

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: January 27, 2021
TO: Honorable Councilmembers and City Clerk
FROM: City Attorney
SUBJECT: Use of Disturbing Imagery During Public Comment at Council and Committee Meetings

INTRODUCTION

During the non-agenda public comment portion of the February 13, 2020 meeting of the City Council's Environment Committee, members of an animal rights organization asked to display a video showing graphic images of animal cruelty in farming. Committee Chair Campbell allowed the video to be played in Committee chambers after warning attendees that the content may be disturbing. The video footage was not shown on the City's government-access cable and internet broadcast (CityTV).

This Office has been asked whether the City Council (Council) must grant the public's request to display content that some viewers may consider disturbing during the public comment portion of Council meetings.

QUESTIONS PRESENTED

1. May the Council President or Committee Chairs prohibit the display of disturbing photos or videos in Council or Committee chambers?
2. May the City block or decline to broadcast disturbing photos or videos when broadcasting Council or Committee meetings on CityTV?

SHORT ANSWERS

1. Yes, if the photos and videos are not protected speech under the United States and California Constitutions. Courts have taken a narrow view of what constitutes categorically unprotected forms of expression. Any prohibitions or restrictions on public comment and

imagery must be viewpoint neutral, reasonable in light of the purpose served by the forum, and leave open alternate channels of communication.

2. Yes, especially during daytime hours, as CityTV's cable broadcasts are governed by different regulations than open legislative meetings. However, any limitations on the broadcast of a public meeting must also be viewpoint neutral and reasonable considering the nature of live television broadcasts.

ANALYSIS

I. THE COUNCIL OR COMMITTEE CHAIR MAY PROHIBIT SPEECH THAT IS NOT ENTITLED TO FIRST AMENDMENT PROTECTION

The public generally has a First Amendment right to provide comment at legislative hearings on any topic that falls within the jurisdiction of the legislative body.¹ Some legislative bodies, including our own, allow members of the public to display visual aids, exhibits, photos, and videos on City equipment during their comments.²

A. Exceptions to the First Amendment Exist.

Protections under the First and Fourteenth Amendments extend to speech, film, and imagery even if some viewers might find it disturbing or offensive. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). The California Constitution provides an even broader free speech rights than the First Amendment.³ *Victoria Baca v. Moreno Valley Unified School District*, 936 F. Supp. 719, 727 (C.D. Cal. 1996). However, these protections do not extend to every form of speech or expressive activity. *Center for Bio-Ethical Reform, Inc. v. Irvine Company, LLC*, 37 Cal. App. 5th 97 (2019). Unprotected categories of speech include obscenity,⁴ defamation, fraud, incitement, speech integral to criminal conduct, and child pornography. *United States v. Robert J. Stevens*, 559 U.S. 460 (2010), *New York v. Paul Ira Ferber*, 458 U.S. 747 (1982).

The courts have declined to expand the list of categorically unprotected speech to animal cruelty. In *United States v. Stevens*, 559 U.S. 460 (2010), the Supreme Court overturned a criminal conviction for the possession and sale of videos depicting dog fights because the federal statute at issue was substantially overbroad. The Court held that “[d]epictions of animal cruelty are not, as a class, categorically unprotected by the First Amendment.” *United States v. Stevens*, 559 U.S.

¹ Please see detailed analysis on the Council's authority to limit public comment under the Brown Act. *See* 2003 Op. City Att'y MOL 213 (2003-17; Sep. 19, 2003); City Att'y MOL No. 2017-2 (Apr. 24, 2017); and MS-2020-29 (July 16, 2018).

² The City of San Diego generally allows the display of photos and videos that may be considered disturbing.

³ California courts rely on both state and federal law when deciding free speech issues; however, in offering broader protection, state law takes precedence. *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1025-26 (C. D. Cal. 2002).

⁴ The Supreme Court has defined “obscenity” as that which “does not have serious literary, artistic, political or scientific value.” *Marvin Miller v. State of California*, 413 U.S. 15, 15.

460, 460 (2010). Accordingly, although some would find the images presented at the Environment Committee disturbing, the presenters were properly exercising their First Amendment rights, and the Chair acted appropriately in permitting the video.

B. The Council or Committee Chair May Impose Reasonable Time, Place, and Manner Restrictions on Speech and Images

A public meeting of a governmental body is a limited public forum. As such, the Council or a Committee can regulate the time, place, and manner of speech, and sometimes the content of speech, within limitations. *Robert Norse v. City of Santa Cruz*, 629 F.3d 966, 975 (9th Cir. 2010) citing *Walter E. White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990). For example, courts have held that “[i]n order to preserve the limits of a limited public forum . . . the State may legitimately exclude speech based on subject matter where the subject matter is outside the designated scope of the forum.” *Grant T. Cogswell v. City of Seattle*, 347 F.3d 809, 815 (9th Cir. 2003).

