

CML LEGAL CORNER



Is it time to abandon remote public comment?

By Robert Sheesley, CML general counsel

During the COVID-19 pandemic, municipalities widely adopted virtual meeting policies that included options for the public to address the governing body by telephone or video call during general public comment periods and public hearings. These options for remote public comment have been retained despite meetings largely being held in person. Just because technology makes remote comment possible, however, does not mean that continuing it is in the best interests of the municipality.

Recent episodes suggest a need to rethink how to conduct general comment periods when remote options are offered, or whether to have a remote option at all. Public comment periods have frequently become stages for performances to viewers, rather than addresses to the governing body. Worse, this month several Colorado municipalities saw groups of speakers use fake names and addresses to make antisemitic statements and other comments having no bearing on municipal business.

Remote comment options are no longer necessary to ensure public health and have become primarily a method of inclusion in government. (In some instances, remote comment may be considered an accommodation for a person with a disability that is outside the scope of this discussion.) The value of expanded participation is diminished, however, if business is delayed or if members are distracted by the commentary.

BOUNDARIES OF PUBLIC COMMENT

In general, a council or board meeting is for conducting city or town business as reflected in the meeting agenda. Officials and the public expect the body to address

the agenda meaningfully and in a timely manner. As an adjunct to a regular meeting, many municipalities also allow a public comment period, by local law or practice.

A comment period is a venue for free speech (including spoken words and expressive conduct) protected by the First Amendment to the U.S. Constitution and Article 2, Section 10 of the Colorado Constitution. The government typically cannot restrict a speaker based on the viewpoint (or opinion on a subject) they express through speech or expressive conduct. When the right to speak is provided, protecting First Amendment rights should be first in a chairperson's mind.

Often, comment periods allow the public to speak on any topic of their choosing. The content of speech often can be limited in a general comment period, provided the restriction is grounded in the law that creates the comment period. For example, that authorization may permit comment "on matters listed in the agenda" or "on matters related to the business of the city." Even then, determining whether speech relates to a particular item can be a difficult task. Public hearings, in contrast, can be more regulated as to the subject and speakers.

Within constitutional boundaries, local law or practice establishes all other requirements for public comment period. If the law is "viewpoint neutral," the municipality can regulate the "time, place, and manner" of public comment in a uniform way. Note that some speech is not protected, like speech that is directed to incite imminent violence or lawbreaking and is likely to do so.

MODIFYING REMOTE COMMENT OPTIONS

The simplest solution may be to remove remote comment options entirely. If

remote comment options are too valuable to eliminate entirely, then restrictions generally would be appropriate if they do not discriminate based on the speaker's opinion or, except where local law creates a narrow scope for the comment period, the subject of the comments. There can be time limits for individual speakers, a total time limit for public comment, a limit on the number of speakers, or an overall time limit on public comment. Pre-registration, coupled with a lottery or first-come, first-serve system, can complement meeting management. Some communities might hold a public comment period before the business meeting or defer comment until after business is completed.

Speaking at a meeting may carry unique weight, but alternate methods of communication can provide the same or better access to officials. E-mail, online comment submittal forms, town hall-style meetings, and one-on-one communications allow a member of the public to speak directly their representatives. Other means of communicating also support reasonable restrictions on commenters.

The time to evaluate whether this manner of public comment should be tolerated is before it occurs, not as a quick reaction to a troubling meeting. A governing body, in consultation with its attorney, should ask, "Is this tool useful for members of our community or has it become a distraction from public business?" and "Are we willing to allow our meeting to be used this way?" If there is any uncertainty, a body should ensure that its meeting regulations align with the purpose of allowing remote comment.

This column is not intended and should not be taken as legal advice. Municipal officials are always encouraged to consult with their own attorneys.