



**TOWN OF ATKINSON
MODERATOR**

Frank Polito

21 Academy Avenue
Atkinson, NH 03811
603-362-4450
frank@nh.st

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Memo To:

Board of Selectmen
Chairman of Planning Board
Chairman of Budget Committee
Chairman of ZBA
Library Trustees
Chairman of Conservation Commission
Conflict of Interest Committee
Technology Committee
Cable Advisory Committee
Highway Safety Committee
Recreation Committee
Energy Efficiency Committee

Subject:

"Freedom of Speech"

Attached you will find an interesting and enlightening article from the New Hampshire Local Government Center on "freedom of speech".

The United States Constitution grants many important rights and freedoms; the right to free speech is one of them. The First Amendment states:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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."

However, the right to free speech is not without restriction when it comes to the workings of government. The Court has ruled that

"...in the interest of the efficient execution of town business, local governing bodies are generally granted latitude to regulate the public discussion".

This article should help you better understand when (and if) it is appropriate for your board, committee, or commission to limit, restrict, or disallow public input. You should pay particular attention to the distinction between a public meeting, a public hearing/public comment "period", and a legislative body (e.g. Town Meeting Deliberative session). You should also note that this article provides examples (by case law) of what is an appropriate restriction of free speech and what is not.

If you have questions after reading this article; my advice to you is to speak with Town Counsel and or NH-LGC.

New Hampshire Local Government Center

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Public Meetings and Freedom of Speech: When Do Citizens Have a Right to Speak?

In the months leading up to town meeting, public participation in local government reaches an annual peak. Citizens attend meetings of the board of selectmen, school board, budget committee and planning board and speak at public hearings on proposed budgets, bond issues and zoning ordinances. It all culminates in the discussions, deliberations and votes at the annual meetings. Participation is, of course, encouraged because the vitality of local government is measured by the level of public interest and involvement. Many citizens feel empowered to make their views known frequently throughout the year. Yet, there is a good deal of misunderstanding among public officials and citizens alike concerning the rights of the public to speak at public meetings.

Q. There's a group of people in our town who want to come to our selectmen's meetings to complain about an incident with the road agent months ago. They claim the road agent is a thief who has misused town equipment and materials in his private business. We investigated at the time and determined that there was no proof of wrongdoing. They have written a letter claiming they have a right to say what they think about the road agent at a selectmen's meeting under the Right to Know law and the Constitution. Do they?

A. The Right to Know law, RSA Chapter 91-A, is rooted in Part 1, article 8 of the New Hampshire Constitution, which protects the public's right of access to governmental proceedings. However, the Right to Know law is devoted to assuring that meetings of public bodies will be open and governmental records available to the public. The statute does not create a right to speak at public meetings.

Q. What about a constitutional "right to be heard"?

A. There is no absolute right to speak at a public meeting. As the United States Supreme Court put it, "The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984). Certain statutes create rights to speak at public hearings under certain circumstances (for example, a budget hearing under [RSA 32:5](#) or a zoning board of adjustment hearing under [RSA 676:7](#)), and violation of these rights may in some instances be a violation of constitutional due process law.

Q. What if they make a formal request to be placed on our agenda?

A. The board of selectmen controls its own agenda. You can limit it to the items that you determine call for your attention and action. There are exceptions, of course, under particular statutes that require you to make certain kinds of decisions, such as when you receive a petition for a highway layout under RSA Chapter 231 or an application for a property tax exemption under RSA Chapter 72. You may wish to meet with citizens as a matter of policy, but rarely are you absolutely required to meet with someone.

Q. So, if we refuse to put these people on the agenda, and they show up at our meeting anyway during the period for public comment, can we prevent them from speaking?

A. "Periods for public comment" (they are usually entirely optional) are a different story. When a board creates a formal period for public comment, it creates a "forum" for speech, and those seeking to speak have constitutional protection for their freedom of speech. This is a very complicated area of law. In [HippoPress, LLC v. SMG, 150 N.H. 304, 312 \(2003\)](#), the New Hampshire Supreme Court summarized the constitutional doctrine as follows:

The United States Supreme Court has identified three distinct fora in which speech may be communicated: (1) government property that has traditionally been available for public expression (traditional public forum); (2) government property that has been opened for expressive activity by part or all of the public (designated public forum); and (3) all remaining government property (nonpublic forum)....Restrictions on speech in traditional and designated public fora are subject to the highest scrutiny and survive only if they are narrowly drawn to achieve a compelling state interest....Restrictions on speech in nonpublic fora are subject to a far more limited review and are constitutional if they are reasonable and not an effort to suppress expression based on the speaker's viewpoint....[citations omitted]

Q. Do people really make a federal case out of whether they can make a statement at a board of selectmen or school board meeting?