Thus, the Council President or a Committee Chair may limit presentations, photos, and videos to topics that are within the jurisdiction of the Council or Committee. Cal. Gov't Code § 54954.3(a). In addition, Council's own rules (Rules of Council), codified in the San Diego Municipal Code (SDMC), authorize the Council President to restrict speech to topics within the subject matter jurisdiction of the Council. SDMC § 22.0101, Rule 2.6.3.⁵

Moreover, the Brown Act allows the legislative body to make “reasonable regulations, including time limits, on public comments,” so that the body may complete the business at hand. Open and Public V: A Guide to the Ralph M. Brown Act, 37 (Revised April 2016). For example, the Rules of Council limit public comment to two minutes per speaker. The League of California Cities has advised that a “legislative body probably must allow members of the public to show videos or make a PowerPoint presentation, but is under no obligation to provide equipment.” *Id.* The Council is also not obliged to provide City resources, such as equipment capable of playing the video. *Joe Nevins v. City of Chino*, 233 Cal. App. 2d 775 (1965). However, as long as the City decides to make the equipment available for public use, any restrictions or policies governing its use must be consistently applied to every public speaker.⁶

⁵ We have interpreted this rule to extend to Council Committees. The Environment Committee's areas of responsibilities are set forth in the Municipal Code and include “Wildlife Management.” SDMC § 22.0101, Rule 6.10.3(b). While animals in captivity do not fall within the plain meaning of “wildlife,” the Right to Rescue speakers raised issues with respect to the City's regulation of how private parties interact with animals, which could reasonably be interpreted as fitting within the Committee's jurisdiction. Because the jurisdiction of the City Council as a whole is broader than any Council Committee, the number of topics falling outside of its jurisdiction will be more limited.

⁶ During the COVID-19 pandemic, the Council and Committees have not permitted any non-agenda public speakers to show photos or videos during public comment due the technical limitations of virtual meetings. This is legally permissible as long as the policy is consistently applied to each speaker.

C. Any Prohibitions on Content Must Be Viewpoint Neutral, Reasonable in Light of the Purpose Served by the Forum, and Leave Open Alternative Channels of Communication

Assuming speech falls within the jurisdiction of the Council or Committee, any prohibition based on content should be: (1) viewpoint neutral; (2) reasonable in light of the purpose served by the forum; and (3) leave open alternate channels of communication. *Robert C. Steinburg v. Chesterfield County Planning Commission*, 527 F.3d 377, 385 (4th Cir. 2008); *Salvador Reza v. Russell Pearce*, 806 F.3d 497, 504 (9th Cir. 2015).

Here, a decision to prohibit the showing of a video depicting animal cruelty because of the graphic content of the video would not be viewpoint neutral and could be challenged on constitutional grounds. *Center for Bio-Ethical Reform, Inc. v. Irvine Company, LLC*, 37 Cal. App. 5th 97 (2019). In *Baca v. Moreno Valley Unified School District*, 936 F. Supp. 719, 727 (C.D. Cal. 1996), the court rejected the argument that a school district's desire to protect "unwilling listeners" from negative comments about district employees justified the school's decision to prohibit public comment regarding charges or complaints against an employee. *Id.* The court explained that the concept of protecting the unwilling listener is tied to residential privacy, not to statements made in a limited public forum, and a member of the audience who does not wish to listen is free to leave. *Id.* It is unclear whether a reviewing court would find the reading of a statement warning the audience of disturbing graphic images to be viewpoint discrimination, especially if the warning is read selectively based on a determination made by the Chair. Instead, a procedure could be established in which presenters could self-select whether the warning is necessary or a warning could be read at the beginning of all meetings where a presentation will be made.

Also, when evaluating the reasonableness of an imposed restriction, the court may find the target audience of the Council and Committees suitable to watch disturbing graphic imagery. *People for the Ethical Treatment of Animals, Inc. v. Kansas State Fair Board*, 891 F. Supp. 2d 1212 (2012). In *PETA*, the Kansas State Fair Board required exhibits containing graphic videos or images relating to animals be shielded from view by the general public at the Kansas State Fair. The court found this to be a reasonable viewpoint-neutral restriction in a limited public forum when considering "the fair made a particular effort to market itself to students and children, emphasizing both education and entertainment" *Id.* at 1227. By contrast, the audience of Council and Committee meetings is traditionally an older, more mature audience that expects to engage in discussion on controversial or politicized topics.

A reviewing court would also likely consider whether the restrictions imposed leave open alternative channels of communication. *Reza v. Pearce*, 806 F.3d 497, 504 (D. Kan. 2015). Prohibiting disturbing graphic images while allowing the speakers to continue speaking leaves open an alternate channel of communication. However, if the Council has allowed other groups to play videos while speaking on the same issue (e.g., a pro-farming group), a restriction aimed at graphic content would not survive the test of viewpoint neutrality.

