Rules for Public Meetings: Help or Hindrance?

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Governing Laws

- Open Meetings Act
- First Amendment
- Fourteenth Amendment
- Legislation that requires Public Hearings (Planning, creations of TIF entities, etc.)

History of Open Meetings Act

- Sunshine Laws (Open Meetings Act, Freedom of Information Act, Bullard Plawicki Employee Right to Know) were adopted in the post-Watergate era, in several states (including Michigan) and the federal government.
- The designation was an attempt to characterize government under the statute as government operating in the sunshine of public scrutiny rather than the shadows of bureaucratic society.
- Michigan adopted sunshine legislation as early as 1895. Act No. 215 of the Public Acts of 1895 required that all city council meetings and sessions be open to the public.
Open Meetings Act (OMA)

• Michigan’s current version of the OMA took effect March 31, 1977. It has changed only slightly since then.

• All meetings of a public body shall be open to the public and shall be held in a place available to the public. (MCL 15.263)

Michigan’s OMA

• What is a Public Body? “Public body means any state or local legislative or governing body, including a board, commission, committee, subcommittee, authority, or council, that is empowered by state constitution, statute, charter, ordinance, resolution, or rule to exercise governmental or proprietary authority or perform a governmental or proprietary function.” (MCL 15.262)

Michigan’s OMA

• What is a Meeting?
  – “Meeting’ means the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy…” MCL 15.262
  – Informal canvass of individual board members to ascertain each one’s position on a matter is not a “meeting” unless there is disclosure of that position to other board members—in circumvention of the OMA.
  – Blogs or “reply to all” e-mails or instant messaging with a quorum of the public body might qualify as a meeting.
Michigan’s OMA

• What is a Meeting?
  – A meeting occurs any time a sufficient number of members of a public body constituting a quorum engage in substantive discussion and deliberation on an issue.
  • Attendance at a Grand Opening or other City event is not a “meeting” unless there is deliberation.
  • Attendance at educational conferences isn’t necessarily a “meeting.”
  • Attendance at a forum of another organization isn’t necessarily a “meeting.”

Michigan’s OMA

• What are the requirements for a place that is available to the public?
  – Can’t be in a residence unless there is no available public building without cost. Can be a non-public building or even outside the jurisdiction.
  – There is no requirement to move if the public attendance exceeds expectations. However, if a crowd is expected, the City must exercise sincere efforts to accommodate.

Michigan’s OMA

Requirements of the Open Meetings Act
• All persons shall be permitted to attend a public meeting and to address Council on any item.
  – Meetings and public comment are not restricted to City residents.
  – Rules can require that each speaker identify their name, address, and any other unique interest at the time of public comment.
  – Comment can be on any governmental issue that a member of the public feels may be of concern to the residents of the municipality.
• Each person shall be entitled to record, televise, videotape or broadcast a public meeting.
• It is recommended that the door to the meeting room is left open- or if this can’t be done, due to noise, there should be a sign on the door or outside the door indicating that the meeting is open to the public.
Michigan’s OMA

Requirements Under the Open Meetings Act

• Reasonable rules can be enacted to minimize the possibility of disruption at a meeting. These rules should be established, written and published.

• If a person commits a breach of peace at the meeting, they can then be excluded from the rest of that same public meeting- not from future meetings. Warnings should be given before taking this extraordinary measure.

Michigan’s OMA

The Open Meetings Act requires an opportunity for the public to address the public body

• The OMA requires only that time be set aside for public comment at each meeting.
  – It does not guarantee that everyone will be able to speak on any topic.
  – Time limits can be set for each speaker or on the total time for public comment.
  – Public comment can be at the beginning, middle, or end of a meeting, and does not need to be televised.

Michigan’s OMA

Rules Facilitate the Orderly Conduct of a Meeting

• Public meetings belong to the public body. This is distinguished from a “town hall” meeting that belongs to the general public. The public body is responsible for ensuring that the municipality’s business gets done.
  – The rules of procedure are a way for the presiding officer to maintain order and complete the business agenda.
  – The right to challenge the parliamentary rulings of the Chair belongs only to the members of the public body- not to members of the general public.
  – There is no right to address a public body during deliberations.
Parliamentary Procedure

- Rules are enacted to establish order and to preserve decorum.
- Rules enforce the will of the majority, while protecting the ability of the minority to participate and dissent.
- Rules should be simple, clear, and easy to use.
- Complicated rules create apprehension by the general public, and they will not participate in the public process.
- There is also a greater potential for manipulation (or at least the appearance of manipulation) if the rules are complicated and only a select few are well versed in them.
- A violation of the rules will not generally lead to an invalidation of the action. Rules of Procedure can be waived by a majority of the public body. However, a violation of the Open Meetings Act or other statutory violation may lead to additional ramifications.

