DANGER WILL ROBINSON: ADVISING CITY COUNCILS ON ENFORCEMENT OF COUNCIL RULES OF DECORUM[1]

"The city that silences a critic will injure itself as much as it injures the critic, for the gadfly's task is to stir into life the massive beast of the city, to 'rouse each and every one of you, to persuade and reproach you all day long.'"

Dowd v. City of Los Angeles, 2013 WL 4039043 (C.D Cal. 2013)(citing Plato, Five Dialogues, Hackett, 2dEd., Trans. GMA Grube, 35 (Apology)).

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[1] The case law in this paper was last reviewed in 2017 and is being provided to Jurassic Parliament for its use and distribution. While the author believes the case law is still 'good law', further research and review is encouraged.

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As City Attorneys we frequently face questions for which there is no clear answer. Situations are sometimes so fact specific that reliance on case law gives little comfort when providing off-the-cuff advice during a meeting. One such situation is managing comments from the public and councilmembers during council meetings. ***AFTER REVIEW OF RECENT CASE LAW, REVIEW OF COUNCIL RULES REGARDING PUBLIC COMMENT IS STRONGLY ENCOURAGED TO REVISE RULES THAT SEEK TO RESTRICT/REGULATE NON-DISRUPTIVE SPEECH AND BEHAVIOR.***

A. NO CONSTITUTIONAL RIGHT TO SPEAK AT A PUBLIC MEETING EXISTS BUT YOU HAVE GIVEN THE PUBLIC THAT OPPORTUNITY TO SPEAK – NO WHAT!

Fundamentally case law has consistently developed a clear principle that a citizen has *no Constitutional right* to speak at a public meeting. "The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy." [2] Accordingly, it is only when citizens are afforded an opportunity to speak, that their speech is subject to *limited* constitutional protection.[3]

If public comment is allowed, then the traditional public forum analysis must be reviewed to determine the extent and breadth of the authority to manage public comments during council meetings. The first step in the public forum analysis is to determine the nature of the forum at issue. The Supreme Court has created a set of categories under

[2] *Minn. State Bd. for Cmty. Colleges. v. Knight*, 465 U.S. 271, 283 (1984).

[3] *City of Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 175-76 (1976).

which different levels of constitutional scrutiny are applied -- depending upon the context of the speech. Speech in a "traditional public forum" -- such as a street corner or a park -- is subject to expansive protections.[4] On the other hand, the "non-public forum" is afforded very limited protections. These are areas -- such as military bases -- that have no historic tradition of speech, nor has the government taken steps to "open them up" for expressive activity.[5]

City councils are permitted to confine public comment to certain specified topics.[6] It is not in anyone's interest to allow unfettered "free speech" at public meetings because it can be disruptive and prevent the orderly conduct of the Council meeting. In addressing a First Amendment challenge to a mayor removing a citizen from a city commission meeting, the Eleventh Circuit provided:

> [T]he mayor's actions resulted not from disapproval of Jones' message but from Jones' disruptive conduct and failure to adhere to the agenda item under discussion. Jones began by admonishing the commission to act more prudently in its spending habits, particularly with respect to its spending on waste disposal. The commissioners' general fiscal habits were not the topic of debate, however, and the mayor quickly directed Jones to speak only on the relevant issue. Jones' retort--that his comments were germane and that it was the mayor's "problem" if he failed to recognize this--was also irrelevant, and Jones was warned that any further outbursts would result in his removal. Jones responded, "I don't think you're big enough," and was expelled. [7]

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[4] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

[5] *See, e.g., Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992) (airport terminal); *Greer v. Spock*, 424 U.S. 828 (1976) (military base); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (exterior of a city bus).

[6] "Plainly, public bodies may confine their meetings to specified subject matter…." *City of Madison*, 429 U.S. at 175 n.8; *see also*. *Jones v. Heyman*, 888 F.2d 1328, 1332 (11th Cir. 1989)

[7] *Jones v. Heyman*, 888 F.2d 1328, 1332 (11th Cir. 1989)

In the Ninth Circuit, a citizen can be stopped for speaking out of order. In *Kindt v. Santa Monica Rent Control Bd.*[8], a citizen brought § 1983 claims arising out of his conduct at a series of Rent Control Board meetings. The plaintiff alleged that he was not permitted to address all of the topics discussed, his comments were relegated to the end of the meetings, and on occasion, the citizen was ejected for being disruptive. He sued alleging a First Amendment violation. The Ninth Circuit rejected his claims, reasoning that there was not invidious regulation of speech and content was not a factor. The "need for civility and expedition in the carrying out of public business… meetings of a public body do not become free-for-alls simply because the body goes beyond what a member of the public believes (even correctly) to be the body's proper purview."[9]

