. 30A, sec. 18. Public bodies conduct meetings

only on matters within their jurisdiction.[4] Id. The body's chair is charged with the responsibility of both running the meeting and protecting it from interference with the conduct of its business. *See*, M.G.L. c. 30A, sec. 20.

The open meeting law in combination with the particular body's public purpose and jurisdiction serve at the outset to limit the content presented at the meeting.

II. A Public Body Creates a Limited Public Forum When it Places Public Comment on the Agenda.

Both the plain language of the open meeting law and the history of case law interpreting the Public Forum Doctrine under the First Amendment lead to the conclusion that a public comment agenda item of a public meeting is a limited public forum. As such, public bodies may place restrictions on the time, place and manner of a speaker's comments, or otherwise reasonably regulate content neutral speech.

A. The First Amendment and the Public Forum Doctrine

The First Amendment to the U.S. Constitution prohibits the government from enacting laws "abridging

[4] For example, a Conservation Commission would not entertain discussion or comment on the granting of a liquor license because it would not be within their jurisdiction.

the freedom of speech." Massachusetts Coalition for the Homeless v. City of Fall River, 486 Mass. 437, 440 (2020).[5] It does not, however, provide a right of guaranteed access to public property. Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 799-800 (1985). Nor does it grant an unfettered ability to speak while on government property. R.A.V. v. St. Paul, Minn., 505 U.S. 377 (1992); Comm. v. Lucas, 472 Mass. 387, 393 (2015). Instead, the right is bounded and shaped by location in accordance with the public forum doctrine.

To determine whether a violation of the First Amendment occurs on government property, the Courts have developed the public forum doctrine. Roman v. Trustees of Tufts College, 461 Mass. 707, 713 (2012). Under the public forum doctrine, a speaker will have varying degrees of protection under the First Amendment depending on the location and the level of access historically granted to the public within that location. Perry Ed. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45-46 (1983). Government property

[5] First Amendment jurisprudence is often instructive when conducting analysis of the analogous Article 16 of the MA Declaration of Rights. Comm. v. Lucas, 472 Mass. 387, 398 n. 11 (2015).

that is open to the public will fall into one of three categories that will dictate the appropriate application of First Amendment protections for speakers within a particular forum: traditional public forum, designated public forum and limited public forum.[6] Pleasant Grove City v. Summum, 555 U.S. 460, 496-70 (2009). The public forum doctrine provides guidance to public bodies and members of the public as to the respective rights during a public meeting.

i. *Traditional Public Forum*

Traditional public forums are comprised of those places where public debate and discussion have customarily been allowed and First Amendment rights routinely attach. Perry Ed. Ass'n, 460 U.S. at 45. Streets, sidewalks, village greens, and the steps of Town Hall, for example, are all quintessential public forums, used for the free exchange of ideas, protest, discussion, and assembly. McCullen v. Coakley, 573 U.S. 464, 477 (2014); Summum, 555 U.S. at 469. The ability of the government to regulate speech in a

[6]Massachusetts Courts appear to use the terms limited public forum and nonpublic forum interchangeably on occasion. Ridley v. Massachusetts Bay Transportation Auth., 390 F.3d 65, 76 n. 3 (1st Cir. 2004). Here, the term limited public forum will be employed.

traditional public forum is limited. Perry Ed. Ass'n, 460 U.S. at 45.

