



Public Comment: The Wild-n-Crazy and What You Can Legally Do About It.

ULCT Midyear Conference
April 18, 2024 | St. George, Utah

Presented By: Todd Sheeran



Outline

- Public Comment and the First Amendment
- Required public hearings in Utah
- What you can do to regulate public comment
 - Identifying protected speech and its exceptions
 - Identifying the type of “forum” your entity has created
- Common public comment regulations
- Be aware of retaliation claims
- Tips



Public Comment

- Does this ring a bell?
- How many of you have experienced people “caring loudly” at you?





Public Comment and the Constitution





The First Amendment and First Amendment Claims



42 U.S.C. § 1983

No one shall be deprived
"of any rights, privileges, or
immunities secured by the
Constitution and laws..."

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The Fourteenth Amendment requires, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States..." *See also Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) ("The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech."")



Public Comment and the First Amendment

- Does the First Amendment apply to public meetings?
- It depends....
- **On one hand:** "The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271 (1984).
- **On the other hand:** States can mandate public comment, and councils can (and often do) impose public comment periods on themselves.

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5 Tex. Gov. Code § 551.007
Utah Code § 52-4-201.3.



Public Hearing Requirement in Utah (Title 10)

- Annexation Policy
- Boundary Adjustments
- Municipal Disconnect
- Municipal Consolidation
- Municipal Incorporation
- Salaries of Officials and Department Head
- Passing Budgets or Taxes
- Appropriate Money for Corporate Purpose
- Issuing Bonds
- Change of Form of Government
- General Plan Modifications
- Adopt/Change a Land Use Regulation, including Subdivision Ordinances
- Petition to Vacate a Street
- Amending Public Improvements in a Subdivision
- Modify Sign Regulations
- Designating a Steet as a “Mall”
- Provide Cable or Telecommunications

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Annexation – Utah Code § 10-2-401.5

Boundary Adjustment – Utah Code § 10-2-419

Municipal Disconnect – Utah Code § 10-2-502.5

Municipal Consolidation – Utah Code § 10-2-606

Municipal Incorporation – Utah Code § 10-2a-204.3

Salaries of Officials – Utah Code § 10-3-318; And SB91 (2024).

Change of Form of Government – Utah Code § 10-3b-603.

Passing Budgets – Utah Code §§ 10-3c-204, 10-5-107, 10-6-111

Appropriate Money – Utah Code § 10-8-2.

General Plan Modifications – Utah Code § 10-9a-204; and see Utah Code § 10-9a-302 (PC)

Adopt/Change a Land Use Regulation – Utah Code § 10-9a-205; and see Utah Code § 10-9a-302 (PC)

Petition to Vacate a Street – Utah Code § 10-9a-208

Amending Public Improvements in a Subdivision – Utah Code § 10-9a-212

Modify Sign Regulations – Utah Code § 10-9a-213

Designating a Steet as a “Mall” – Utah Code § 10-15-6

Provide Cable or Telecommunications – Utah Code § 10-18-202

Issuing Bonds – Utah Code § 10-18-302



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What Do You Do?

- How many of you have a “general public comment period”? → **Not Required**
- How many of you have public hearings for conditional use permits? → **Not Required**
- How many of you have a public hearing in City Council on land use text amendments? → **Not Required**
- How many of you have a public hearing in City Council on a zoning amendment request? → **Not Required**
- What other public hearings do you have that are not required?



Why?

- Why do you allow for public comment beyond what the State requires?



What About This?



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Or This?

This video contains content related to domestic violence. This topic may be triggering to some.

View discretion is advised.

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What Can You Do To Control Public Comment?

- **Step One:** You first must determine whether the speech is protected by the First Amendment.
- The answer to this question, in a public meeting setting, is almost always yes. In fact, most governmental entities concede this question.
- However,



Exceptions to Protected Speech

- **Incitement to Imminent Lawless Action** (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)).
- **True Threats** (*Virginia v. Black*, 538 U.S. 343 (2003)).
- **Defamation** (*Gertz v. Robert Welch*, 418 U.S. 323 (1974); and see *McKee v. Cosby*, 139 S. Ct. 675 (2019)).
- **Obscenity and Child Pornography** (*Miller v. California*, 413 U.S. 15 (1973))
- **Fighting Words** (*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

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GAME TIME: PROTECTED OR NOT PROTECTED

- At a school board meeting, a parent wanted age-appropriate books in the school. The parent asked the chair about the "hardcore anal sex" books on the book list.
- Is this speech protected by the First Amendment?