A. Oh, yes. Public comment periods at municipal board meetings have generated a large volume of litigation in federal courts across the country. Typically, the meeting is the culmination of a simmering dispute, and the ingredients for litigation are there: an impassioned, perhaps obsessed, citizen; inflammatory, even slanderous remarks; an exasperated board susceptible to impulsive decision-making.

Q. What kind of a "forum" is a public comment period?

A. It's certainly not a traditional public forum. That term is applied to places like streets, sidewalks and parks. Federal courts often use the term "limited public forum" to apply to public comment sessions. Some courts hold that the standard of review for a designated public forum applies; some apply the standard for a nonpublic forum. As United States District Court Senior Judge Shane Devine observed in *Spaulding v. Newport, et al.*, CV- 94-316-SD (1/31/96):

Meetings held by local governing bodies occupy their own corner of First Amendment jurisprudence. On the one hand, when a local board invites commentary from the public, it resembles the traditional public forum, which time immemorial has been sanctified as a place for unfettered debate and commentary, and the airing of various views....On the other hand, in the interest of the efficient execution of town business, local governing bodies are generally granted latitude to regulate the public discussion. [citation omitted]

No matter which level of scrutiny is used, courts will generally approve the control of public comment sessions with carefully drawn content-neutral "time, place and manner" restrictions on speech, such as limiting the subjects to matters on the agenda, limiting the time allowed to each speaker and preventing disruption of the meeting. Such regulations need to have been adopted as general policy prior to use in a controversial case. On the other hand, restrictions that are "content-based" are scrutinized strictly, and restrictions that are "viewpoint-based" are scrutinized even more strictly.

Q. Give me some examples.

A. Restrictions on speech at public comment session ruled invalid:

State labor board prohibition on dissident teachers addressing school board on collective bargaining issues. *City of Madison Joint Sch. Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976).
 Prohibition on "personal attacks." *Bach v. Sch. Bd. of the City of Virginia Beach*, 139 F. Supp. 2d 736 (E.D. Va. 2001).
 Prohibition on criticism of school employees. *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951 (S.D. Cal. 1997; *Baca v. Moreno Valley Unified Sch. Dist.*, 936 F. Supp. 719 (C.D. Cal. 1996).
 Prohibition on speaking about personnel matters or pending litigation. *Mesa v. White*, 197 F. 3d 1041 (10th Cir. 1999).

Restrictions at public comment session upheld:

Five minute time limit. *Wright v. Anthony*, 733 F.2d 575 (8th Cir. 1984).
 Prohibition on excessive repetition and irrelevant remarks. *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990).
 Subjects limited. *Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1089).

Prohibition on buttons, T-shirts and other political campaigning. *Cleveland v. City of Cocoa Beach*, 221 Fed. Appx. 875 (11th Cir. 2007).

Prohibition on rude, personal or slanderous remarks. *Scroggins v. City of Topeka*, 2 F. Supp. 1362, 1373 (D. Kan. 1998).

As the cases show, it is difficult to identify where the line may be drawn. Ultimately, when a speaker gets out of control and disrupts a meeting, the board may call police, who may remove and charge the person with disorderly conduct. *State v. Dominic*, 117 N.H. 573 (1977). Even here, as the *Spaulding v. Newport* case, cited above, illustrates, there can be uncertainty. The issue was the enforcement of a rule that prohibited selectmen from stepping down and addressing the board during the public comment session. The rule was intended to preserve time for the public to speak by requiring selectmen to do their talking during the rest of the meeting. *Spaulding*, a selectman, insisted on reading aloud to the board from a written legal opinion during the public comment session. When he refused to stop, he was arrested. *Spaulding* brought a civil rights suit against the town, the board chair and the police chief. In considering the town's motion for summary judgment seeking dismissal, the Court noted that the "no- selectman rule" appeared content-neutral on its face. However, the Court found sufficient evidence that the board chair's real motive may have been to suppress *Spaulding's* speech, which would have been an exercise of impermissible viewpoint discrimination. The motion was denied, and the litigation continued.

Q. One more thing. The leader of this group has announced that he intends to attend town meeting and tell everyone what he thinks about the road agent when the highway budget comes up for discussion. The man doesn't even live here. He's from Massachusetts and has a second home in our town. He insists he has a right to speak as a taxpayer. What kind of "forum" is town meeting?

A. No problem here, at least. In *Curnin v. Town of Egremont*, 510 F.3d 24 (1st Cir. 2007), the Court held that a New England town meeting is not subject to forum analysis at all. "The registered voters who speak and vote at Egremont's town meeting do so in their capacity as legislators. Since they are not registered voters, the Curnins are not legislators. Non-legislators have no First Amendment right to address sessions of deliberating legislative bodies." It is up to the moderator and the voters to decide whether a nonvoter may speak at town meeting.

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PO Box 617 • Concord, NH 03301 • 603.224.7447