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MEMO

DATE: March 13, 2023
TO: Bonner County Board of Commissioners 
FROM: Louis E. Marshall, Bonner County Prosecuting Attorney
RE: Business Meetings

RE: TRESPASSING CITIZENS

The Chairman of the BOCC has sought advice on how the BOCC may effectively trespass or remove a citizen from a BOCC *Regular Business Meeting* (RBM) in a manner which will be assisted using local law enforcement agencies. Although the BOCC has the power to trespass individuals from BOCC controlled spaces the BOCC must exercise its power to trespass cautiously when attempting to trespass citizens from *Limited Public Forums* (LPFs), such as the RBM, as defined by the First Amendment of the U.S. Constitution.

LAW AND APPLICATION

1. Trespass Law:
 - a. The BOCC may by minute order trespass various individuals from facilities controlled by the BOCC.
 - b. The power of a public entity to trespass its citizens in limited public forums, such as the RBM, is curtailed by the First Amendment to the U.S. Constitution.
2. First Amendment:
 - a. Bonner County Ordinances 192, 408, 531, 545 (Board of County Commissioner Meetings) codified under Title 1 Chapter 2 of the Bonner County Revised Code (BCRC) have constitutional significance.
 - i. Importantly, BCRC 1-2 sets the official framework for public interface at the BOCC RBM and in so doing has made the RBM a LPF as defined by First Amendment jurisprudence.
 1. The language of the BCRC creates both a "*Public Comment Segment*" and an "*Agenda Item Specific Comment Opportunities*" both of which are part of the RBM LPF.
 - b. It is the Prosecutor's position that the following BCRC Title 1 Chapter 2 language prioritizes public participation in the RBM.

- i. BCRC 1-200 (Purpose) was enacted to establish a regular meeting schedule for the BOCC in order that its activities “can be carried out with greater public participation and awareness.”
- ii. BCRC 1-200(A) states that “The purpose of the regular business meeting is for the board of county commissioners to conduct the business of Bonner County publicly.”
- iii. BCRC 1-200(B) provides for a “*Public Comment Segment*” “to enable citizens with issues or concerns which they wish to bring to the board’s attention and afford an opportunity for consideration on a future agenda for possible board action.”
- iv. BCRC 1-201(F-H) provides a mechanism for public interaction on specific agendized issues.

3. Application:

- a. The Prosecutor interprets Ord 545 as evincing an intent to reasonably balance public participation in the RBM with business efficiency. According to the First Amendment jurisprudence any limitations to public participation in the RBM must be shown to be reasonable under the circumstances.
 - i. The right to attend and participate in LPF public meetings is a fundamental aspect of the First Amendment's protection of free speech as well as the right to petition the government for redress of grievances. Under the First Amendment doctrine, a county government is generally required to allow for public comment at its LPF designated RBM. The U.S. Supreme Court has recognized that the First Amendment protects the right of citizens to participate in LPF public meetings, including the right to express their views and opinions on matters of public concern. While the specific requirements for public comment may vary depending on the jurisdiction and the type of meeting, most government bodies are required to provide some form of opportunity for public comment in their LPF RBMs.
 - ii. First Amendment Liability.
 1. Both local government entities and local government public employees in their individual capacities may be liable for breaching a citizens First Amendment public participation right.
 - a. Law Enforcement Agency Liability. A law enforcement agency such as the Sandpoint City Police Department and the Bonner County Sheriff's Department may have 42 USC Section 1983 liability if they remove a citizen from a LPF public meeting for engaging or attempting to engage in protected speech, such as criticizing government officials or expressing opinions on public policy matters. Such conduct in many cases will be viewed as a violation of the individual's First Amendment rights and be subject to legal challenge under Section 1983 of the Civil Rights Act, which allows individuals to bring lawsuits against government officials who violate their constitutional rights.
 - b. Individual Public Official Liability. Individuals such as county commissioners, their personnel, and individual law

enforcement officers can face individual Section 1983 liability for wrongfully removing a citizen from a LPF public meeting.

