

Public Comment Q & A

Maria Davis, Assistant Legal Counsel and
Claire Silverman, Legal Counsel, League of Wisconsin Municipalities



Are governing bodies required to include a public comment period at meetings?

No. The public does not have a constitutional right to speak at governmental body meetings¹ and Wisconsin Statutes do not require governing bodies to designate public comment periods at meetings. Wisconsin Stat. § 19.84(2) provides that the public notice of a meeting of a governmental body *may* include a period of public comment.² While Wisconsin's open meetings law and other statutes require that meetings be accessible to the public,³ they do not afford the public the right to address the governmental body. Although public comment periods are not required by law, many municipalities utilize public comment periods, finding they provide a valuable opportunity for constituents to offer feedback on matters in their community.

Are governing body members able to speak/respond to citizens during public comment period?

Yes, although there is a limit to how far that discussion should go if the subject was not specifically included in the meeting notice. Wisconsin Stat. § 19.83(2) provides that a governmental body may discuss any matter raised by the public during a public comment period that was publicly noticed. However, if members of the public

raise subjects not specifically included in the meeting notice, the Wisconsin Department of Justice's Open Meetings Law Compliance Guide suggests, "it is advisable to limit the discussion of that subject and to defer any extensive deliberation to a later meeting for which more specific notice can be given." The compliance guide also states that a governmental body may not take formal action on a subject raised during public comment that was not also identified in the meeting's public notice.

May governing body members speak as members of the public during a public comment period?

No, unless the subject matter the governing body member intends to speak on was included in the meeting's public notice. The limited exception in Wisconsin Stat. § 19.84(2), allowing members of the public to bring up items not specifically on the agenda during a period of noticed public comment, is intended to allow local governments to be responsive to their constituents and to receive information from members of the public. However, it was not intended to allow members of governmental bodies to bring up matters without placing them on the agenda and giving notice to the public. Given that members of governmental bodies have ready access to the body's agendas, a body member's use of the § 19.84(2) exception to discuss

unnoticed subject matter would likely be seen as an impermissible attempt to circumvent the open meetings law's notice requirements.

Can governing bodies restrict the subject matter that may be discussed during a public comment period?

It depends on whether the governing body established the public comment period as a designated public forum or a limited public forum. Nothing in the Constitution requires government to freely grant access to all who wish to exercise a right to free speech on every type of government property without regard to the nature of the property or to disruption that might be caused by speakers' activities.⁴ Government ability to regulate or restrict protected speech depends, in part, on where that speech is occurring. Government property can be classified into three basic types of forums: (1) Traditional public forum; (2) designated public forum; and (3) non-public forum. Examples of a traditional public forum include, but are not limited to, public streets, parks, sidewalks, etc. A designated public forum is a place that is not traditionally open for expressive activity, but that the government has opened for expressive activity.⁵ Non-public forums are all other types of government property that have not been opened to expressive activity.

1. See *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 283 (1984). Note, however, that some statutes require public hearings for particular subject matters. In such instances, the public *does* have a right to be heard. Examples of statutes requiring public hearings are § 65.90(4) (hearing on proposed budget), § 62.23(7)(d)1.b. (prior to rezoning), and § 66.0703(8) (prior to special assessment).

2. "May" is typically construed as being permissive, rather than mandatory, in nature. *City of Wauwatosa v. Milwaukee Cty.*, 22 Wis. 2d 184, 191, 125 N.W.2d 386 (1963).

3. Wis. Stat. §§ 19.81(2), 19.82(3), 61.32, and 62.11(3)(c).

4. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985).

5. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

A governing body has limited ability to regulate speech in traditional and designated public forums.⁶ In either of these forums, a regulation based on the content of one's speech is subject to strict scrutiny, meaning the government must show that the regulation "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."⁷ In other words, the regulation must be the least restrictive means of achieving the compelling governmental interest.⁸ Regulations subject to a strict scrutiny analysis rarely survive. Governments may enforce reasonable time, place, and manner restrictions on speech in traditional and designated public forums provided they are content neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.⁹ Regulations of speech based on viewpoint are always prohibited.

