



CITY COUNCIL AGENDA REPORT

MEETING DATE: July 15, 2014

ITEM NUMBER:

SUBJECT: SECOND READING OF THE ORDINANCE AMENDING SECTION 2-61 RELATING TO CONDUCT WHILE ADDRESSING THE CITY COUNCIL AND ADDING SECTION 2-87 (SEVERABILITY)

DATE: July 15, 2014

FROM: CITY ATTORNEY'S OFFICE

PRESENTATION BY: ELENA Q. GERLI, DEPUTY CITY ATTORNEY

FOR FURTHER INFORMATION CONTACT: ELENA Q. GERLI (714) 446-1400

RECOMMENDATION:

Present Ordinance 14-09 for second reading, to be read by title only.

BACKGROUND:

Section 2-61 of the Costa Mesa Municipal Code (Propriety of conduct while addressing the council) provides that the presiding officer may, at his or her discretion, bar any person from a council meeting for "disorderly, insolent, or disruptive behavior." This regulation was the subject of a federal lawsuit, which resulted in the Ninth Circuit striking down the ordinance in a *per curiam* opinion. The Court of Appeals held that the ordinance is facially invalid because it fails to limit proscribed activity to conduct that actually disrupts city council meetings. Rather, the Court said, the ordinance unnecessarily sweeps a substantial amount of non-disruptive, protected speech within its prohibiting language. Acosta v. City of Costa Mesa, 718 F.3d 800 (2013).

The Ordinance was read for the first time on July 1, 2014. Following discussion and public comment, the Council made some modifications, as articulated below. This will be the second reading of the Ordinance, with modifications.

ANALYSIS:

The First Amendment of the United States Constitution provides in relevant part that "Congress shall make no law ... abridging the freedom of speech..." The First Amendment is applicable to the States by virtue of the Fourteenth Amendment. Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 44 (1983). Subdivision (a) of Section 2 of Article I of the California Constitution provides further that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Free speech analysis under the Federal and State Constitutions are largely concurrent, with some exceptions not relevant here. Long

Beach Lesbian and Gay Pride, Inc. v. City of Long Beach, 14 Cal. App. 4th 312, 324 n.3 (1993).

The standard of review for content-based regulations of speech (including expressive conduct) depends on “the character of the property at issue.” Perry, 460 U.S. at 44. In places that “by long tradition or government fiat” have been devoted to assembly and debate, such as streets and parks, the government’s ability to restrict speech is “sharply circumscribed.” Id. at 45. In traditional public forums, the government has the burden to show that any content-based speech regulations are narrowly tailored to serve a compelling government interest. Id. This is known as the strict scrutiny standard of review, and it is almost always fatal to the regulation challenged, as the regulation must be shown to be the least restrictive means necessary to achieve the compelling interest.

Subject to a less exacting level of scrutiny, the city can also restrict speech and expressive conduct through time, place and manner regulations that are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative avenues of communication. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Narrow tailoring in the context of time, place, manner regulations does not require an exact fit between the means and the end: “the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” Id. at 798-99 (internal citations and ellipses omitted).

A designated public forum consists of public property that has been opened to the public for expressive activity. Although the government “is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.” Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Perry, 460 U.S. at 45-46.

A third category, the limited public forum, is “[p]ublic property which is not by tradition or designation a forum for public communication....” In addition to time, place, and manner regulations, the city “may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable” and viewpoint neutral. Perry, 460 U.S. at 46. A limited public forum is created “by allowing public property that traditionally has not been available for assembly and debate to be used as a place for expressive activity by certain speakers or about certain subjects.” Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 813 (1985) (Blackmun, concurring).

City council meetings are limited public forums, White v. Norwalk, 900 F.2d 1421 (9th Cir. 1990), and the Council may adopt regulations related to the conduct at the meetings that are reasonable for the purpose of the forum and viewpoint neutral. Norse v. City of Santa Cruz, 629 F.3d 966 (9th Cir. 2010). It is therefore with this analytical

framework in mind, and the ruling in the Acosta v. City of Costa Mesa case, that the City Attorney's Office drafted the attached proposed ordinance.

The proposed ordinance has a narrow scope. It regulates conduct while addressing the council, and would replace only Section 2-61 of the Municipal Code. The remaining regulations regarding City Council meetings are not affected by the proposed ordinance.

The proposed ordinance provides that any person who engages in disorderly behavior that actually disrupts, disturbs or otherwise impedes the orderly conduct of a city council meeting shall be barred from further audience at that meeting by an order of the presiding officer or by a majority of the city council. The ordinance lists some examples of disorderly behavior in subdivision (b), such as shouting, throwing objects, or addressing the audience rather than the council, among others. However, it should be noted that the behavior, by itself, might not be enough to warrant disciplinary measures: the person's conduct must actually disrupt the meeting.

At first reading, the council deleted profanity, yelling and being unduly repetitious from subparagraphs (b)(2), (b)(3) and (b)(8), and combined subparagraphs (b)(10) and (b)(11).

The proposed ordinance also provides the procedure for enforcement of the rule. A warning, if practicable, is required. If the warning is ignored, or the person heeds the warning but then later disrupts the meeting again, or if a warning cannot practicably be given, the disruptive individual shall be barred from that council meeting. If, after being barred from the meeting, the person does not voluntarily leave, the presiding officer shall direct law enforcement to remove the person.

Finally, the proposed ordinance provides that continuing to engage in disorderly behavior after receiving a warning, refusing to leave a meeting after being ordered to do so, or returning to the same council meeting after being barred or removed, constitute misdemeanor offenses.

A severability clause has been added as Section 2-87 of the Municipal Code, and applies to the entire chapter addressing city council meetings and procedures.

The proposed ordinance has been reviewed by Lois Bobak, Esq., Woodruff, Spradlin and Smart, who represented the City for the Acosta v. City of Costa Mesa litigation, and by Bardis Vakili, Esq., ACLU of Southern California, who represented Mr. Acosta.

ALTERNATIVES CONSIDERED:

The City Council can choose not to adopt the proposed ordinance.

FISCAL REVIEW:

No fiscal impact.

LEGAL REVIEW:

The City Attorney has prepared a draft ordinance as well as this report based on Council direction.

CONCLUSION:

The proposed ordinance corrects the flaws of the current version of Section 2-61 of the Costa Mesa Municipal, striking a balance between the City's interest in maintaining order during its City Council meetings, and the interest of individuals addressing the Council to freely express their opinions.

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Attachments: [Ordinance 14-09](#)