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March 9, 2016

VIA ELECTRONIC MAIL AND CERTIFIED MAIL

Charlottesville City Council
P.O. Box 911
City Hall
Charlottesville, VA 22902

Re: Council Meeting Procedures Passed on February 16, 2016

Dear Council Members:

The Rutherford Institute has spent more than 30 years advocating for transparency in government and championing the First Amendment right of the citizenry to speak candidly and openly to their elected representatives and other citizens.¹ As such, we can personally and professionally vouch for the fact that representative government works best when the government's actions are fully disclosed and citizens are allowed to speak honestly and openly to their elected representatives and other citizens without fear of retribution.

Until recently, local government meetings have remained one of the few legitimate forums available to citizens to personally address their government representatives about decisions that have immediate and substantial impact on their day-to-day lives. Unfortunately, officials at all levels of government have succeeded in insulating themselves from their constituents through the use of free speech zones, electronic town hall meetings, security barriers, regulations restricting what is said at public meetings, and other tactics that run afoul of the First Amendment's safeguards for free speech, public assembly and the right to petition the government for a redress of grievances.

Thus, we are particularly troubled to see the Charlottesville City Council marching in lockstep with those who would stifle the ardor of citizens, arbitrarily silence critics and impede efforts to assure transparency in government. As the elected representatives of the citizens of

¹ The Rutherford Institute, a national nonprofit civil liberties organization based in Charlottesville, Va., defends individuals whose constitutional rights have been violated and educates the public about threats to their freedoms.

Charlottesville, charged with establishing the policies of the City, it is crucial that you remain open to your constituents both individually and when acting as a collective Board.

It is beyond question that the First Amendment’s protection of the freedom of speech and the right to petition the government apply with full and special force at the public meetings of bodies such as the Charlottesville City Council.² Public meetings of local legislative boards have historically served as the quintessential citizens’ forum—giving individuals the opportunity to speak on the issues important to the community and to address directly those who have the authority to take action on those matters.

In this respect, the following meeting procedures that were recently adopted by the Charlottesville City Council violate the letter and spirit of these constitutional rights by imposing obstacles to transparency and citizen engagement.³

If the City is serious about being a leader in the fight for open government, it must rescind these new rules and replace them with ones that demonstrate a commitment to public participation in the democratic process.

Restrictions on Video Recording

Council has given the Mayor “control of the Council Chambers,” including the power that “[i]n case of a disturbance or disorderly conduct that disrupts the meeting, the Mayor may...[order] audio and visual equipment temporarily turned off...”

Nothing in the rule limits its application to City-operated equipment, so by its plain terms it could be used by the Mayor to stop citizens from using personal recording equipment. This application of the rule would violate Virginia’s Freedom of Information Act, which specifically protects a citizen’s right to record an open government meeting.⁴

Additionally, the First Amendment protects a citizen’s right to record what transpires at meetings of government bodies open to the public.⁵ Restrictions on this constitutional right must be narrowly tailored to serve a substantial government interest.⁶ There is no conceivable interest, much less a substantial one, in preventing a citizen from creating a precise record of what occurs at Council meetings and/or capturing and revealing the truth about the workings of government that occur in public clearly serves the public interest.

² *Steinburg v. Chesterfield County Planning Commission*, 527 F.3d 377, 385 (4th Cir. 2008).

³ “Council Meeting Procedures,” City of Charlottesville, <http://www.charlottesville.org/departments-and-services/departments-a-g/city-council/council-meeting-procedures>. Accessed on March 9, 2016.

⁴ Va. Code Ann. § 2.2-3707 (H).

⁵ *Blackstone v. State of Ala.*, 30 F.3d 117 (11th Cir. 1994).

⁶ *Tisdale v. Gravitt*, 51 F. Supp. 3d 1378 (N.D. Ga. 2014).

Indeed, the lack of any real interest in preventing recording also warrants rescinding this rule as applicable to City-owned recording equipment. Even in the case of a “disturbance” or “disorderly conduct,” what possible interest can there be in failing to record the events? Doing so only prevents creation of an accurate record of what has occurred, which may be crucial in the event legal proceedings arise out of the event. Moreover, the public has a right to see and know how their representatives and servants, including law enforcement officers, act in response to unusual circumstances.

The rule serves no substantial government interest and is only an impediment to a transparent government.

“Improper” Comments

Council also has declared that “improper comments . . . are not permitted,” including “vulgar language” and “defamatory attacks on individuals or groups.”