In a traditional public forum, content-based regulations are subject to strict scrutiny. Perry, 460 U.S. at 45 To pass muster, it must be shown that the regulation is necessary to serve a compelling government interest and narrowly drawn to achieve that result. Id. For content-neutral regulations, restrictions on the time, place and manner of expression are permissible. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Viewpoint neutrality requires that a restriction on speech be based on something other than a disagreement with the words being said. Ridley v. Massachusetts Bay Transportation Auth., 390 F.3d 65, 82 (1st Cir. 2004). Such restrictions must be narrowly tailored to serve a significant government interest and allow for alternative methods of communication. Ward, 491 U.S. at 791.

ii. *Designated Public Forum*

A designated public forum is created when the government opens property up to the public to be used in a similar fashion as a traditional public forum. Summum, 555 U.S. at 469. Once a government body opens

a location, a meeting, or a social media page up to the public for comment, it may regulate only the "features of speech unrelated to content through the use of time, place and manner restrictions." McCullen, 573 U.S. at 477. A designated public forum will only arise upon an affirmative intent on the part of the government to create one. Cornelius, 473 U.S. at 802; Ridley, 390 F.3d at 76. When a designated public forum is created, speakers will enjoy the same First Amendment protections as they would within a traditional public forum, and the government entity is limited to those same restrictions. Summum, 555 U.S. at 469.

iii. *Limited Public Forum*

A government entity may create a limited public forum to serve certain defined purposes or delineated groups. Perry Ed. Ass'n, 460 U.S. at 46; Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995). Any restrictions placed upon speakers within a limited public forum must be reasonable and content neutral. Cornelius, 473 U.S. at 806. If restrictions are content-based, they must still be limited to the time, place and manner of expression. Ward, 491 U.S. at 791. In a limited public forum,

permissible content-based restrictions often include well defined subject matter parameters and discussion topics or they exclude speakers who are not proper participants in the discussion. Cornelius, 473 U.S. at 806; Curnin v. Town of Egremont, 510 F.3d 24 (1st Cir. 2007).

Given the parameters of the public forum doctrine, and in light of the discussion above as to the implications of the Open Meeting Law, the Court below concluded appropriately that a municipal public body creates a limited public forum when it opens a public meeting up to public comment.[7]

B. A Public Comment Agenda Item Merely Creates a Limited Public Forum.

i. The Open Meeting law Allows for the Creation of a Limited Public Forum.

Under the open meeting law, a government body is under no obligation to allow members of the public to speak or participate at a meeting, with exceptions for regulatory public hearings. Unless explicitly granted

[7] While not entirely consistent across jurisdictions, public comment during a public meeting is widely considered to be a limited public forum for purposes of determining a speaker's First Amendment rights. See Barron v. Kolenda, Worcester Sup. Ct. No. 2085CV00385, Memorandum of Decision and Order on Defendants' Motion for Judgment on the Pleadings, p. 13-14, n. 8 and cases cited therein.

permission, the public simply has no right to speak, whether by the plain language of the open meeting law or pursuant to the public forum doctrine.

When a public body does provide the opportunity for the public to speak during a public comment session, the public body is entitled to define the contours of the public's First Amendment rights by creating a limited public forum. With the creation of a limited public forum, a public board or commission is empowered, in conformity with the public forum doctrine, to set parameters as to subject matter and time limitations and may demand order from its speakers.

ii. Balancing of Rights

When creating a limited public forum by allowing public comment, a public body must be cognizant of balancing a speaker's First Amendment rights against the need for the public body to conduct an orderly meeting. At its core, the rights embodied by the First Amendment protect one's ability to openly criticize, debate, and complain about issues of public import and the workings of government. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). This protection extends to language that is unpleasant, inappropriate,

disparaging, or insensitive. Texas v. Johnson, 491 U.S. 397, 414 (1989); Iancu v. Brunetti, 139 S. Ct. 2294, 2299-300 (2019). Kindness is not required for speech to fall within the ambit of the First Amendment. A public body, however, must be able to hold orderly, efficient and productive public meetings, free from disruptions that undermine the process. Jones v. Heyman, 888 F. 2d 1328, 1332 (11th Cir. 1989). In a limited public forum, the right to free speech must be balanced against the interest the government has in conducting the day to day business of providing programs and services to the public.

