



**OFFICE OF THE CITY ATTORNEY  
MEMORANDUM**

**TO:** City Council  
cc: Maurice Jones, City Manager

**FROM:** Craig Brown, City Attorney

**DATE:** March 10, 2016

**RE:** City Council Meeting Procedures

---

---

City staff has been provided with a copy of the March 9, 2016 letter from The Rutherford Institute (“TRI”) to City Council concerning Council’s Meeting Procedures and how those rules could impact the public’s participation at Council meetings. This memorandum responds to the suggestions that some of the procedures are unconstitutional infringements of First Amendment rights. The memorandum will not respond to subjective assertions that Council’s rules violate the “spirit” of the First Amendment, a debate more suited to the political arena, nor will we attempt to address every conceivable circumstance where the procedures could possibly be applied in an unconstitutional manner. That is not the standard by which the facial validity of a regulation is measured.<sup>1</sup>

In summary, after a careful and objective review of the TRI March 9<sup>th</sup> letter we can find no compelling reason to recommend any amendments to the Council Meeting Procedures as recently adopted. To the contrary, we would be very concerned about the Council’s ability to do the people’s business if, as suggested by TRI, the Council’s policies only applied to “fighting words, true threats, obscenities, and incitement of unlawful activities”, or simply restricted speech “that creates a breach of the peace”. For example, “if a member of the public at the Hearing of the Public portion of a Council meeting wanted to discuss his child’s birthday party, the proposed speech, though not presenting a danger to anyone, would be so far removed from the business of the meeting, or the Council’s or County’s business in general, that the chairperson could suppress the speech without raising First Amendment issues.” Galena v. Leone, 638 F.3d 186, 211 (3<sup>rd</sup> Cir. 2011).

Those attending Charlottesville City Council meetings have at times been outspoken and aggressive in their criticisms of the City, and have expressed their viewpoints passionately, even in very personal terms. Occasionally they have been mad or upset. With the exception of the rare incidents where it was obvious a speaker was attempting to disrupt the proceedings and hijack the meeting, speakers have enjoyed the full exercise of their First Amendment rights

---

<sup>1</sup> See, e.g., Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore, 721 F.3d 264 (4<sup>th</sup> Cir. 2013) (discussing the difference between a facial review and an “as-applied” analysis). Even though many of the rules that TRI finds upsetting were adopted three years ago, they do not cite any example where a rule has actually been applied in a manner that raised a constitutional concern.

without any adverse consequences. There is nothing in the new Meeting Procedures to suggest that citizens will not continue to enjoy the same opportunities to address City Council in the future.

There is ample case precedent establishing the authority of a local governing body to regulate proceedings that take place in the context of a limited public forum.<sup>2</sup> Perhaps most instructive and relevant for purposes of this discussion is the opinion in Steinburg v. Chesterfield County Planning Commission, 527 F.3d 377 (4<sup>th</sup> Cir. 2008). Mr. Steinburg had been ejected from a public meeting after the Chair concluded that he was not addressing the issue at hand, and he refused to sit down when so ordered by the Chair. The Court described the “uncontroversial contours” of the government’s ability to restrict speech in a limited public forum as follows:

Because of government’s substantial interest in having such meetings conducted with relative orderliness and fairness to all, officials 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* [emphasis in original] 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.FN3 This obviously contemplates that in this setting the content of speech may properly be the conscious target of state action (where it is cut off for irrelevance or manner of delivery), or its collateral victim (when it is cut off for excessive duration). But this consequence assuredly lies within well-established constitutional principles, once it is accepted, as I think we must, that disruption of the orderly conduct of public meetings is indeed one of the “substantive evils that [government] has a right to prevent.

FN3. The "disruption" to which this interest extends -- as an "evil" to be avoided -- is of course not confined to raw, physical violence, but includes any conduct that significantly violates generally or specially established rules of parliamentary order, and "disrupts" by that means the orderly conduct of a meeting.

Id. at 385-386 (quoting Collinson v. Gott, 895 F.2d 994, 1000 (4<sup>th</sup> Cir. 1990) (Phillips, J., concurring). In concluding that the Commission’s policy against “personal attacks”<sup>3</sup> was not unconstitutional, the Court reasoned:

The Commission has a significant interest in maintaining civility and decorum during the public comment sessions of its public meetings, both to ensure the efficient conduct of the people’s business and to maximize citizen participation in the discussion. To further these legitimate public interests, therefore, the Commission adopted a policy against personal attacks.