Plainly, these terms are ambiguous and vague, vesting the Council with a power of censorship that violates the First Amendment. A fundamental constitutional principle is that laws and rules must not grant unfettered discretion to a governmental person or entity to determine what may or may not be said in a public forum.⁷ Vesting the government with standardless discretion gives it the power to discriminate against unpopular viewpoints. This is precisely the danger to the rights of citizens created by the “improper comments” rule; the words “vulgar” and “defamatory”⁸ are so ambiguous that there is a real danger that Council could use the rule to silence speakers for viewpoint discriminatory reasons. Indeed, this rule would have a chilling effect on speech of legitimate relevance to a public meeting as speakers seek to avoid making “improper comments.”

This threat of censorship is contrary to the First Amendment because it allows for censorship of speech by government officials on the basis of disagreement with the speaker’s message.

Exclusion of Persons

The new rule giving the Mayor the power to expel persons and bar them from attending future meetings for some indefinite time suffers from the same vagueness problem. Expulsion is authorized for “serious” violations of the rules, “disruptive” behavior or words that incite “disorder.” The Mayor is then allowed to determine whether to bar that person from future meetings for a “reasonable” time.

⁷ *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

⁸ Disparaging statements are constitutionally protected if true or if made without reckless disregard of their truth, *Cox Broadcasting v. Cohn*, 420 U.S. 469, 489 (1975), and Council is not in a position to know whether a speaker is engaged in speech beyond constitutional protection.

Again, there are no standards set forth to constrain the exercise of this power and there is the very real danger that it will be used to silence speakers who are provocative and challenge Council.

This sort of unconstrained power to silence speech is fundamentally at odds with the First Amendment.

Limitation on Who May Be Addressed

The new rules also provide that the comments must only be addressed to the Council, prohibiting speakers from directing comments to any other persons.

This also is unduly restrictive and not necessary to keep the public comments pertinent and within the bounds of decorum. A speaker might have a particular issue with the action of some City official under the direction of Council or to the statements of some previous speaker, and the most effective means of delivering the message is to direct it to that person.

There is simply no compelling reason justifying this restriction.

Suggested Guidelines

Council must rectify this misguided attempt to control its public meetings by revising the rules and regulations so they are consistent with the public's right to petition and to know about the activities of their elected representatives.

In that vein, we suggest the following as guidelines:

- Video and audio recordings of Council meetings, either by the public or by the City, should not be curtailed, unless the Council can demonstrate a clear and present danger resulting from it.
- Restrictions on the content of speech by persons recognized by the meeting chair and allowed to speak must be viewpoint and content neutral; any established standards should comply with First Amendment standards by being sufficiently clear and limited to restricting unprotected speech, such as fighting words, true threats, obscenities, and incitements of unlawful activities.
- The decorum of public meetings should be protected not by regulations aimed at the content of speech, but at the manner of speech, such as by restricting the volume or noise created by a speaker, restricting speech that creates a breach of the peace, and the like.
- Speakers who are deemed in violation of a regulation should be given the opportunity to cease their violation before they are expelled from a meeting; any order barring a person

from future meetings should be for a definite time or number of meetings and should be approved by all Council members.

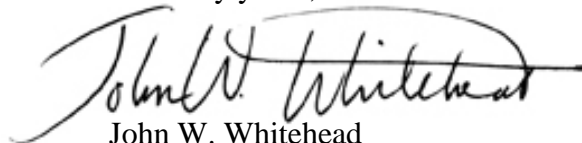
Conclusion

Instead of placing restrictions on citizens' ability to engage with their representatives at council meetings, the Council should be seeking to maintain an open and robust exchange of views with the people of Charlottesville.

The limits on speech imposed by the recently adopted rules are contrary to the fundamental principle that the activities of elected representatives be open and transparent to citizens and that the public have a right to actively and effectively engage with those representatives.

For citizens to feel vested in their government, they must know that government meetings are conducted in a transparent manner and that citizens are free to express their views to their representatives. Therefore, we urge the Council to revoke the rules it has adopted and thereby affirm the Council's commitment to open, responsive government and ensure that Council meetings remain a forum for free speech.

Sincerely yours,

A handwritten signature in black ink that reads "John W. Whitehead". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

John W. Whitehead
President

Enclosure: Memorandum re: "Public Meeting Rules: Guidelines for Protecting First Amendment Rights"