

Supreme Judicial Court Declares Public Comment Policy Unconstitutional

March 8, 2023

On March 7, 2023, the Massachusetts Supreme Judicial Court issued its much-anticipated decision in [Barron v. Kolenda](#), SJC-13284 (“[Southborough](#)”) concerning the constitutionality of a select board policy addressing participation during “public comment” periods of its meetings. The Court concluded that the policy, which sought to implement standards of civility for public comment periods by limiting critique and rude or disparaging remarks, violated Articles 19 and 16 of the Massachusetts Declaration of Rights. In short, the [Southborough](#) court observed that “[a]lthough civility can and should be encouraged in political discourse, it cannot be required.” This case has important implications for public bodies.

By way of background, in [Southborough](#), the Select Board held a public meeting which included a public comment period. At the beginning of the public comment period, the Chair referenced the Board’s public comment policy, which required, in part, that all public comments be “respectful and courteous, [and] free of rude, personal or slanderous remarks.” During that portion of the meeting, an attendee held up a sign criticizing the Board for violating the Open Meeting Law and spending frivolously, and, when recognized by the Chair, made comments critical of the Board. The Chair requested that the attendee not slander volunteer public officials and informed the attendee that the Board would take a recess if the attendee continued. The attendee then proceeded to twice refer to the Chair using the name of a reviled historical figure. During a meeting recess, a video of the meeting showed an apparent animated exchange between the Chair and the attendee, during which the Chair threatened to remove the attendee. The attendee then left the meeting.

The [Southborough](#) court analyzed both the 19th and 16th Articles of the Massachusetts Declaration of Rights, which provide rights analogous to the First Amendment to the U.S. Constitution. The Court reviewed the history of discourse at public meetings dating back to the Revolutionary War era, noting that such meetings were at times rancorous and discourteous. Article 19 confers upon the public the rights to assemble and petition the government regarding their grievances. In its decision, the Court concluded that the right to assembly and to petition the government extends to persons making statements during a public comment period at a meeting.

The Court further concluded that Article 19’s reference to assembling in an “orderly and peaceable manner” is not the equivalent of a “polite and courteous” discourse. The Court stated, essentially, that regulation of a public comment period can only be accomplished through reasonable “time, place, and manner restrictions” permitted under the First Amendment. The Court also analyzed Article 16, which protects the rights of free speech, and applied a strict scrutiny standard in concluding that the Select Board’s “civility code” unconstitutionally regulates

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protected political speech. The Court held that the public comment policy also appeared viewpoint-based in that the policy appeared to allow praise of public officials but not criticism.

While this case did not examine the application of the Open Meeting Law, the Court seemed to premise its conclusions on the fact that the Board invited public comment by including “public comment” on its meeting agenda. Once public comment was included as an item for discussion during the meeting, the Court concluded that constitutional considerations applied to the Board’s efforts to regulate public comments.

We encourage municipalities to review the form and practice of their public comment policies, ensuring that there is no attempt to regulate civility, rude or disparaging remarks, or other content-based criticisms of public officials. In our view, public comment policies may continue to regulate, for example, content-neutral time limits for public comments, the duration of the public comment period as a whole, at which part of the meeting the public comment will occur, individual speaking time limits, rules preventing speakers from speaking over others, and acting in a non-peaceable and disorderly manner.

In summary, state law does not require municipalities to provide public comment periods during board and committee meetings. Some charters and special acts do require such public comment periods, however. Each municipality should review its governing documents to determine whether public comment is mandated. To the extent that public comment is permitted, the rights of individuals participating will be protected by Articles 16 and 19 of the Massachusetts Declaration of Rights. For these reasons, following the decision in Southborough, great care should be taken to ensure that any regulation of public comment periods is limited to reasonable time, place, and manner restrictions, rather than mandated civility, or other content-based, restrictions.

The scope and extent of the Southborough case cannot be fully anticipated. This area of law will both rapidly evolve and require ongoing analysis.

In the meantime, please contact your KP Law attorney with any specific questions.

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