In *White v. City of Norwalk*, the 9th Circuit held that the moderator at a public meeting that allows citizen input possesses authority to control the agenda and to conduct the business of government:

> [A] City Council meeting is still just that, a governmental process with a governmental purpose. The Council has an agenda to be addressed and dealt with. Public forum or not, the usual First Amendment antipathy to content-oriented control of speech cannot be imported into the Council chambers intact. In the first place, in dealing with agenda items, the Council does not violate the first amendment when it restricts public speakers to the subject at hand. While 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.[10]

In *White,* the Ninth Circuit affirmed the dismissal of claims arising out of plaintiffs' ejections from council meetings after they had been deemed "out of order" for being repetitive and irrelevant. A city guideline that prohibited "loud, threatening,

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[8] 67 F.3d 266, 271 (9th Cir. 1995).
[9] *Id.* at 272.
[10] *White v. City of Norwalk, 900 F.2d 1421, 1425 (9th Cir. 1990)*

personal or abusive language, or… any other disorderly conduct which disrupts, disturbs or otherwise impedes the orderly conduct of any Council meeting" was also upheld.[11] However, given the recent development in this area of the law, caution should be taken before removing an individual whose conduct or speech is not creating an actual disruption.

Recently, in *Norse v. City of Santa Cruz*, a citizen was ejected from a council meeting after he gave a "Nazi salute" in support of another disruptive member of the audience. [12] The mayor characterized the actions as a disturbance -- which offended and distracted the council -- and enforced the rules of order accordingly. The citizen countered that his free speech rights were limited as a consequence of his viewpoint. The district court agreed with the mayor, and affirmed dismissal of the citizen's claims. It emphasized the case law affording discretion to council moderators and the need to conduct council business.

However, on appeal the 9th Circuit court of appeals reversed and held that rules of decorum are constitutional if they only permit a presiding officer to eject an attendee for *actually* disturbing or impeding a meeting. In discussing the necessity that an actual disruption must occur prior to removal the Court stated: "Actual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, nunc pro tunc disruption, or imaginary disruption." [13] The Court held that there had not clearly been a disruption when a man "gave the Council a silent Nazi salute" and could not be the reaction of a Councilmember who felt offended or attacked.

This thread of actual disruption was further augmented again by the Ninth Circuit

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[11] *White*, 900 F.2d at 1424.
[12] *Norse v. City of Santa Cruz, 629 F.3d 966, 975, (9th Cir. 2010)*
[13] *Id. at 976.*

in *Benito Acosta v. City of Costa Mesa*[14] where the Court provided additional insight into the parameters of council rules seeking to regulate public comment. In *Benito Acosta* the court held a council rules as unconstitutionally overbroad when it prohibited "personal, impertinent, profane, insolent, or slanderous remarks." Benito Acosta, an activist appealed a U.S. District Court for the Central District of California dismissal of a First Amendment facial challenge to Costa Mesa, Cal., Mun. Code § 2-61 (making disorderly, insolent, or disruptive behavior at city council meetings a misdemeanor), and further appealed a partial summary judgment to defendants city and police officers on a Fourth Amendment claim. A jury returned a defense verdict on remaining claims.

On appeal, the Court held that the applicable rule of decorum was facially invalid because it prohibited "insolent" conduct that could fall well below the level of behavior that actually disturbed or impeded a meeting. However, the Court determined that the rule was constitutionally applied because the jury implicitly found the Benito Acosta actually disrupted the meeting. As the facts read like a good novel, I have provided a detailed recitation of the facts surrounding Acosta's eventual arrest from the Court's decision.

In December 2005, the Mayor proposed that the City enter into an agreement with Immigration and Customs Enforcement ("ICE") to have its police officers designated immigration agents with the authority to enforce federal immigration laws in the City. The proposal was placed on the City Council's December 6, 2005, agenda and passed by a vote of three to two. Members of the public were permitted to comment on the ICE agreement.

Acosta, a U.S. citizen of Mexican descent is a founding member of an

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[14] *Benito Acosta v. City of Costa Mesa*, 718 F.3d 800 (9th Cir 2013)

organization that represents the rights of undocumented and immigrant workers and their families and believed an agreement with ICE would undermine public safety because it would deter undocumented workers from reporting crimes against them for fear of deportation. He attended the December 6th council meeting to express his opposition to the proposal. Toward the end of his comments he called the Mayor a "racist pig," at which point the Mayor told Acosta to stop. Acosta repeated his slur, which prompted the Mayor to cut Acosta's speaking time short by calling for a recess. Acosta then responded by calling the Mayor a "fucking racist pig." The Council subsequently passed the proposal.