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Protected. See *McBreairty v. Sch. Bd. of RSU22*, 616 F. Supp. 3d 79 (D.C. Me. July 20, 2022)



GAME TIME:

PROTECTED OR NOT PROTECTED



Protected
speech?

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Protected. See *Mama Bears of Forsyth Cty. v. McCall*, 2022 U.S. Dist. LEXIS 234538 (D.C. Ga. Nov. 16, 2022).



GAME TIME: PROTECTED OR NOT PROTECTED



- At a Q&A with the re-elected mayor, a resident was asked to leave by one of the officers. On her way out, the resident looked at the officer in a "fierce kind of way" and muttered "a**hole," "son of a b****," and "Opie-Taylor-looking motherf*****" to the officer.
- Protected speech?

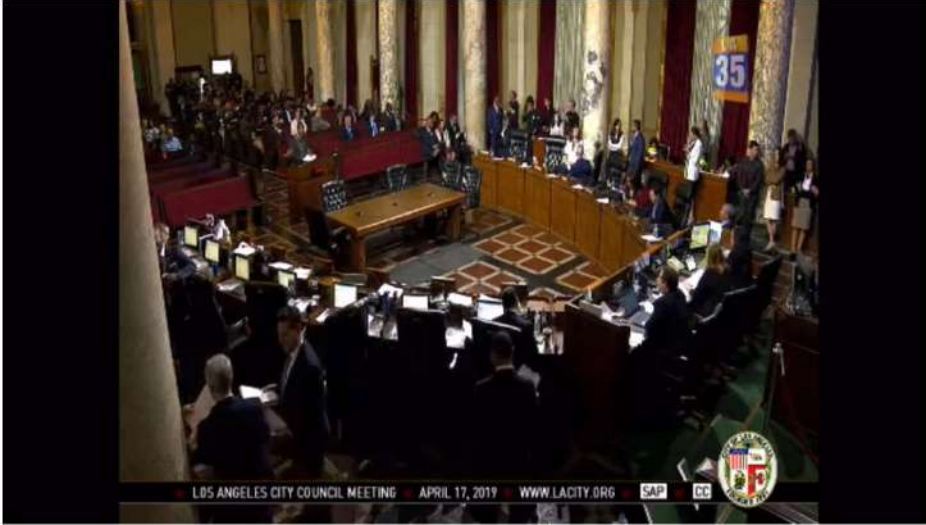
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Protected. See *Osborne v. Lohr-Robinette*, 2006 U.S. Dist. LEXIS 92275 (D.C. W. Va. Dec. 20, 2006). Note: Even though the court found the speech protected, the defendants had qualified immunity "because at the time it was not clearly established that plaintiff's speech was constitutionally protected."



GAME TIME:

PROTECTED OR NOT PROTECTED



Protected
speech?

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Not protected. See *City of Los Angeles v. Herman*, 54 Cal. App. 5th 97 (2nd Dis. Ct. Aug. 10, 2020).

→ **GAME TIME:**
PROTECTED OR NOT PROTECTED



Protected speech?

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Protected. See *Draego v. City of Charlottesville*, 2016 U.S. Dist. LEXIS 159910 (D.C. W. Va. Nov. 18, 2016).



Court Analysis: Step 2 - Forum

- **Step two:** If the speech is protected, the court must next "identify the nature of the forum" in which the speech occurred.
- For government property, there are four categories of forums:
 - **Traditional public forums** – public places usually associated with the ability to freely express themselves (e.g., parks and sidewalks).
 - **Designated public forums** - places not normally a traditional forum, but the government intentionally opened it up.
 - **Limited public forums** – property limited to use by certain groups or dedicated solely to the discussion of certain subjects.
 - **Nonpublic forum** – places where it is clear that the entity did not intend to create a public forum.

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See Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 679 n.11 (2010); *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 347 (5th Cir. 2001); *Tyler v. City of Kingston*, 74 F.4th 57 (2nd Cir. 2023).



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Designated Public Forum

- "A designated public forum consists of public property which the state has opened for use by the public as a place for expressive activity, such as a meeting space in a state-run university."
- "Reasonable time, place and manner regulations are permissible, and a **content-based prohibition must be narrowly drawn to effectuate a compelling state interest.**"

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A municipal example is having a neighborhood meeting.

McBreairty v. Sch. Bd. of RSU22, 616 F. Supp. 3d 79 (D.C. Me. July 20, 2022) (quoting *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

Perry, 460 U.S. at 46.



