M E M O R A N D U M

TO: Board of Trustees

FROM: Josh Nelson
Annie Branham
Legal Counsel

SUBJECT: Presentation on Regulating Public Comment.

DATE: August 30, 2023

I. RECOMMENDATION

That the Board of Trustees receive a presentation on its ability to regulate public comment during Board of Trustees and similar public meetings.

II. BACKGROUND

The First Amendment guarantees the right of free speech. In part, the scope of this right depends on when and where speech occurs, and the courts have created a series of tests that apply different standards to speech occurring at public property depending on the "publicness" of the property. Stated simply, government can less strictly regulate speech on property that has historically been open to public speech (i.e., a park) than property that has not been open to public speech (i.e., a water treatment plant). The courts call these categories of property "forums."

Recognizing the core First Amendment[1] right to petition the government, Board meetings are considered "limited public forums." (*White v. City of Norwalk* (9th Cir. 1990) 900 F.2d 1421, 1425.) Limited public forums are the second most open category of property, and governments can only impose reasonable time, place and manner regulations that are (i) content neutral; (ii) narrowly tailored to serve a significant government interest; and (iii) leave open alternative channels of communication.

The Open Meeting Law and Attorney General recognized a number of permissible regulations on public comment during a meeting. These include:

- Time limits for individual public comment.
- Prohibitions on unduly repetitious or irrelevant speech.

[1] Nevada Constitution Article I, Section 9 has equivalent protections for free speech.

- Prohibitions on actually disruptive behavior as determined by the Chair. Examples of this include yelling and trying to speak outside of comment periods or interrupting other speakers.

In applying these regulations, IVGID cannot cut off speech because of disagreement with the views or statements expressed by the speaker. *(White v. City of Norwalk* (9th Cir. 1990) 900 F.2d 1421, 1425.)

One area where there is conflicting guidance from the courts and Attorney General is for "personal and slanderous remarks." The Attorney General has opined that an agency may prohibit this type of speech. (See AG File No. 00-047, p.3) It can be very difficult to determine what qualifies under this type of standard. For example, the Ninth Circuit has opined that a city council could not eject a member from a public member solely for making a "Nazi salute." (*Norse v. City of Santa Cruz* (9th Cir. 2010) 629 F.3d 966.) The salute must have been actually disruptive. The court reminded public agencies that "…government officials in America occasionally must tolerate offensive or irritating speech." Similarly, legitimate criticism of the government or its officials will oftentimes be personal in nature. It is very difficult to distinguish between permissible criticism and potentially impermissible personal remarks. For these reasons, it is very risky (and not recommended) to stop public commentators solely because one believes that their speech is personal or offensive. Below is a (non-exhaustive) chart identifying some types of behavior that may, and may not, be regulated by the Board:

Behavior Considered Disruptive; Attendee May be Removed After Warning	**Behavior Not Considered Disruptive; Attendee Should Not be Muted or Removed[2]**
Exceeding the allotted time to speak before the Board, i.e., three minutes each – warn the person that their time has expired and they must leave the podium, then have clerk turn off microphone if the person persists (make sure this rule is applied even-handedly across <u>all</u> speakers).	A silent Nazi salute in the meeting room, i.e., a silent act of protest that went largely unnoticed by the meeting participants, until singled out by an offended member of the public body

[2] It is appropriate to ask a person using profanity, obscenities, or the like to stop, but they should not be pressed if they refuse.

Comments that are willfully disruptive of the meeting by being irrelevant, repetitious, slanderous, offensive, inflammatory, irrational, or amounting to personal attacks or interfering with rights of other speakers	Comments in general about District Board members or employees, if they do not rise to the level of slander or are not objectively offensive or inflammatory to a reasonable person[3]
Speaking without first being recognized by the Chair (for instance, yelling things out from the audience)	Profanity alone, without the additional element of a "disruption" to the meeting
Specific, credible threats to the Board, members of the public, or themselves	Criticism of District or Board policies, whether valid or entirely unfounded
Inciting violence or using "fighting words"	
Encouraging members of the audience to disrupt the meeting (i.e., by applauding), when the meeting is actually disrupted	
Yelling and speaking out of order to an extent that it hinders another member of the public from addressing the legislative body	

[3] This can be a very difficult line to draw, and the 9th Circuit has stated that "the point at which speech becomes unduly repetitious or largely irrelevant is not mathematically determinable. The role of a moderator involves a great deal of discretion." (*White v. City of Norwalk* (9th Cir. 1990) 900 F.2d 1421, 1426.) If in doubt about whether cutting off a commenter might violate their First Amendment rights, we recommend calling for a brief recess so that counsel and the Board may discuss.

III. FINANCIAL IMPACT AND BUDGET

None.

IV. ALTERNATIVES

This is a presentation item. There is no alternative.

V. BUSINESS IMPACT

This item is not a "rule" within the meaning of Nevada Revised Statutes, Chapter 237, and does not require a Business Impact Statement.