

**Municipal Alert**  
**March 16, 2023**

**CIVILITY IS DEAD – THE SUPREME JUDICIAL COURT RULES MUNICIPAL  
CONTROL OF PUBLIC SPEAK LIMITED TO REASONABLE  
TIME/PLACE/MANNER RESTRICTIONS**

On March 7, 2023, the Supreme Judicial Court ruled in the highly anticipated Barron v. Kolenda and the Town of Southborough (SJC-13284) case. The case brought a constitutional challenge to the Town of Southborough’s (“Southborough”) public comment policy (the “policy”), which imposed a code of civility on members of the public who participated in so-called “public speak” before Southborough boards and committees. In its decision, the Court ruled that Southborough’s policy violated Articles 16 and 19 of the Massachusetts Declaration of Rights.

At the heart of the Barron<sup>1</sup> case was a select board meeting chaired by Kolenda and attended by Barron, and participation in the public comment part of the select board meeting. At the start of that part of the meeting, Kolenda reminded the public of the policy, which included the requirement that “...All remarks and dialogue in public meetings must be respectful and courteous, free of rude, personal or slanderous remarks.” Later, Barron spoke, while holding a sign that said: “Stop Spending” and “Stop Breaking Open Meeting Law.” Barron also critiqued the select board for its prior Open Meeting Law violations. Kolenda and Barron then entered into a colloquy where Kolenda threatened to stop public comment and go into recess, and Barron called Kolenda a particular name. After the second reference to that name, Kolenda ended the meeting and the video of the meeting ceased. Kolenda allegedly screamed at Barron and threatened to have her escorted out of the meeting. Barron left, believing he would act on that threat.

The Court’s opinion reviewed the history of Articles 16 and 19 of the Declaration of Rights, and the long history of freedom of assembly and speech in Massachusetts. The Court noted that long standing Massachusetts cases have stood for “the fullest and freest discussion” which is “sanctioned and encouraged by the admirable passage in the constitution,” where that right is “exercised in ‘an orderly and peaceable manner.’” The Court also noted that more recent Massachusetts cases have drawn from “well-understood First Amendment principles and provided for reasonable time, place and manner restrictions” to public speech.

In the context of full and fierce discussion, the Court determined that governmental criticism is subject to reasonable time, place and manner restrictions. Such speech, while required to be

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<sup>1</sup>In her Complaint, Plaintiff sought a declaration that a portion of the public comment policy requiring civility was unconstitutional under the Massachusetts Declaration of Rights because it disallows criticism of board members and decisions. Plaintiff also brought a claim under the Massachusetts Civil Rights Act (“MCRA”) against Kolenda individually. The Superior Court granted the Defendants motion for judgment on the pleadings and Barron appealed. The SJC transferred the case to itself, on its own motion.

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peaceable and orderly, was not required to be “respectful and courteous.” The Court noted that even “rude and insulting” speech referencing a particular name is still protected speech.<sup>2</sup>

The Court also found that the civility code portion of the policy regulated the content of public speech and was “extraordinarily broad.” Where the policy required that speech directed at government be “respectful and courteous, free of rude remarks,” the Court determined it constituted viewpoint discrimination, since it allowed praise, but disallowed criticism.

Finally, the Court found that Kolenda, by allegedly screaming at Barron and threatening to remove her while she was engaging in protected speech, could be subject to a claim under the MCRA, which protects against violations of rights by threats, intimidation, or coercion.

Based on this opinion, and the Court’s description of reasonable time, place and manner restrictions, it is important that municipalities, in consultation with their counsel, take a hard look at their public speak or public comment policies, and consider revising them so that they are limited to designations of:

- when and where a public comment session may occur;
- how long a public comment session may last;
- time limits for each person speaking during public comment session; and,
- establishment of rules preventing speakers from disrupting others and removing those who do.

The Court did not address any portion of the Open Meeting Law or, under that law, the rights of the Chair of a public body to direct speakers at a public meeting. However, the designations listed above that could serve as reasonable time, place and manner, content-neutral limitations on speech are the types of rules which appear to be enforceable by the Chair of a public body, consistent with a Chair’s rights and obligations under the Open Meeting Law.

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<sup>2</sup> Subject to a carve out related to the doctrine of “fighting words” which is not protected speech.



***This Client Alert was prepared by Karis North and reviewed with Andy Waugh, Michael Maccaro, and Kevin Freytag. If you have any questions about this issue, please contact Karis North, Kevin Freytag, or the attorney responsible for your account, or call (617) 479-5000.***

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