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DATE: September 19, 2003

TO: The Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Regulating Disruptive Public Comments at Council Meetings

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MEMORANDUM OF LAW

QUESTION PRESENTED

May the City prohibit a member of the public from making offensive comments at an open meeting of the City Council when such comments disrupt the proceedings?

SHORT ANSWER

Yes. An open meeting of the Council is a limited public forum. As such, the Council may regulate the time, place, and manner of public comment and testimony. Although the Council cannot prohibit comments based solely on content, comments of a threatening, personal or abusive nature that disrupt the proceedings may be prohibited and the presiding officer of the Council may take appropriate action to stop disruptive comments and remove the individual from the meeting, if necessary.

BACKGROUND

During the public testimony of Ron Boshun at a Special Meeting of the City Council on Thursday, August 7, 2003, he accused the Mayor of being a thief and made other accusations directly against the Mayor.[1] After his testimony Councilmember Jim Madaffer requested that the City Attorney research whether it is possible to prevent public testimony of this type against a member of the City Council. The Mayor referred the matter to our office. We have reviewed the constitutional guarantees of freedom of speech, the Brown Act requirements, and the San Diego Municipal Code, and conclude that the City Council may stop public speakers only if the comment disrupts, disturbs or otherwise impedes the orderly conduct of the Council meeting.

DISCUSSION

Article 1, section 2 of the California Constitution provides, in relevant part: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." The California Constitution provides an even broader guarantee of the right of free speech than does the First Amendment. *Baca v. Moreno Valley Unified School District*, 936 F. Supp. 719, 727 (1996). In interpreting this right, the court in *Baca* concluded that a public agency may not censor speech by prohibiting citizens from speaking, even if their speech is, or may be, defamatory. *Id*. at 727.

A legislative body may not prohibit public criticism of the policies, procedures, programs, or services of an agency or its acts or omissions. Cal. Gov't Code § 54954.3(c). It is well established that a public meeting of a governmental body is a limited public forum. As such, members of the public have broad constitutional rights to comment on any subject relating to the business of the governmental body. In that regard, the Ralph M. Brown Act [Brown Act], states, in relevant part, that: "[e]very agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body." Cal. Gov't Code § 54954.3(a). Members of the public must be given an opportunity to address the legislative body on "any agenda item of interest to the public." 84 Op. Cal. Att'y Gen. 30 (2001).

The Brown Act allows local jurisdictions some latitude in how public comment may be made: "So long as the body acts fairly with respect to the interest of the public and competing factions, it has great discretion in regulating the time and manner, as distinguished from the content, of testimony by interested members of the public." *The Brown Act: Open Meetings For Local Legislative Bodies,* California Attorney General (2003), p. 28. The Brown Act does not permit local agencies to adopt provisions that are more restrictive than what is provided for under the Brown Act. Moreover, any attempt to restrict the content of such speech must be narrowly tailored to effectuate a compelling state interest. *Baca,* at 730.

In *Baca*, the court reviewed a school district's policy that prohibited comment in open session of "charges or complaints against any employee of the District, regardless of whether or

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[1] Attached is a transcription of Mr. Boshun's comments at the meeting.

not the employee is identified by name or by any reference which tends to identify the employee." *Id*. The district tried to justify this policy on several grounds, including: (i) the employees' right to privacy; (ii) the employees' liberty interest, i.e., its employees' right to notice and an opportunity to be heard; (iii) the district's interest in regulating its own meetings; (iv) the district's desire to protect "unwilling listeners" from negative comments about district employees; and (v) the presence of alternative means of communication of complaints. *Id.* at 731-37.

The court disagreed with each reason, finding that: (i) speech criticizing District employees is protected from prior restraint or censorship by the freedom of speech components of the United States and California Constitutions; (ii) the open session of a school board meeting is a designated and limited public forum pursuant to the Brown Act; (iii) regulations of speech in such fora must meet the same constitutional standards as must regulations of speech in traditional public fora; and (iv) the policy is content-based, not narrowly drawn to effectuate compelling state interests, and therefore is facially unconstitutional. *Id.* at 726-27.[2] The court also found that the concept of protecting the "unwilling listener" is tied to residential privacy, not to statements made in a limited public forum, and it is therefore up to the individual members of the audience to decide whether they want to listen to complaints and criticisms of employees, and, if they choose not to listen, they are free to leave. *Id.* at 735. With regard to the school district's argument that speech may be limited at public meetings if alternative channels of communication, such as filing a complaint and addressing the school board in closed session, were available, the court stated that "requiring all speech critical of . . . employees to occur during closed sessions not only tends to restrict the audience which the speaker may reach, but also restricts the information available to the general public, a result clearly contrary to that intended by the Brown Act." *Id.* at 736-37.

However, in *White v. Norwalk*, 900 F.2d 1421 (9th Cir. 1990), the court upheld the constitutionality of a City of Norwalk ordinance entitled "Rules of Decorum." That ordinance provides, in relevant part, that:

> Each person who addresses the Council shall not make personal, impertinent, slanderous or profane remarks to any member of the Council, staff or general public. Any person who makes such remarks, or who utters loud, threatening, personal or abusive language, or engages in any other disorderly conduct which disrupts, disturbs or otherwise impedes the orderly conduct of any Council meeting shall, at the discretion of the presiding officer or a majority of the Council, be barred from further audience before the Council during that meeting.