Due to significant media attention and a large number of demonstrations the City Council decided to consider the ICE agreement again at the next council meeting. During the public comment portion of the meeting a total of twenty-five speakers addressed the City Council, fifteen in favor of the agreement and ten against and the council chambers was filled to capacity.

Early into his remarks, Acosta turned away from the council and toward the audience to ask members who agreed with his viewpoint to stand similar to a previous speaker in favor of the agreement had asked. The Mayor interrupted him, saying, "No, we're not going to do that." In defiance of that order, still facing the audience, Acosta nonetheless said, "Do it," three times. Approximately twenty to thirty people stood up in response to his urging and some began clapping. The Mayor then abruptly recessed the meeting and indicated the council would return in a few minutes.

Acosta was then approached by an officer and he was asked to step down from the podium and leave the chambers and as you could imagine, Acosta did not

immediately comply. The officers then had to forcibly remove him from the chambers and take him outside of City Hall. Once outside, however, the officers encountered a large crowd and Acosta increased his efforts to resist the officers. When the officers attempted to move Acosta back into the City Hall and away from the volatile crowd of demonstrators outside City Hall (some of whom threw objects at the police), Acosta wrapped his legs and arms around a pole in an attempt to prevent the officers from moving him. The officers separated him from the pole and began moving him toward the City Hall. Acosta continued to resist, causing himself and an officer to fall to the ground.

The Costa Mesa rule relied upon by the Mayor in support of his actions provided:

> Rule 2-16 Propriety of conduct while addressing the council.
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> (a) The presiding officer at a meeting may in his or her discretion bar from further audience before the council, or have removed from the council chambers, any person who commits disorderly, insolent, or disruptive behavior, including but not limited to, the actions set forth in (b) below.
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> (b) It shall be unlawful for any person while addressing the council at a council meeting to violate any of the following rules after being called to order and warned to desist from [**16] such conduct:
> (1) No person shall make any personal, impertinent, profane, insolent, or slanderous remarks.
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> (2) No person shall yell at the council in a loud, disturbing voice.
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> (3) No person shall speak without being recognized by the presiding officer.
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> (4) No person shall continue to speak after being told by the presiding officer that his allotted time for addressing the council has expired.
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> (5) Every person shall comply with and obey the lawful orders or directives of the presiding officer.
>
> (6) No person shall, by disorderly, insolent, or disturbing action,

> speech, or otherwise, substantially delay, interrupt, or disturb the proceedings of the council.
> Costa Mesa, Cal., Mun. Code § 2-61 (2012) (emphasis added)

In analyzing this rule upheld it's prior ruling in *Norse* and stated that "[a]n ordinance that governs the decorum of a city council meeting is "not facially overbroad [if it] only permit[s] a presiding officer to eject an attendee for actually disturbing or impeding a meeting."[15] The Acosta court also upheld its prior holding that in *Norse Norwalk* that actually disturbing or impeding a meeting means and actual disruption of the meeting; and that a municipality cannot merely define disturbance in any way it chooses such as simply defining that any violation of the council rules of decorum constitutes a disturbance.

Finally, the Acosta court further emphasized its ruling in *Norwalk,* that a speaker may create a disturbance and be stopped if his speech becomes" irrelevant or repetitious," even in a limited public forum however, a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing. The Court considered two jury instruction indicating that actual disruption is measured by an effect on the audience and that profanity without more is not an actual disruption:

> "Whether a given instance of alleged misconduct substantially impairs the effective conduct of a meeting depends on the actual impact of the conduct on the course of the meeting. A speaker may not be removed from a meeting solely because of the use of profanity unless the use of profanity actually disturbs or impedes

[15] *Norse v. City of Santa Cruz, 629 F.3d 966, 976, (9th Cir. 2010*

the meeting. [16]

Therefore, it light of this ruling, council rules governing public comment should be carefully reviewed and be narrowly tailored to ensure that the rules only prohibit actual disruptive conduct. In review of the cases, however, extreme caution should be taken if a speaker's comments are becoming repetitive or "irrelevant" (that would play out nicely – the Mayor thought your comments were irrelevant so he cut your time short) but those comments are being made within the allowed time frame for public comment, it could be possible that a court could deem that not an "actual disruption".

B. THE GOOD OLD U.S. SUPREME COURT'S PORNOGRAPHY STANDARD OF 'WE CAN'T DEFINE IT BUT WE KNOW IT WHEN WE SEE IT" AS APPLIED TO AN "ACTUAL DISRUPTION".

The 9th Circuit clearly has set the standard that to survive constitutional facial validity scrutiny rules of decorum must be drafted in such a manner as to only allow a person to be ejected when that person is actually disturbing a meeting. A review of the relevant case law does not readily equate to a precise legal standard or definition of what constitutes an "actual disruption.