As a practical matter, the difficulty in crafting reasonable content neutral regulations often arises in the grey area where speech abuts behavior. Attempts to maintain order through a seemingly facially content neutral regulation may result in impermissible viewpoint discrimination, either by application or under further scrutiny of the language of the restriction. See, e.g. Steinburg v. Chesterfield County Plan. Comm'n, 527 F.3d 377, 387 (4th Cir. 2008)(policy that prohibits personal attacks is a permissible restriction only when it is content neutral, noting that personal attacks are content

neutral when the attack is not related to an agenda item or when the attack devolves into a disruption of the meeting); Ison v. Madison Local School Dist. Bd. of Educ., 3 F.4th 887 (6th Cir. 2021)(policy that prohibits abusive, personally directed, and antagonistic statements found unconstitutionally viewpoint based); Youkhanna v. City of Sterling Heights, 934 F.3d 508, 518-20 (6th Cir. 2019)(policy that prohibits "attacks on people or institutions" held to be impermissible viewpoint discrimination); Marshall v. Amuso, 571 F. Supp. 3d 412, 423 (E.D. Pa. 2021)(policy that prohibits personally directed, abusive, offensive, intolerant and otherwise inappropriate comments or personal attacks found overbroad and vague so as to be unconstitutionally content-based); but see Moms for Liberty - Brevard County, FL v. Brevard Pub. Sch., 582 F. Supp. 3d 1214, 1219 (M.D. Fla. 2022)(policy that allows chair to interrupt speaker for "lengthy, personally directed, abusive, obscene, irrelevant" language is reasonable and content neutral).

What comes into focus from review of these cases is that it is unlikely that the meaning of the words, themselves, can form the basis of an action to silence

or remove a member of the public from a meeting of a public body.[8] Speech that causes *actual disruption* of the public meeting, upending the orderly business of government, is more clearly a suitable reason to abridge a speaker's First Amendment rights. Ideas and opinions, alone, rather than the resultant conduct, enjoy significant protection. Perry Ed. Ass'n, 460 U.S. at 46; Marshall, 571 F. Supp. 3d at 423 (when policy that prohibits disruptive comments is applied to ideas rather than conduct the policy is no longer viewpoint neutral).

Reasonable, content neutral rules and regulations merit careful consideration when crafting language to protect a constitutional right, even though "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." Ward, 491 U.S. at 794. However, small municipal boards, operated by volunteers on a Tuesday night without the benefit of Town staff or counsel available for immediate advice deserve as much clarity and guidance as possible with respect to a rule where the wrong decision could deprive someone of a deeply

[8] See Chaplinsky v. State of New Hampshire, 315 U.S. 568 (1942)(lewd, obscene, profane, libelous and "fighting words" do not merit protection under the First Amendment).

held constitutional right. When a public meeting devolves into chaos as a result of an irate resident butting heads with a green volunteer, guidance from this Court is necessary to provide a beacon for what are often split second, heat of the moment choices made by a chair of a local commission. Barbs, insults, slings and arrows may all be constitutionally sanctioned forms of critique, but members of City and Town boards must be able to trust that they have the ability to control the situation in order to conduct business when tempers flare.

III. Conclusion

MMLA urges this Honorable Court to provide necessary, helpful direction to the volunteers who serve on the thousands of Boards and Commissions across the Commonwealth, while affirming the judgment entered on Count VI, which asserts a declaratory judgment as to the constitutionality of the policy on its face.

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the applicable rules for the filing of briefs under the Massachusetts Rules of Appellate Procedure, including M.R.A.P. 16(k). This brief is compliant because the brief is produced in 12 point Courier New font and contains approximately 4271 unexcluded words as determined by the word count feature of Microsoft Word.

/s/ *Maura E. O'Keefe*
Maura E. O'Keefe

CERTIFICATE OF SERVICE

I, Maura E. O'Keefe, counsel for Amicus Curiae Massachusetts Municipal Lawyers Association hereby certify that I have caused a true and accurate copy of the foregoing document to be served upon counsel of record by electronic service through eFileMA on October 12, 2022.

/s/ *Maura E. O'Keefe*
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