Generally, a governmental body meeting is not considered a traditional public forum. A governing body that includes a public comment period in its meetings will typically have created either a designated public forum or limited public forum. In a designated public forum, content-based restrictions on speech are subject to the same strict scrutiny analysis that applies to traditional public forums;¹⁰ thus, content-based restrictions of speech are unlikely to survive. A limited public forum is a type of designated public forum. In a limited public forum setting, governing bodies may restrict participating speakers to certain topics.¹¹ Those restrictions are then subject to intermediate judicial scrutiny and will survive so long as they are "reasonable in light of the purpose served by the forum" and do not restrict speech based on particular viewpoints within the permitted topics of conversation.¹² For example, a governing body could limit public comment discussions to agenda items, which might include discussion of whether to build a new public library, but it could not limit speakers to only those who were in favor of the project. Accordingly, a governing body's ability to place restrictions on what is discussed during public comment turns on how the body has created the forum. Merely specifying a time period during meetings for public comment, with nothing further, likely results in a designated public forum and content-based restrictions on speech will be unlikely to survive judicial scrutiny. On the other hand, when a governing body limits a public comment period from the outset – e.g., limiting discussion to certain topics – it will likely have created a limited public forum and content-based restrictions on speech

6. *Surita v. Hyde*, 665 F.3d 860, 870 (7th Cir. 2011).

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

8. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

9. *Surita v. Hyde*, 665 F.3d at 870.

10. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70 (2009).

11. *See Good News Club v. Milford Central School*, 533 U.S. 98, 106 (2001).

12. *Good News Club v. Milford Central School*, 533 U.S. at 106-07 (2001).

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are permissible if reasonable in light of the forum's purpose.

Can governing bodies limit participation in public comment period to certain categories of speakers?

Yes, but only if the governing body creates a limited public forum when it establishes the public comment period.¹³ Additionally, the restrictions must still be reasonable in light of the forum's purpose and may not discriminate on the basis of viewpoint or protected class. For example, a governing body could choose to limit participation in public comment periods to residents and taxpayers. However, this may not be best practice, and other alternatives could achieve a more inclusive result. For instance, a governing body could choose to apply reasonable time, place, and manner restrictions to the public comment period that give priority to resident and taxpayer speakers. If the governing body has placed an overall time limitation on the public comment period – e.g., it shall last for no more than one hour – all speakers could then be prioritized within that timeframe.

Should governmental bodies allow the public to speak outside of public comment periods?

Generally speaking, no. Although governmental bodies may disagree with this answer, allowing the public to interject outside of public comment periods raises significant legal issues and is probably not a best practice. Most concerning is that a governmental body that regularly allows the public to speak outside of public comment periods is arguably setting up its meetings as a designated public forum, which

will greatly curtail the body's ability to control its meetings. For example, if the governing body permits public commentary at some times but not others, or allows some persons to speak but not others, the governing body opens itself to claims that the differential treatment is content or viewpoint based or that the regulations are not reasonable or sufficiently defined.

What are some reasonable time, place, and manner restrictions?

Reasonable time, place, and manner restrictions must be content neutral and are subject to intermediate scrutiny. Some examples of reasonable restrictions include limiting the amount of time per speaker, limiting the total amount of time devoted to public comment, requiring speakers to address the body from a podium or designated area, and requiring speakers to register before speaking.

What can governing bodies do if persons are disorderly?

Governing bodies have power to preserve order at meetings and to punish by fine persons present for disorderly conduct.¹⁴ To preserve order, governing bodies may also order disorderly persons removed. However, this should not be done lightly. Because any content-based regulation of speech in a designated public forum will be subject to strict judicial scrutiny, it is imperative that speakers not be viewed as disorderly simply because they are critical of the governing body or municipal employees; or are speaking in an angry voice. The same holds true in limited public forums, even though regulations of speech in a limited public forum are subject to intermediate scrutiny rather than strict scrutiny. As a general rule, the

focus should be on the person's conduct rather than what the person is saying.

In the context of a public meeting, conduct may be viewed as disorderly when it interferes with the running of the meeting itself. Examples of disorderly conduct include a speaker who refuses to conform with time limits set by the body and yield the floor once his or her allotted speaking time is over, or a person who repeatedly yells things out while sitting in the audience, or a speaker in a limited public forum who insists on speaking about a topic for which the forum has not been opened up.

Situations involving disorderly conduct during public comment periods are fraught with difficulty; the line between speech and conduct can be difficult to draw, and courts' after-the-fact analysis of such situations will be heavily fact dependent and evaluated on a case-by-case basis. Therefore, it is important that governing bodies tread carefully whenever a potential limitation of speech is involved.

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About the Authors:

Claire Silverman is Legal Counsel for the League of Wisconsin Municipalities. Claire joined the League staff in 1992. Contact Claire at cms@lwm-info.org

Maria Davis is the Assistant Legal Counsel for the League of Wisconsin Municipalities. Maria joined the League staff in 2018. Contact Maria at mdavis@lwm-info.org

13. See *Good News Club v. Milford Central School*, 533 U.S. at 106 (2001).

14. Wis. Stat. §§ 61.32 and 62.11(3)(c).