However, an attempt to synthesize the case law was made by a 9th circuit district court in *Dowd v. City of Los Angeles.*[17] The primary issue in question in *Dowd* was a challenge to the City of Los Angeles' lottery permit system for assigning vendors and street performers space along the tourist heavy Venice Beach Boardwalk. LA for several years had attempted to regulate activity along the boardwalk and sought to enforce regulations requiring permits. Dowd and other plaintiffs were street performers and

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[16] *Acosta*, 718 F.3d at 810

[17] *Dowd v. City of Los Angeles*, 2013 WL 4039043 (C.D. Cal. 2013)

artists who made their living singing, dancing, etc. and selling various items or accepting donations. During the course of discussions about existing and proposed ordinances regulating activity along the boardwalk, Dowd and others frequently spoke at council meetings. Frequently, comments contained the use of profanity.

Dowd and others frequently spoke at council meetings and would direct their comments specifically at certain councilmembers and the council president. In one instance the council president was called "pathetic and hopeless" and that she is "not doing a very good job and you need to get together and loser her. During one comment, a plaintiff known as Zuma Dogg challenged the City Attorney's use of outside legal counsel and spending millions and millions and that the permit regulations take money away from him by stating;" [the city attorney] can spend millions and millions and millions and millions of dollars [and] outside counsel can drag it out and I only want a fraction. As Matt Dowd would say that is fucked up." In another instance, Dogg was allowed without interruption to sing a rendition of a Whitney Houston song to express his love for a certain councilmember, but is ejected when he says, "as Matt Dowd would say that is fucked up." Occasionally, Dowd or Zuma Dogg were removed from a meeting when they were perceived to not be on topic. There was to be a Christmas Parade that was to be funded by the City and that would benefit a specific councilmembers district. Dogg started his public comment by saying " My public comment is that I want to discuss the legality of this when you've got a criminal taking the money." Dowd came to the podium and had a discussion with a councilmember about the relevance of Dogg's and Dowd's comments to the agenda item of the Christmas parade. Dowd kept saying that he wanted to speak about Councilmember Alarcon's performance as a

councilmember. The debating councilmember kept insisting the topic was the Christmas Parade and Dowd kept insisting he wanted to speak about Alacron's performance and his alleged criminal activities and Dowd was quickly removed by the Sergeant of Arms. Other incidents that involved removal of Dowd or Zuma Dogg were similar in nature.

The Court in *Dowd*, attempted to synthesize the prior ruling related to an actual disruptions. The Dowd court cited to *Norwalk* for the proposition that an actual disruption need not resemble a breach of the peace or fighting words, [18] and that "a speaker may disrupt a council meeting by speaking too long, by being unduly repetitions, or by extended discussion of irrelevancies. The meeting is disrupted because the Council is prevented from accomplishing its business in a reasonably efficient manner."[19]. The Dowd court noted a potential conflicting result where in *Kindt v. Santa Monica Rent Control Bd.,* and *Norse*. In *Kindt,* 67 F.3d 266 (9th Cir 1995), the court held that it was permissible to remove a man who had previously disrupted proceeding of the same meeting when his frequent partner in disruptive behavior made an obscene gesture which the board believed threatened to start the disruption all over again.[20] However, in *Norse* the court held that there had not clearly been a disruption when Norse gave a silent Nazi salute and was then ejected and arrested, rejecting the City's definition of disturbance as any violation of its decorum rules.

The *Dowd* court applied the principles discussed above to the incidents when Dowd or Dogg were removed. The Court held that while the evidence demonstrated significant tolerance of citizen speech on the part of the members of the City Council and the frequent comments by Dowd and Dogg, it did not mitigate for the relatively few

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[18] *Norwalk,* 900 F.2d at 1425.
[19] *Id.* at 1426
[20] *Kindt v. Santa Monica Rent Control Bd.,* 67 F.3d 266 (9th Cir 1995)

instances that Dowd and Dogg were unconstitutionally removed. The court held that in relation to the incidents identified that an actual disruption did not occur beyond the mere breach of the Rules of Decorum. Specifically, personal attacks and profanity did not rise to the level of an actual disruption. In fact, the Council appeared to deem the use of profanity as an actual disruption per se.

C. CONCLUSION:

It is clear that council rules can regulate public comment. However, council rules that are overbroad, that include the prohibition of the use of profanity, or prohibit personal attacks without the qualification of actually disrupting the meeting will likely be held unconstitutional. Additionally, when enforcing the rules of decorum, an actual disruption of the business of the council is necessary prior to removing the speaker.