Parliamentary Procedure

- Rules of Procedure prevent the minority from imposing their will upon the majority or defeat the purpose desired by the majority.
- The presiding officer has the primary responsibility to preserve order and decorum.
- The presiding officer decides all questions of order (subject to appeal of council members—then majority vote decides). A parliamentarian can provide advice to the presiding officer.

Parliamentary Procedure

- Each member of the public body has the obligation to preserve order and decorum.
- Members of the public body must respect one another, and each member shall be able to speak without being interrupted.
- Members of the public body must be versed in parliamentary procedure, and shall not refuse to obey the orders of the presiding officer (or public body).
Parliamentary Procedure

- A Sergeant-At-Arms should be designated to assist with the preservation of order and decorum.
- In Council-Manager forms of government, the Police Chief generally reports to the City Manager, and therefore a specific rule should be adopted to allow for the public body to give direct orders to a Police Chief that is designated as a Sergeant-At-Arms.

OAG Opinions on Rules

“Public bodies may establish rules to ensure the orderly conduct of meetings and the rules must be recorded by the public body... Rules established under these provisions must be flexible and should be designed to encourage public participation and attendance rather than discourage it.”

OAG Opinion 1977-78 21
(Initial explanatory opinion)

OAG Opinions on Rules

- Cannot deny a union member the right to address the public body.
- Cannot limit the subject or issues that the speaker wants to address.
- Cannot require exhaustion of administrative procedures before allowing a person to speak.
- Cannot prevent a person from talking about a closed session topic (no right to attend closed session).

OAG Opinion 1977-78 224
A public body can address the following procedural matters:
• Length of time that a person has to address a public body.
• Designation of the time for public participation during a certain part of the agenda.
• Requirement that a speaker identify himself/herself before speaking.

OAG Opinion 1977-78 224

A rule that limits the overall public comment to ½ hour may “result in certain members of the public being denied the opportunity to address the body. . .” (This would be a violation of the OMA)

OAG Opinion 1979-80 812

MI Cases Addressing Rules

  – Mr. Lysogorski arrived at the public meeting after the designated public comment time, which was placed at the front of the agenda. He sued under the First Amendment and the OMA, since the Township Board did not let him give his public comments.
  – The Court of Appeals ruled that the OMA requires a public comment time for each public meeting, but does not preclude limitations on the public comment portion.
  – The Court of Appeals also ruled that there is no right to an advance copy of the agenda.
Timmon v. Wood - (6th Circuit 2007)
Ms. Timmon sued for $30 million dollars in damages, alleging that two members of the Lansing City Council violated her First and Fourteenth Amendment rights in enforcing a Rule that prohibited "slanderous or profane remark(s) which disturb(), disrupt(), or otherwise impede() the orderly conduct of a meeting."

The Lansing Council members were granted absolute legislative immunity, since they were acting within the legitimate legislative sphere.
In the meeting itself, the Council members raised several points of order to address her numerous violations of the Rules of Procedure.

The Timmon Court also discussed qualified immunity for Council members, and held that qualified immunity is NOT available if:
- There was a constitutional violation (deprivation of a right); AND
- The right was clearly established. "Did the Council members act with the intent to silence Timmon’s viewpoint or did they act with the intent to further the legitimate gov’t. interest?"

In this case, the Court of Appeals distinguishes appropriate situations for municipal resolutions as opposed to ordinances.
Resolutions are appropriate only when a municipality is "implementing ministerial functions of government for short term purposes."
In cases of more permanence, ordinances should be adopted to “avoid secretive governmental action.”
Cases From Other Jurisdictions

- **Monteiro v. City of Elizabeth** - 436 F. 3d 397 (3rd Circuit, 2006)
  - Mr. Monteiro, a member of the elected public body, prevailed on his First Amendment claim against the Council President, who ejected him from a meeting and had him arrested. He had actively encouraged citizens to attend the public meeting, and express opposition to the budget.
  - The Court held that the President’s conduct was emotional, and rooted in personal animosity, rather than the legitimate goal of running an orderly meeting.