---

<sup>2</sup> If TRI’s use of the phrase “quintessential citizens’ forum” is a suggestion that City Council meetings are a traditional public forum, we would disagree.

<sup>3</sup> The City’s policy stops short of prohibiting “personal attacks” against either elected or appointed individuals, and I am confident that anyone who has actually attended Council meetings during the past few years would attest that such attacks, often in very strident terms, are not uncommon.

We conclude that a content-neutral policy against personal attacks is not facially unconstitutional insofar as it is adopted and employed to serve the legitimate public interest in a limited forum of decorum and order. Such a policy is deemed content-neutral when it serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others.

Id. at 387 (citations omitted).

In our opinion the Council Meeting Procedures are reasonable measures designed to ensure that Council meetings are conducted in an efficient and effective manner, without disruption or disorder. They are designed not only to meet the bare legal requirements for such meetings, but to encourage a robust and meaningful dialogue between City Council and individuals who attend a public meeting for the purpose of addressing City Council. The discussion that follows is in response to each of the four areas of concern identified in TRI's letter.

### Video Recording

The adopted policy states that, in the case of a disturbance or disorderly conduct that disrupts the meeting, the Mayor may suspend the meeting until order is restored, order audio and visual equipment temporarily turned off, and order areas to be cleared by the Sergeant-at-Arms.<sup>4</sup> TRI's complaint is based on their observation that "[n]othing in the rule limits its application to City-operated equipment". As you know, during the deliberation and discussion of this policy there was never any suggestion that it would be used to restrain members of the media or the public in taking notes or making their own audio or visual recordings of the proceedings. When the policy was under consideration, City staff's direction was to determine whether it was even possible to temporarily shut down the City's own equipment. The policy merely acknowledges the Mayor's authority over the audio and visual equipment operated by City personnel during a City Council meeting.

The rather blanket statement that "the First Amendment protects a citizen's right to record what transpires at meetings of government bodies open to the public" does require some response. Some courts have held that a total ban on filming in City Council meetings could violate the Constitution because it "burdens more speech than necessary to further the City's interest in maintaining order and efficiency at its City Council meetings". Tisdale v. Gavitt, 51 F.Supp.3d 1378, 1389 (N.D. Ga. 2013) (cited by TRI). Other courts have taken a more restrictive view:

Courts have generally held that there is no constitutional right to videotape public proceedings, particularly where the public has an alternative means of gathering information, such as making an audio recording or taking notes. See Rice v. Kempker, 374 F.3d 675 (8<sup>th</sup> Cir. 2004) ("hold[ing] that neither the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government

---

<sup>4</sup> See Wenthold v. City of Farmers Branch, 2012 U.S. Dist. LEXIS 18452 (N.D.Tex. 2012) (the "great deal of discretion" that must be left to the governing entity allowed the presiding officer to call for a recess to calm a disruptive crowd).

proceedings that are by law open to the public"); Whiteland Woods, 193 F.3d at 183-84 (finding no constitutional right to videotape meetings of a public planning commission where the public could take notes and make audio recordings); United States v. Kerley, 753 F.2d 617, 621 (7<sup>th</sup> Cir. 1985) (holding that the public has no right to videotape a criminal trial); Carlow v. Mruk, 425 F. Supp. 2d 225 (D.R.I. 2006) (holding that the public has no First Amendment right to videotape a public fire district meeting).

Malta v. Slagle, 2007 U.S. Dist. LEXIS 23200(W.D.N.Y. 2007).

Regardless of any constitutional concerns, as TRI itself points out, any such application of the rule beyond City owned equipment “would violate Virginia’s Freedom of Information Act, which specifically protects a citizen’s right to record an open government meeting”. When analyzing the facial validity of a regulation I know of no basis for assuming, in advance, that the regulation will be applied in a manner that may violate Virginia statutory law, rather than in a manner consistent with the law.