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[2] The reasoning of *Baca* was followed in *Leventhal v. Vista Unified School District*, 973 F. Supp. 951 (S.D. Cal. 1997) which evaluated a similar policy prohibiting complaints or charges against an employee of the school district at an open board meeting.

Id. at 1424.

The plaintiffs in that case argued that the policy was unconstitutional on its face for overbreadth and vagueness, particularly the prohibition against "personal, impertinent, slanderous or profane remarks." The City of Norwalk asserted that removal can only be ordered when someone making a proscribed remark is acting in a way that actually disturbs or impedes the meeting. *Id.* at 1424. The court, in adopting the City's narrow interpretation, stated that "[w]hile a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing, it certainly may stop him if his speech becomes irrelevant or repetitious." *Id.* at 1425 (citation omitted). In that regard, the court noted:

> [T]he nature of a Council meeting means that a speaker can become "disruptive" in ways that would not meet the test of actual breach of the peace. . . A speaker may disrupt a Council meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies. The meeting is disrupted because the Council is prevented from accomplishing its business in a reasonably efficient manner.

Id. at 1425-26. The court affirmed the role of the moderator noting that it involves a great deal of discretion. A moderator may not rule a person out of order because he disagrees with the content of the speech. *Id.* In upholding the ordinance, the court concluded that speakers are subject to restriction only when their speech "disrupts, disturbs or otherwise impedes the orderly conduct of the Council meeting." *Id*.

San Diego Municipal Code section 22.0101, Permanent Rules of the Council, does not prohibit criticism of the Council or employees during council meetings. The closest limitation on content is found in Rule 8, "Nonagenda Public Comment," which provides that members of the public may "address the Council on items of interest to the public that are not on the agenda but are within the jurisdiction of the Council." Rule 8(a). This limitation is permissible under the Brown Act. Cal. Gov't Code § 54954.3(b). The Rules also provide that speakers during nonagenda public comment shall be limited to three minutes (Rule 8(c)), and that:

> All remarks shall be addressed to the Council as a whole and not to any member thereof. The presiding officer shall not permit any communication, oral or written, to be made or read where it does not bear on something of interest to the public which is within the subject matter jurisdiction of the Council.

Rule 8(d). Accordingly, a member of the public may address the Council on "any item of interest" to the public that is "within the subject matter jurisdiction" of the Council.

With respect to regulating disruptive conduct, Rule 8.1, entitled "Public Conduct," provides authority to remove a public speaker who is disruptive. That section states: "Notwithstanding any other provision of law, no person shall cause any disruption of these

proceedings by loud, offensive, boisterous or tumultuous conduct." In addition, the Brown Act provides authority for removing individuals who are disruptive. That section states, in relevant part, that:

> In the event that any meeting is willfully interrupted by a group or groups of persons so as to render the orderly conduct of such meeting unfeasible and order cannot be restored by the removal of individuals who are willfully interrupting the meeting, the members of the legislative body conducting the meeting may order the meeting room cleared and continue in session.

Cal. Gov't Code § 54957.9. Accordingly, a member of the public whose conduct causes the disruption of the Council proceedings may be ruled out of order and removed from the proceedings. Conduct which is disruptive will depend on the particular circumstances, but shouting, intimidation, spitting, challenging to fight, or making threats could justify a warning and removal, if necessary. The presiding officer has the discretion to decide when such action should be taken.

The presiding officer must be careful to distinguish loud and offensive conduct from mere disagreement about the speaker's position or view on any matter. "[N]either the United States nor California constitution allows government to censor statements merely because they are false and/or defamatory." *Baca*, 936 F. Supp. 719 at 727. Therefore, we recommend that Rule 8.1 be amended to clarify the decorum expected at the meeting and specify procedures, such as a warning and removal, if a person disrupts the meeting. Rule 8.1 presently provides that no person shall disrupt the proceedings by "loud, offensive, boisterous or tumultuous conduct." Rule 8.1 could be amended to state:

> Notwithstanding any other provision of law, no person shall cause any disruption of these proceedings by loud, offensive, boisterous or tumultuous conduct. Any person who engages in such conduct or who utters threatening, personal or abusive language, or engages in any other conduct that disrupts, disturbs or otherwise impedes the orderly conduct of any Council meeting shall, at the discretion of the presiding officer, be barred from further audience before the Council during that meeting. Every person addressing the Council shall avoid making repetitious statements or discussing irrelevant matters. Any person having been ruled out of order by the presiding officer shall immediately conform to the orders of the presiding officer. Any person who refuses when ordered to conform to the rules of conduct may be removed from the place of the Council meeting by order of the presiding officer. *(Proposed revisions underlined).*

This proposed amendment to Rule 8.1 would apply to conduct during nonagenda public comment, public testimony on agenda items, and all other portions of the Council meeting.

CONCLUSION

An open meeting of the Council is a limited public forum. Members of the public are allowed to speak on any item of interest within the subject matter jurisdiction of the Council. Included in the public's right to free expression is the right to criticize government officials. Any attempt to prohibit such speech must be narrowly tailored to effectuate a compelling state interest. As described in the cases above, it is not enough to want to protect employees' privacy, or to protect "unwilling listeners," or the fact that alternative means of communication are available. Although the content of the speech may not be regulated, conduct that disrupts, disturbs, or otherwise impedes orderly proceedings of a Council meeting may be prohibited, as well as comments that are outside the scope of the Council's jurisdiction.

CASEY GWINN,
City Attorney

By

Catherine Bradley

Deputy City Attorney

CB:jb
Attachment
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