Cases From Other Jurisdictions

  - Mr. Jones was a regular attendee of Council meetings. After getting slightly off the agenda topic, and making a general attack on the City’s spending habits, the Mayor asked him to get back on track. He responded with a taunt to the Mayor- who used his position to direct two police officers to handcuff and remove him from the meeting. Mr. Jones also tried to get back into the meeting after being ejected. He was criminally charged.
  - The Court ruled against Mr. Jones, who challenged the criminal ordinance, which prohibited any person from “disturbing or interrupting any meeting of the City Commission.” The Court upheld the ordinance as a valid time, place, and manner restriction on speech.

Cases From Other Jurisdictions

- **Clarence Rowe v. City of Cocoa, Florida** - 358 F. 3d 800 (11th Circuit, 2004)
  - Mr. Rowe was a non-resident attending a public meeting of Cocoa, Florida. The municipal rules of procedure allowed for Council members to exclude non-residents from speaking during the 30 minute public comment period.
  - The Court ruled in favor of the City. There was no First Amendment or Equal Protection Violation, since the rule did not discriminate based on the content of the message. It was a neutral time, place and manner restriction that served the legitimate government interest in conducting orderly and efficient meetings.
Cases From Other Jurisdictions

• White v. Norwalk
  900 F. 2d 1421 (9th Circuit, 1990)
  - The Court recognized that a moderator of a meeting must enjoy broad discretion in determining when a meeting has been disturbed (as long as the decision is not based on the content of the speech). In this case, the Plaintiff was “out of order” for three violations of the Rules in one meeting.

Cases From Other Jurisdictions

• Brown v. Smythe
  780 F. Supp 274 (E.D. PA 1991)
  - Ms. Brown, a member of the elected body, was ruled out of order when she attempted to respond to disparaging remarks (failure to pay taxes) made during the public comment time by a former council member/member of the public. The Chair ruled her out of order, and asked her to leave the meeting. Upon her refusal, the Council President directed the Police Chief to arrest her. She was acquitted of the criminal charges brought against her, including obstruction of a public meeting, simple assault, aggravated assault, and disorderly conduct.
  - Legislative immunity was denied in this case, since the Court found that the actions were based on a motivation to silence her as opposed to a desire to bring order to the meeting.

Cases From Other Jurisdictions

• Zapach v. Dismuke
  134 F. Supp 2d 682 (E.D. PA 2001)
  - Zapach was a member of the public who was protesting a rezoning action. During his comments, he read from a prepared statement that mentioned the names of the current and former supervisors who were involved in the disputed zoning action. The Chair objected to the use of specific names, and asked that the record not contain these names, since they were not relevant.
  - Tensions mounted, and the Chair grabbed Zapach and attempted to take his prepared speech away. Although the Court found that the actions were motivated by the content of the speech, the Chair was still afforded absolute immunity since it was a quasi-judicial action. Qualified immunity would have also shielded the Chair, since the Court determined that a reasonable person may not have known that they were violating Mr. Zapach’s rights.
Cases From Other Jurisdictions

- **Burstein v. Morial** - 438 So.2d 554 (L.A. 1983)
  - Mayor vetoed an ordinance, then left on a business trip, leaving the Council President as the Acting Mayor. The City Charter prevented the Council President from serving as both the Acting Mayor and also a Council member.
  - The Council, including the Council President, attempted to override the Mayor’s veto. The invalidation of the Council President’s vote, based on his service as Acting Mayor at the time of the vote, meant that there were insufficient Council votes to override the Mayor’s veto.
  - This lawsuit was filed by a citizen’s group, and not the Mayor.

Cases From Other Jurisdictions

- **Steinburg v. Chesterfield** – 4 th Circuit- May 2008
  - The Court held that a Planning Commission meeting is a limited public forum, and therefore the public body was justified in limiting the public comment to planning commission agenda items.
  - Reasonable restrictions to preserve the civility and decorum necessary to further the limited forum’s purpose of conducting business were upheld.
  - Steinburg was ejected from the Planning Commission meeting due to his disruptive behavior. This action was not related to the viewpoint (content) that Steinburg was expressing.