### Ambiguous and Vague Terms, and Unfettered Discretion

The Council Meeting Procedures prohibit “disorderly conduct” and improper comments such as campaigning for public office, promoting private business ventures, using profanity or vulgar language or gestures, threatening violence, engaging in intimidating behavior, interrupting others in a manner that disrupts the meeting or defamatory attacks on individuals or groups. It has been my experience that similar limitations are commonplace in operating procedures adopted by local government bodies, and that they are no more vague or ambiguous than the proscription against “personal attacks” upheld by court in Steinburg v. Chesterfield County Planning Commission, *supra*. Similarly, in Galena v. Leone, 638 F. 3d 186, (3<sup>rd</sup> Cir. 2011), the Court upheld the plaintiff’s removal from a Council meeting because he attempted to object to the council’s procedures at a time other than what was set aside for public comment. The Council’s administrative code allowed the presiding officer to bar a member of the public from the meeting if the individual became “boisterous or makes offensive, insulting, threatening, insolent, slanderous, or obscene remarks”. *Id.* at 191; *see also* Eichenlaub v. Township of Indiana, 385 F.3d 274 (3<sup>rd</sup> Cir. 2004) (upholding the removal of the plaintiff from a public meeting because of “repetitive and truculent” remarks, and for repeatedly interrupting the presiding officer). The First Amendment does not compel City Council to conduct its meetings in a manner akin to *The Jerry Springer Show*.

This regulation is not new – it has been applicable to City Council meetings for the past three years, without issue. While the rule’s age and uncontroversial existence does not insulate it from scrutiny, it does call into serious question the basis for an assertion that there “is a real danger that Council could use the rule to silence speakers for viewpoint discriminatory reasons”.

### Exclusion of Disruptive Persons

The Meeting Procedures allow the Mayor to expel any person for a serious violation of the rules, disruptive behavior, or any words or action that incite violence or disorder, subject to appeal to City Council. Again, this rule has been in effect, with minor modification, since 2013,

yet TRI only now feels compelled to admonish City Council about the evil specter of “unconstrained power to silence speech”. Rather than provide a long list of case precedent upholding the expulsion of individuals from public meetings for various forms of disruptive behavior, I will provide some observations from Judge Wilkinson of the United States Court of Appeals for the Fourth Circuit, which I found extremely pertinent. While he was discussing the immunity of local legislators from suit under the federal civil rights statute (Section 1983), his opinion indicates a keen understanding of how local government works:

Every presiding officer in a public meeting must, at some time, make a spontaneous judgment as to whether a speaker is abusing the forum. Section 1983 was not intended to make actionable isolated incidents in which politicians show poor judgment at a public meeting in calling someone out of order . . . Presiding officers have been running public meetings in much the same way Gott did for centuries: if he overstepped the boundary of sound judgment, he should be called to account, not under section 1983, but at the ballot box. . . The conduct of local public meetings is inescapably a discretionary act. It makes no more sense to try Gott for ruling Collinson out of order than it would make to try a district judge for the discretionary curtailment of testimony at trial. The conduct of public meetings is part of the job for which commissioners, councilmen, supervisors, and aldermen are elected.

Collinson v. Gott, *supra*, 895 F.2d at 1005, 1006-07 (Wilkinson, J., concurring).

#### Limitation on Who May Be Addressed

TRI’s final area of concern is the 2013 rule, continued in effect under the new Procedures, that states that remarks by the public must be addressed directly to Council and not to City staff, the audience, other speakers or the media. No legal authority is cited in support of a conclusion that the rule is unconstitutional, or even that it could conceivably be applied in an inappropriate manner. It is apparently based on the entirely unremarkable premise that “the most effective means of delivering the message is to direct it to that person”.

City Council meetings provide a designated time when members of the public can state a position, provide information to City Council, comment on the services, policies and affairs of the City, or present a matter that, in the speaker’s opinion, deserves the attention of City Council. It is not a designated time for speakers to chat with the Clerk of Council, the Sergeant-at-Arms, or any other member of the public within earshot. The First Amendment “does not guarantee a speaker the most effective means of communication of his message,” it does not “guarantee the right to communicate one’s views at all times and places or in any manner that may be desired”, and it does not “guarantee a speaker an absolute right to actual conversation with his audience in every circumstance”. Galena v. Leone, *supra*, 638 F.3d at 204 (citations omitted). In my opinion this benign rule poses no threat to any recognized constitutional right.