Limited Public Forum

- "[A] limited public forum is created when the government opens a non-public forum for public expression, *but limits expressive activity to certain kinds of speakers or the discussion of particular subjects.*"
- Public comment restrictions "need only be **viewpoint neutral and reasonable.**"

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Hotel Emples. & Rest. Union, Local 100 v. City of N.Y. Dep't of Parks & Rec., 311 F.3d 534, 552 (2nd Cir. 2002).

Id. at 546.

Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207, 212 (2nd Cir. 1997)

See also *Tyler v. City of Kingston*, 74 F.4th 57 (2nd Cir. 2023)



Comparison

Designated Public Forum

- Con: If a city denies public comment, there is a higher chance of the city losing a First Amendment case.
- Pro: More flexibility for people to speak freely, and less issues with inconsistent enforcement.

Limited Public Forum

- Pro: If a city denies public comment, there is a better chance of the city winning a First Amendment case.
- Con: Less flexibility for people to speak freely, and more issues with inconsistent enforcement.



Critical Questions

- Does your municipality have a policy on public comment?
 - Is comment classified as an "open mic"? Or does the chair say something like, "if anyone wants to speak about anything, please come up?"

5. Public Comment

Audience members may bring any item to the City Council's attention. Comments will be limited to two minutes. State Law prohibits the Council from acting on items that do not appear on the agenda. Public comments for this meeting will also be conducted

- Possible designated public forum i.e., any prohibition must be **narrowly tailored** to effectuate a **compelling state interest**.

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See Draego v. City of Charlottesville, 2016 U.S. Dist. LEXIS 159910 (D.C. W. Va. Nov. 18, 2016) ("The Charlottesville City Council ("Council"), in an effort at responsive government, holds "matters by the public" periods at its meetings, during which a citizen can speak for three minutes on essentially any topic he wants. The subject-matter of this period is unlimited and unrelated to the meeting's agenda: As conceded at oral argument, people can "talk about totally irrelevant matters if they want to" that "may not even relate to the City.")

See also Scarce v. Pittsylvania Cnty. Bd., 2023 U.S. Dist. LEXIS 166392 (D.C. W. Va. Sept. 19, 2023) (The defendant alleged, and the plaintiff did not contest, that the board meeting was a limited public forum. Thus, the "court assumes the same." However, in a footnote, the court stated that an "open mic period" created "a gaping forum that skews closer to traditional or designated public forum.")



Analysis

- Remember the guy who claimed that the increase in people being raped is because of the Muslim migrants?
- If the city had a “limited” public forum instead of a “designated” public forum, the city would have likely won that case.





Public Comment - General Rule

"There is a significant governmental interest in conducting orderly, efficient meetings of public bodies."

- *Rowe v. City of Cocoa*, 358 F.3d 800, 803 (11th Cir. 2004).

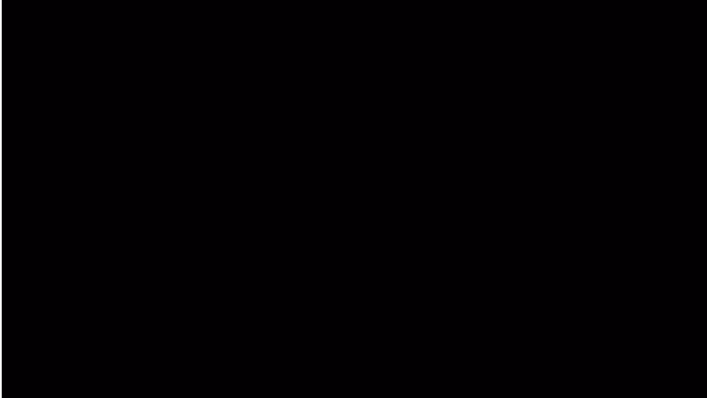


Public Comment Regulations & Policy

- Requiring names
- Requiring residency
- Time restrictions
- Irrelevant comments
- Disrespectful or attacking comments
- Signs during public meetings
- Profanity/vulgarity/obscenity
- Online vs in-person comments
- Recording of public comment



What About Requiring Names?



- Requiring a speaker to announce their name before giving public comment does not violate the First Amendment .

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See Miller v. Goggin, _ F. Supp. 3d _ (E.D. Pa, May 5, 2023).



What About Requiring Residency?

- Courts have upheld a bona fide residency requirement as a reasonable speech restriction in a limited public forum. *See, e.g., Rowe v. City of Cocoa*, 358 F.3d 800, 803-04 (11th Cir. 2004) ("It is reasonable for a city to restrict the individuals who may speak at meetings to those individuals who have a direct stake in the business of the city").