Rules To Address Specific Situations

- Question- Can we adopt a rule to allow telephonic participation in our meetings?
  - The City of Dearborn has adopted a rule allowing limited telephonic participation in public meetings. There is no requirement under the OMA to require physical presence.
  - **Goode v. DSS** (Michigan case) allowed for telephonic participation in an administrative hearing.
Rules To Address Specific Situations

• In light of the upcoming election, can a public body prohibit placards, banners, or signs from the meeting place?
• Can a public body prohibit t-shirts with slogans or other campaign material?
  – Must be content neutral, applied evenly to all.

Rules To Address Specific Situations

• If requested by a member of the public, does a public body need to provide the technical equipment for a video presentation or audio recording?
• Advance screening requirements to make sure profanity and/or inappropriate images do not get broadcast.
• Can require compliance with time limits.
• Can’t review for content of the message.

Rules To Address Specific Situations

• Should rules be adopted to prevent a member in the minority from interfering or otherwise undermining the decision of the majority?
  (Example- contacting a reviewing state agency and leaving the appearance that the City has objections, and does not desire approval).
Rules To Address Specific Situations

• Can Rules be adopted to prevent persons from using profanity, slander, or other remarks that disturb, disrupt, or impede orderly conduct of a meeting, including personal attacks?
  • First Amendment is not absolute.
  • Disruptive comment can lead to ejection and/or criminal charges.
  • Rules can be adopted to prevent personal attacks or remarks that are not related to job performance of a public official.

Rules To Address Specific Situations

• Post-Kirkwood, can a person be permanently banned from all public meetings, due to their violent nature?
  – Persons can be removed from a meeting, based on their conduct at that meeting.
  – Rules should be designed to empower the presiding officer, as well as the Sergeant–At-Arms, to act quickly to remove a person who is an immediate danger.

Rules To Address Specific Situations

POST KIRKWOOD SAFETY MEASURES

– The public body should have an alternate way out of the meeting room, in case of threatened and real violence.
– A public body could request a Judge issue an injunctive order permanently banning a violent person.
– Can’t enact ordinances prohibiting concealed weapons in municipal buildings.
Rules To Address Specific Situations

• What if someone is violating the traditional rules of decorum—i.e., wearing a hat while the meeting is in session?
  – You can’t legislate manners.
  – There may be religious reasons why a hat is being worn—use discretion.

Rules To Address Specific Situations

• What if an audience member refuses to recite the Pledge of Allegiance and/or participate in the Invocation?
  – Can’t condition attendance at a public meeting.
  – If your municipality has an Invocation, there should be a rotating schedule where the clergy of all faiths can participate.

Rules To Address Specific Situations

• When a public body passes a resolution after holding a public hearing, is the public body prohibited from reconsidering that resolution at a subsequent meeting without the public being notified of the possible reconsideration?
  • Reconsideration provisions in the Rules of Procedure of each public body will control.
Rules To Address Specific Situations

• What can we do if an audience member is loud and disruptive?
  – Presiding Officer has an essential role.
    Strong warnings should first be given.
  – A majority of Council can vote to compel
    Presiding Officer to take action or overrule
    Presiding Officer who has overreacted.
  – Personal observation by a Sergeant-At-Arms may result in
    arrest for unlawful behavior in a police officer’s presence.

Rules To Address Specific Situations

• What policies can we adopt to encourage public participation
  But yet still have our meetings adjourn at a reasonable time?
  • Encourage comments to be forwarded to all council members
    by the use of a “reply to all” e-mail option;
  • Provide an e-mail address on each public notice

Rules To Address Specific Situations

• Does a Motion for Reconsideration always need to be made by a person on the prevailing side?
• Are there time limits for making a Motion for Reconsideration?
• What’s the voting requirement for a Motion for Reconsideration? (2/3)
Rules To Address Specific Situations

• What if someone wants to talk about something that we don’t control? (i.e. complaints regarding the school board) Can a public body prevent this public comment?
  - Presiding officer can tactfully educate the speaker as to the limits of authority.

