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NEW HAMPSHIRE MUNICIPAL ASSOCIATION

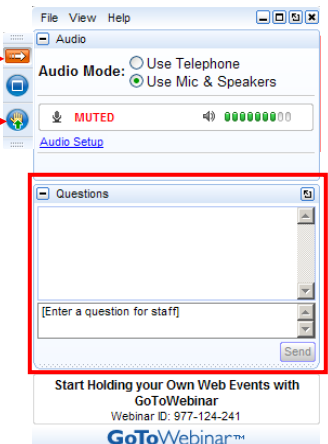


Is There Free Speech in Municipal Government?


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Free Speech - Origins

- 1st Amendment to U.S. Constitution: “Congress shall make no law...abridging the freedom of speech....”
- Pt. I, Art. 22 of N.H. Constitution: “Free speech and liberty of the press are essential to the security of freedom in a state; They ought, therefore, to be inviolably preserved.”



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Poll



- Where do citizens have the right to free speech? (Click on all that apply.)
 - Town Meeting/deliberative session
 - City Council or Selectmen’s meeting
 - Town green or park
 - Budget hearing
 - Sidewalk in front of town/city hall



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What Is “Freedom of Speech”?

- People are *not* guaranteed freedom of speech in every time, place or manner
- “Speech” is not just the spoken or written word, it is all “expressive activity”
 - Doyle v. Comm’r. NH Dept. Resources & Economic Development, 163 N.H. 215 (2012)



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Where?

- Not all government property is a public forum, and not all speech is protected
- Speech in a public forum that is basically compatible with normal activity of that particular place at that particular time is generally protected
- Some government sites are not open for expression in the way that others are – they are NOT all created equal



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Where?

- Traditional Public Forum: a government property traditionally available for public expression
- Designated or Limited Public Forum: government property that has been opened by the government for expressive activity by all or part of the public on all or specific topics
- Non-Public Forum: all remaining government property, no speech rights



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Examples

- Traditional Public Forum: streets, parks, sidewalks, town meeting, generally open to assembly and debate by all
- Designated Public Forum: public comment period at a public meeting – any of the public may comment on any topic
- Limited Public Forum: government opens comment by specific groups on specific topic(s)



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How Can Speech Be Regulated?

- Traditional and Designated Public Forum: content-neutral “reasonable time, place and manner restrictions”
 - Note that there are two elements here – content neutrality and time, place and manner restrictions.
- Limited Public Forum: same as above, but may also regulate the topic of speech.
 - E.g., topics on the agenda or a specific issue



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Time, Place and Manner Restrictions

- Reasonable:
 - Time limits for each speaker
 - Prohibiting repetitious remarks
 - Prohibition on obscenity, profanity, and defamatory remarks
 - Prohibiting activity that disrupts the business of the meeting
- Unreasonable:
 - Prohibiting all criticism, permitting all praise
 - Unreasonably short time limits



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Content Neutrality

- If it is a public forum of any type, the viewpoint of any speaker may not be restricted.
 - Must accept the negative with the positive
 - Criticism of public officials can't be stifled
 - Expression of both (or many) sides of an issue must be permitted



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Libel and Slander (Defamation)

- Libel = written; slander = spoken
- Defamatory Statement: A false statement that tends to lower a person in the esteem of any substantial and respectable group
- Failure to *exercise reasonable care* in *publishing* (oral or written) a defamatory statement *about a third person*.
- Only needs to be “published” to 1 person



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Libel and Slander (Defamation)

- Some statements are privileged (during town meeting or during judicial proceedings) – but don't count on it.
- True statements are not defamatory!
- Opinions are not defamatory. Compare:
 - “He is ruining this town.” (*opinion*)
 - “He used \$3,000 from his budget to pay his own expenses.” (*purporting to be fact*)



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Libel and Slander (Defamation)

- Republishing is also actionable.
- So who can be liable here?
 - The person originally making the statement
 - Possibly the municipality if the meeting is broadcast or streamed live to the public, or available for later viewing (republishing)
 - If concerned about republishing, consult municipal attorney



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Libel and Slander (Defamation)

- No privilege for local officials conducting town business.
 - Board members and other officials are not immune from liability for defaming someone while conducting municipal business.
 - A private person need only show actual harm, not that the speaker intended to harm



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Public Officials

- Threshold for defamation is also higher when the statement is about a public figure.
 - I.e., selectmen can insulted at a meeting
- A public official must show the defamatory statement was made with “actual malice” to injure his or her reputation.



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Poll



- Which of the following statements are true?
 - Public comment must be allowed at public meetings
 - The public can comment on anything of public interest or concern
 - Citizens have a right to ask to be put on the agenda for a meeting
 - Citizens have the right to request a nonpublic session at a meeting



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Public Comment at Meetings

- Public bodies do not have to permit public comment at meetings
- What is the purpose of meetings?
- When might a board want public comment?
- Who has a right to request to be put on the meeting agenda?
- Who has the right to request a nonpublic session?



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Public Comment at Meetings

- If comment is permitted, that part of the meeting is designated/limited public forum
- Content-neutral “time, place and manner” restrictions are permitted
- Explain ground rules up front (time limits, subject matter, obscenity, repetitive comments, etc.)
- Repeat and enforce rules fairly and evenly



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Public Hearings

- Public meeting: conduct board business
- Public hearing: obtain public testimony and comment on a specific issue
- Some involve a statutory right to be heard
 - E.g., applicant before planning board
- Others are required by statute but are open for everyone to comment
 - E.g., public budget hearing



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Public Hearings

- Ground rules are important at hearings
- Same kind of restrictions:
 - Time limits – what if a person won't stop?
 - No excessive repetition or irrelevant remarks
 - Limiting comment to the subject at hand
 - Prohibiting obscenity (but be careful)
- Announce at the beginning, repeat as necessary. Warn as needed.



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Speech by Town/City Officials

- Board members are still citizens
 - Have opinions
 - May be a party in a land use situation
- Single member of a board – speaking for themselves, or for the whole board?
- Revealing confidential information?
- Care should be taken before speaking



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Speech by Employees

- RSA 98-E:
 - A public employee “shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies”
 - “No person shall interfere in any way with the right of freedom of speech, full criticism, or disclosure by any public employee”
 - Note: confidentiality under RSA 91-A is unaffected and still controls



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Advocacy and Electioneering

- How far may municipality go to promote its policies? Unclear.
 - Don't directly advocate for or against a candidate, warrant article or other measure
 - US Supreme Court has found some authority for government use of media to endorse policies, but it is still unclear
 - Provide factual information rather than advocacy



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Advocacy and Electioneering

- Candidate or other endorsements by public officials – don't do it.
 - RSA 659:44 prohibits electioneering by election officers during official duties
 - 2009, selectmen publish letter in newspaper endorsing a specific candidate, AG finds illegal
 - Don't be lulled by informality. Statement on social media is exactly the same thing.
 - May still speak as an individual, but be clear



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Advocacy and Electioneering

- Public employees prohibited from electioneering during official duties or by using government property to do it, RSA 659:44-a
- Electioneering = an action “in any way specifically designed to influence the vote of a voter on any question or office
- Don't use gov't social media to do this



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Thank you!

- For more information – please contact us:
 - Call NHMA Staff Attorneys at:
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