Policy Example



The Salt Lake Tribune

DONATE

Public comment returns to St. George City Council meetings — with new rules

The mayor 'paused' such comments this month after disruptions and accusations of being 'communists.'



According to the mayor's statement Tuesday, those wishing to comment at City Council meetings must live in St. George and provide their name and address to the city recorder. The public cannot comment on "any agenda item or pending land use application" — just "City business."



What About Time Restrictions?



- A time limit for speakers is a reasonable time, place and manner restriction and serves "a significant governmental interest in conserving time and in **ensuring that others had an opportunity to speak.**" *Wright v. Anthony*, 733 F.2d 575 (8th Cir. 1984). *See also Shero v. City of Grove* 510 P.3d 1196 (10th Cir. 2007) (time limitations "**promote orderly and efficient meetings.**")

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What About Limiting the Total Time Per Item?

- Courts have found that a municipality may limit the total time per topic.
- But...

Salt Lake City Council's approval of cap on public comments prompts rowdy protest

By Carter Williams, KSL.com | Posted - March 5, 2024 at 10:30 p.m.



A protester reads from a book while the Salt Lake City Council attempts to resume a meeting Tuesday night. The meeting was delayed nearly 30 minutes by disruptions from a group opposed to the council's new public comment policy. (Salt Lake City Corporation)



What about Irrelevant Comments?



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Continued

- Public comment trolling is becoming a major internet sensation and a problem for municipalities around the United States.
- Subject to state law, a municipality may (**and should**) limit discussion during the comment period to topics related to municipal business.
 - **You can likely only do this if you create a limited public forum.**

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See Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 176 n. 8 (1976); *see also Gagnon-Smith v. City of Middletown*, 2004 U.S. Dist. LEXIS 5560 (D.C. Conn. 2004); and *White v. Norwalk*, 900 F.2d 1421 (9th Cir. 1990).



How To Create A Limited Public Forum?

- Generally precluding "irrelevant" comments in a limited public forum has been found to be vague and overbroad.
- To avoid constitutional pitfalls, clearly state that **topics must relate to the specific agenda items** and, for those entities that allow for a general public comment period, state that **comments must relate to municipal business.**

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See Marshall v. Amuso, 571 F. Supp. 3d 412, 424-26 (E.D. Pa. Nov. 17, 2021).

See Miller v. Goggin, ___F.Supp.3d___ (2023) ("Policy 903 clearly sets out the parameters of relevancy by describing the two opportunities for public comment: the first "is intended for public comment or questions related to posted agenda items"; the second "is intended for public comment or questions on any topic related to district business."")



What About Criticisms of Public Officials?



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See also Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018)



Continued

Courts have said this about criticizing public officials:



• Actually, courts have said this:

- "Public officials may need to have **thicker skin** than the ordinary citizen when it comes to attacks..."

- *Mattox v. City of Forest Park*, 183 F.3d 515, 522, (6th Cir. 1999)

• And this:

- "It is asking much of City Council members, who have given themselves to public service, to tolerate profanities and personal attacks, but **that is what is required by the First Amendment.**"

- *Dowd v. City of L.A.*, 2013 U.S. Dist. LEXIS 111435, p. 61 (C.D. Cal. Aug. 7, 2013)

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What About Signs During Public Meetings?

- In *Tyler v. City of Kingston*, 74 F.4th 57 (2nd Cir. 2023), the council was scheduled to hold a public meeting to discuss whether the City would purchase an armored rescue vehicle. Several activists planned to protest the purchase and bring non vulgar or obscene signs (e.g., "No Tanks No Thanks!" and "Oh my God! No Tank! Move on!!")
- Getting word of the protest, the council (a few days earlier) passed a No Signs policy for city hall.
- The court held that "Plaintiffs have not adequately alleged that the sign prohibition was unreasonable in relation to the City's common-sense interest in running efficient and orderly meetings."

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What About Profanity / Vulgarity?

- Courts are split on the question of whether profane remarks constitute protected speech.
- One court observed that "whether profane speech is constitutionally protected may in fact depend on its context and thus, it is not categorically protected or unprotected."



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See Knots v. Or. Trail Sch. Dist. 46, 2017 U.S. Dist. LEXIS 178441 (D.C. Or. Oct. 26, 2017).



What About Online Comments?



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Continued

- You can prohibit online comments if you have physical comment period at the council meeting.
 - **Possible exception:** accommodation requests under the ADA. *See Barich v. City of Cotati*, 2022 U.S. Dist. LEXIS 222435 (N.D. Cal. Dec. 9, 2022).
- Require the camera to be turned on, name to be given, and residency stated.