- i. 42 USC Section 1983 is a federal law that allows individuals to bring lawsuits against state and local government officials who violate their constitutional rights. This includes the right to free speech and the right to participate in LPF public meetings, both of which are protected under the First Amendment of the United States Constitution. In some cases, these public officials will be entitled to qualified immunity and in other cases they may not be. The determination of whether a public official is entitled to qualified immunity will depend on the specific facts and circumstances of each case. In order to establish liability, the citizen must show that the official acted under color of law (i.e., that they were acting in their official capacity as a government official) and that their actions resulted in a deprivation of the citizen's constitutional rights.
- c. Punitive Damage Exposure. Punitive damages against both the public entity and its individuals may be awarded in a Section 1983 lawsuit. The amount of such damage will depend on the specific facts and circumstances of the case. Courts will consider factors such as the egregiousness of the defendant's conduct, the harm suffered by the plaintiff, and the need to deter similar conduct in the future when determining punitive damages.

PUBLIC PARTICIPATION – MEETING EFFICIENCY BALANCING ANALYSIS

Prior to taking adverse action that might impair a private citizen's First Amendment comment and participation rights in the RBM LPF established by BCRC 1-2, the BOCC should (with the assistance of counsel) balance the importance of the public participation with the importance of business efficiency at the specific RBM in which a specific instance of public participation is thought to be excessive or inappropriate.

The BOCC must ensure that its regulations of public participation in each RBM are reasonable time, place, and manner regulations. In determining reasonableness, the following should be considered:

1. If the BOCC wishes to limit public comment because it is overbooked on a specific RBM day and this overbooking is not the product of poor time or calendar management, then the BOCC should provide a substitute functional equivalent opportunity for public comment at a different time and/or place e.g., by continuing the meeting to another day or time to finish receiving public comment. This aligns with the First Amendment requirement to narrowly tailor limitations to public comment.

2. It is the Prosecutor's understanding that a bright-line per-se rule of 12-minutes has been considered reasonable by some on the BOCC as it applies to the Public Comment Segment of the RBM. It is our opinion that such a rule is unreasonable.
 - a. We have found no precedent to suggest that such a short limitation period is reasonable i.e., "narrowly tailored to serve a significant government interest" as required by First Amendment law and therefore appears facially unreasonable as a per se rule given BCRC 1-2's strong language favoring public participation.
 - b. In our opinion there are many concrete reasons the BOCC should generally afford all their constituents an opportunity to comment at their RBM in the *Public Comment Segment* absent extreme circumstances.
 - c. In our experience prior BOCCs have had little difficulty in accommodating everyone that wished to speak in the *Public Comment Segment*. In our recollection prior BOCCs have rarely if ever imposed total time limits on public comment in the RBM and have still been able to conclude their weekly business efficiently and effectively. Even with tight schedules prior BOCCs have found ways to accommodate public comment by rearranging the order of agenda or continuing the RBM to a different time or day if necessary.
 - d. The BOCC and many of its staff that regularly present agenda items are full-time exempt employees and are available to work beyond a standard 40-hour work week when necessary and consequently staff time is not usually an impediment to longer public comment periods. In situations where there are unusually large numbers of people signing up for public comment it may be possible to further shorten the total time per person for comment. We believe these situations are rare and can be accommodated by continuance and we therefore discourage limiting public comment per person under the 3-minute period currently in use.
3. It is our opinion that allowing citizens to express their views to government officials during the *Public Comment Segment* of the RBM serves as an opportunity for members of the public to hear diverse perspectives on matters of public concern. This promotes open and democratic governance, as it allows decision-makers to consider the views and concerns of a broad range of constituents. It also serves to enable the citizens who are voicing their concerns to the BOCC to also, at the same time, voice their concerns to the public and media. These ideas are all part of the First Amendment public comment jurisprudence and are likely built into BCRC 1-2 and therefore should be considered when conducting a reasonableness analysis.
4. The reasonableness of time, place, and manner restrictions are benchmarked against the exigencies of each BOCC RBM. For example, if an RBM concerns a matter of significant public concern, such as a controversial policy proposal or a major public project, then a longer amount of time for public comment may be deemed reasonable, regardless of the size of the audience. Ultimately, the determination of what amount of time is reasonable for public comment will depend on the specific circumstances of each case. Consequently, the safest route is not to put any prior total time limitations on the public comment period and only limit total time after conferring with counsel and making every effort to accommodate public comment by continuance or otherwise.

5. Some of this analysis applies not only to the *Public Comment Segment* but also to *Agenda Item Specific Comment Opportunities*. After the chairman has allowed some members of the public to comment on an agenda item, they should be very cautious in refusing the same opportunity to others especially when the selection of speakers may have something to do with the viewpoints of the speakers. Legal counsel should be consulted when deciding to limit public comment on agenda items once partially opened.