Finally, as long as a quorum remains in attendance, a Council or Committee member may leave the room when disturbing images are displayed and return to the meeting as soon as the imagery ceases. This is consistent with the Brown Act so long as the member has heard enough of the discussion to meaningfully participate and this does not otherwise interfere with the right of a member of the public to directly address the legislative body. Cal. Gov. Code § 54954.3(a).

II. CITYTV IS SUBJECT TO THE SAME LIMITED PUBLIC FORUM PROTECTIONS AS A PUBLIC MEETING.

CityTV is the City of San Diego's municipal government access cable channel. CityTV provides live televised coverage of San Diego municipal meetings through streaming internet and multiple cable television providers. CityTV's own policies dictate that:

- Public meeting coverage shall not be edited or subject to editorial comment. [. . .]
- Coverage will be primarily focused on the officially recognized speaker, and on any visually displayed information that may be showing.

City of San Diego Municipal Programming and Video Production Policies (June 29, 2016) (on file with the Communications Department) ("CityTV Policy").

By covering public meetings without editorial comment and directing coverage to the current speaker and any visual exhibits, CityTV has opened a limited public forum as part of its broadcast. See *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45-46 (1983). Therefore, CityTV's broadcast of public meetings may only be subject to reasonable time, place, and manner regulations. However, the reasonableness of any limitations on public speech in this venue must be analyzed in the context of Federal Communications Commission (FCC) regulations and the cable broadcasters' policies.

The FCC regulates interstate and international communications by radio, television, wire, satellite, and cable. 47 U.S.C. §§ 151-152. The FCC has enacted regulations that generally prohibit illegal or obscene content on cable, satellite, and broadcast TV and radio. 18 U.S.C. §1464.⁷ As a live broadcaster on cable, CityTV must comply with the FCC regulations and cannot broadcast any illegal or obscene content, even accidentally, or it will be subject to sizeable penalties.

Assuming that content does not fall within one of the prohibited categories (i.e., illegal or obscene content), CityTV may regulate the speech or imagery so long as the regulations are viewpoint neutral and promote an important government interest. For instance, although profane,

⁷ The FCC regulations are more stringent for basic television as opposed to cable. See e.g. *In the matter of Various Complaints Regarding CNN's Airing of the 2004 Democratic National Convention*, 20 F.C.C.R. 6070 (2005) (indecent regulation is only applied to television broadcast services, not cable), *In the matter of Violent Television Programming and Its Impact on Children, Notice of Inquiry*, 19 F.C.C.R. 14394, 14403 (2004).

vulgar, offensive, or shocking speech is protected under the First Amendment, it is not entitled to absolute constitutional protection in all contexts. *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 728 (1978). Because CityTV is televised to a wide public audience, including unsupervised children, CityTV Policy may reasonably be more restrictive than that for a public meeting, especially during daytime hours when children are most likely to be watching. *See Id.* at 750 (recognizing the government interest in protecting unsupervised minors from exposure to vulgar and offensive spoken language on a radio broadcast); *see also* 47 Code of Federal Regulations § 73.3999 (“No licensee of a radio or television broadcast shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent”). This concern is especially relevant during the current Regional Stay Home Orders and restrictions surrounding COVID-19.

Also, unlike a public meeting, CityTV does not have the ability to preview presentations or videos that may be shown to determine whether they could violate FCC or cable broadcaster’s regulations, so it may decide to mute or block certain speech or images during a live broadcast. *See Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (recognizing a broadcaster’s ability to “bleep out” vulgar expletives without adulterating the content of a broadcast).

In addition to being viewpoint neutral, any CityTV content restriction must leave open alternate channels of communication. In this case, the ability to speak in the live public meeting itself serves as an alternative means of communication. In addition, CityTV has the option of time shifting portions of a meeting with mature content that cannot be part of a live broadcast to FCC safe harbor hours⁸ when children are less likely to constitute a significant portion of the viewing audience. *Action for Children’s Television v. Federal Communications Commission*, 58 F. 3d 654, 669 (1995) (en banc), cert. denied, 516 U. S. 1043 (1996), *Federal Communications Commission v. Pacifica Foundation*, 438 U. S. 726, 749-751 (1978) (noting that some forms of offensive expression may be withheld from the young without restricting the expression at its source).

However, any proscriptive CityTV Policy must ensure viewpoint neutrality by prohibiting editing based on point-of-view and requiring that controversial issues be presented in a reasonably fair and equitable manner.

CONCLUSION

The Council President or Committee Chair may impose reasonable time, place, and manner restrictions on speech, and may prohibit speech that is not constitutionally protected. It may, for instance, limit speakers to issues within the jurisdiction of the Council or Committee and impose time limits for each speaker in managing its meetings. Regulations must be viewpoint neutral,

⁸ Safe harbor hours are from 10 p.m. to 6.a.m. when children are less likely to be viewing.

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reasonable in light of the purpose served by the forum, and leave open alternate channels for expression. Finally, content shown on CityTV must comply with FCC regulations.

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