What About Not Recording or Broadcasting the Comment Period?

- One court has held that denying the listening of public comments online does not violate the First Amendment. It also held that there is no First Amendment right to observe public comment outside of the physical location provided by the town.

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Potanovic v. Town of Stony Point, 2023 U.S. Dist. LEXIS 8045 (S.D. N.Y. Jan. 17, 2023)

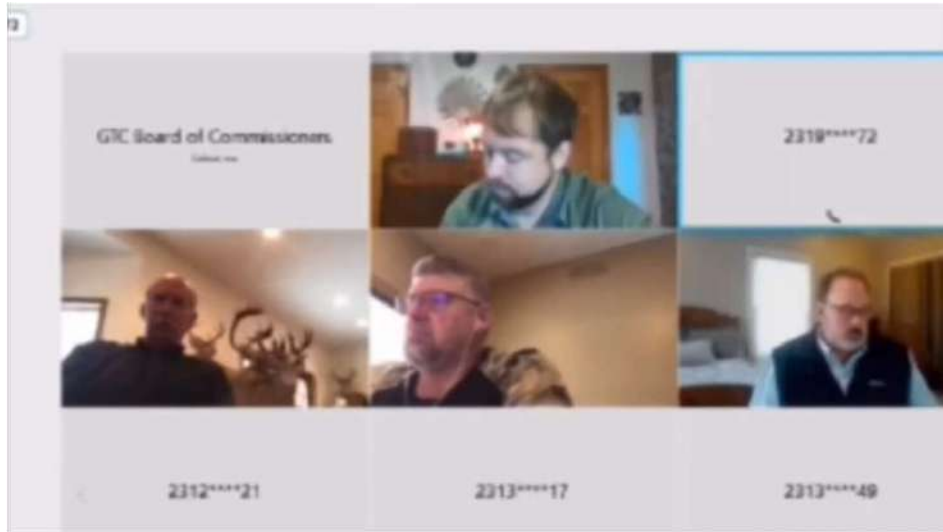


Retaliation - *MacIntosh v. Clous* (6th Cir. 2023)

- Patricia MacIntosh expressed her concern about the Commission's prior invitation to and endorsement of the Proud Boys, a group that has been designated an extremist group and a hate group. She requested that the Commissioners make a public statement condemning the group's violent behavior.
- In response, a commissioner did this:



MacIntosh v. Clous - Clip





MacIntosh v. Clous

- After the district court denied Clous' motion to dismiss, Clous appealed the decision to the Sixth Circuit.
- The Sixth Circuit held that the "facts alleged in the Complaint also demonstrate that **Clous's threat would deter a person of ordinary firmness from speaking at future meetings**" and its plausible that "**Clous is not entitled to qualified immunity** because it was clearly established that Clous's conduct violated MacIntosh's First Amendment rights."

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MacIntosh v. Clous, 69 F.4th 309, 317 & 321 (6th Cir. 2023)



Removing Commenters

- Utah Code § 52-4-301 states, “This chapter does not prohibit the removal of any person from a meeting, if the person willfully disrupts the meeting to the extent that orderly conduct is seriously compromised.”



Pro Tips

- Create a public comment policy.
- The policy should include:
 - A robust purpose statement e.g., “There is a significant governmental interest in conducting orderly, efficient meetings of the municipality.”
 - An understanding that the municipality has created a **limited** public forum and comments need to relate to municipal business or issues within the council’s purview.
 - Clear statements of restrictions e.g., residents only, time constraints per person.



Pro Tips

- Publish your public comment policy and have it available online *and* in print at the meeting (next to the public comment sign in card).
- Require anyone giving public comment to fill out a public comment card. The card should include:
 - The person's name,
 - The person's address, and
 - Acknowledgment that they will adhere to the public comment policy.



Pro Tips

- Time limits do not represent lack of interest
 - Mutual respect of all speakers
 - Key points heard
- Coaching public on participation can be helpful
 - Where emotion, conviction (including intimidation) have been effective before.



Pro Tips

- Strategy meetings between Mayor & City Manager prior to meetings
 - Anticipate issues and appropriate responses
 - Can staff help clarify informational issues?
 - Can/Should an issue be separated into parts?
 - Is further work needed?



Pro Tips

- Consider holding meetings between staff & stakeholders
 - Public has all info the municipality has
 - Public knows the governing body understands their concerns
 - Possible resolutions can be explored
- Staff encourages public respect of officials
 - Take breaks when issues get heated
 - Use humor, as appropriate



Questions?



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