Rules To Address Specific Situations

• Can a member of the minority who has joined a lawsuit challenging the decision of the majority participate pending legal strategy closed session discussions?
  - Code of Conduct vs. OMA
  - May be a protective order entered in the civil lawsuit precluding the adverse litigant from attending.

Rules To Address Specific Situations

• Should a member of the public body with a pecuniary conflict be able to participate in the deliberation of the item, as long as they abstain from voting?
  – Abstention vs. Recusal- Charter Requirements
  – Avoid appearance of impropriety. Conflicted Councilperson had the opportunity to affect the vote which some equate with the vote itself.
  – Debate whether MCL 15.342 applies to local govt.
Rules To Address Specific Situations

- Should municipal officials immediately respond to members of the public who ask questions/demand action during the public comment portion of the meeting?
  - Recommended approach: Designate City Official charged with responsibility of follow up at the meeting, and allow that person to obtain necessary background.
  - Public participation is most effective when the person contacts the public body members before the meeting or members of City staff.

Rules To Address Specific Situations

- Can members of the public body be removed for failing to observe orders of the presiding officer and disruption of a meeting?
  - Much easier if there is a requirement for all members to observe the rules and decisions of the presiding officer. Should be last resort- and necessary to restore order, after providing warnings.
  - The presiding officer can be overruled by a majority of the public body.
  - Sergeant-At-Arms may have discretion- and may serve as an independent arbiter.

Rules To Address Specific Situations

- Can we adopt a rule that requires all speakers to give their name and address?
- Can we require those persons who want to speak to register in advance?
- Can we limit the speaking to only those persons pre-registered?
General Themes

• Councils have the authority to adopt internal rules and rules related to public comment, provided that those rules are reasonable, flexible, and do not discourage or prohibit public discussion.
• Councils have great discretion in maintaining order at their meetings, provided that the steps they take to maintain order comport with individuals' civil rights.
• Councils are recognized as having a significant interest in maintaining order at meetings, conserving time, and ensuring that all members of the public who wish to speak have the opportunity to do so.

General Themes

• The concept of “breach of peace,” as found in the Open Meetings Act has a broader definition in the context of meetings than the term would normally suggest.
  – In the meeting context, a “breach of peace” may consist of citizens disobeying time limits, becoming repetitious, or otherwise disrupting the orderly progress of the meeting.
• When enforcing council rules and attempting to restore order to meetings, it is critical that the council member(s) avoid acting to hastily.
  – A point of order should be called and/or reference should be made to a specific Council rule that the Council is trying to enforce.

General Themes

• Where feasible, it is advisable to give the speaker another chance by asking the speaker to get back on topic, or to correct the problem that caused the point of order to be raised.
  – Mere attempts to silence, remove, or otherwise obstruct a participant in the meeting without a clear reason will look suspicious.
  – The actions taken should not in any way relate to the content of the message.
General Themes

• Legislators will enjoy absolute immunity from liability for their enforcement of council rules if they are acting as members of the legislative sphere, and with a legitimate legislative purpose.
• Legislators will enjoy qualified immunity from liability for their enforcement of council rules, provided that the council person has not acted with the motive/intent to silence a speaker and violate their constitutional rights.

General Themes

• Though legislators may enjoy absolute and/or qualified immunity from suits seeking money damages, a suit seeking to declare a rule or ordinance as unconstitutional could proceed. Therefore, when drafting rules, it is important that the Rule not be vague, overbroad, or otherwise constitutionally suspect.
• For example, the Rule in Timmons prohibiting “slanderous or profane remarks which disturb, disrupt or otherwise impede the orderly conduct of any Council Meeting,” as well as any “disorderly conduct, including the utterance of threatening or abusive language” was deemed unconstitutional by the Sixth Circuit, but since the lawsuit only sought money damages, the Council enjoyed immunity, and the suit was dismissed.

General Themes

• The enforcing member should avoid long discussions along the lines of how he/she respects free speech and is saddened that he/she need to enforce a rule against a speaker, as it will suggest that the person is acting with knowledge/intent to curb that person’s right to speak.
• Consistent enforcement of the rules is advisable.
Concluding Thoughts

• Contact your Corporation Counsel/ City Attorney to Insure compliance with Charter and State Law.