DISTRICT COURT, PITKIN COUNTY, COLORADO 560 East Main Street Aspen, Colorado 81611 (970) 925-7635	DATE FILED: September 19, 2019 11:05 AM CASE NUMBER: 2018CV18
Plaintiffs: Lee Mulcahy and Ned Carter v. **Defendant**: Aspen Pitkin County Housing Authority	▲ **COURT USE ONLY** ▲ Case No.: 2018 CV 18 Division: 6

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. Procedural Background

The case is before the court on the Defendant, Aspen Pitkin Housing Authority's (APCHA's) Motion for Summary Judgment. The Motion has been fully briefed. The case was initiated by the Plaintiffs, Lee Mulcahy and Ned Carter, (Plaintiffs) to challenge the constitutionality of APCHA's "Rules of Decorum" governing public comments at APCHA's public meetings. Plaintiffs challenge the Rules of Decorum on First Amendment grounds, arguing they are unconstitutional both facially and as applied. Plaintiffs seek an order declaring that the Rules of Decorum are unconstitutional and injunctive relief to prohibit APCHA from using

its Rules of Decorum at public meetings. APCHA contends the Rules of Decorum are constitutional both facially and as applied and seeks an order on summary judgment to that effect.

After considering the briefs and the exhibits attached thereto, the court grants APCHA's motion for summary judgment on the facial constitutionality challenge, finding that the Rules of Decorum impose reasonable content-based restrictions relating to the purposes of APCHA's public hearings. However, the court finds that the Rules of Decorum, as actually applied to Plaintiff Lee Mulcahy, constitute impermissible viewpoint discrimination to the extent they prohibit Mulcahy from expressing criticism of APCHA, its policies, or APCHA's Board members.

The material facts in this case are not subject to dispute. Neither party submitted any affidavits with the Motion, the Response, or the Reply, but both parties made repeated references to the agendas and transcripts from the relevant APCHA meetings that were attached as exhibits.[1] Since neither party objected to these materials on evidentiary grounds or otherwise, the court considers them uncontested. C.R.C.P. 56 permits a party to move for summary judgment with or without supporting affidavits. Other pertinent facts as set out below were admitted in the pleadings or other filings in the case.

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[1] APCHA's Motion made reference to an affidavit of Cindy Christensen as Exhibit A, but no Exhibit A was filed.

II. Undisputed Facts

APCHA is an independent statutory multijurisdictional housing authority authorized pursuant to § 29-1-204.5(1), C.R.S. It was created by an intergovernmental agreement between the City of Aspen and Pitkin County. APCHA's primary purpose is to establish and implement affordable housing programs in Aspen and Pitkin County. APCHA is governed by a Board of Directors (Board) consisting of seven members. Three Directors are appointed by the City, three are appointed by the County, and the seventh and one alternate are appointed jointly.

Plaintiff Mulcahy is a named defendant in a lawsuit initiated by APCHA in 2015. APCHA sued Mulcahy for claimed violations of certain deed restrictions relating to an employee housing unit he owns in Burlingame Ranch in Pitkin County. APCHA prevailed in the litigation at the trial court level and on subsequent appeals. This is a sore point for Mulcahy, to put it mildly.

APCHA conducts regular public meetings approximately every two weeks. APCHA publishes an agenda for its meetings, and every agenda includes a public comment item in which speakers are allowed to address the Board for three minutes each. Mulcahy has been a frequent attendee at these meetings. From November 15, 2017, through January 16, 2019, Mulcahy addressed the APCHA Board during the public comment period fourteen times. (APCHA's Exhibits 1 through 14, Plaintiffs'

Exhibit A.) Plaintiff Ned Carter addressed the Board at one meeting. It is the public comment periods, and Mulcahy's spoken comments during the public comment periods, that are the source of the dispute in this case.

Both parties attached copies of the meeting agendas as well as transcripts of the recorded comments made by Mulcahy and various Board members. Neither party disputes the accuracy of those transcripts or the dates upon which the public meetings occurred. It is fair to say that Mulcahy's comments to the Board during each of his appearances at the APCHA meetings have focused on his perspective about the litigation, his criticisms of various Board members or the Board's legal counsel, objections to the Board conducting business in "secret" executive sessions, and more general comments about his history with, and love for, the Aspen and Pitkin County communities.

It is also fair to say that Mulcahy's comments, both verbal and written, have often been contentious, repetitive, and personally disparaging to APCHA's Board members, counsel, and employees. For example, Mulcahy has referred to the City of Aspen as "Moscow in the Mountains", the City Attorney's Office as "a modern day equivalent of Darth Vader", APCHA's public comment policy as akin to "North Korea or China", and City employees as "Stormtroopers."

Mulcahy often tried to engage the Board in a back and forth colloquy that was borderline taunting or, at a minimum, abrasive. (*See*, APCHA's Exhibits 1

through 14, Plaintiffs' Exhibit A.) Regardless of the tenor of Mulcahy's comments, they were almost always focused on APCHA's activities and policies, and more particularly with respect to his ongoing legal troubles.

In May of 2018, APCHA adopted Rules of Decorum (Rules) to regulate the public comment period of its public meetings. The Rules were incorporated into the printed meeting agendas and were read into the record at the start of every meeting. The Rules state as follows:

> APCHA Board meetings shall be conducted in a fair and impartial manner that allows the business of APCHA to be effectively undertaken. Citizens, APCHA staff, and APCHA Board members alike must be allowed to state their positions in a courteous atmosphere that is free of intimidation, profanity, personal affronts, threats of violence or the use of APCHA as a forum for politics. All remarks shall be directed to the APCHA Board as a whole, not to APCHA staff or to the public in attendance. Members of the pubic shall not approach the dais without first seeking and obtaining the permission of the Chairperson or presiding officer. Warnings may be given by the Chair at any time that a speaker does not conduct himself or herself in a professional and respectful manner and anyone whose loud, defiant, threatening, personal, vulgar, uncivil or abusive language or behavior impedes the orderly conduct of an APCHA meeting shall, at the discretion of the presiding officer, be barred from speaking further and may be ejected from the meeting.

The Rules do not state a time limit for public comments, but it is undisputed that public comments are limited to three minutes per speaker.

There are three instances in the record where Mulcahy's speech was curtailed by the Board during the public comment period based on claimed violations of the Rules. At the June 6, 2018, Mulcahy was confronted with the Rules for the first

time. He stated his opinion that the Rules were "ridiculous" and then launched into a lengthy criticism of the Board, its attorney, and the Aspen City attorney. The APCHA chairperson then interrupted Mulcahy informing him that if he failed to follow the Rules, "then you have to leave, and you won't be allowed to speak." The chairperson then asked Mulcahy how his comments were "pertinent to APCHA Board of Directors and public comment?" Mulcahy then asked "Okay. Can we talk about your attorney? Can we do that?" The chairperson responded "No. No. Officer?...I would like this gentleman to be escorted from the room. Thank you." Mulcahy was then escorted from the meeting by a police officer.

At the July 18, 2018, meeting Mulcahy again criticized the Rules stating: "I don't think its constitutional" (sic). Mulcahy then asked if the Board had any comments about that opinion. Board Attorney Smith responded: "This isn't a debate. It is public comment. You can say whatever you want within the limits of the Rules of Decorum." Mulcahy then stated: "Okay. So I would like to talk about Mr. Smith. Is that okay, Mr. Smith?" Smith responded: "Pardon me?". Mulcahy: "Can I talk about you?" At that point Board Chairperson Erickson stated: "No, you cannot. That part of the, part of the Rules of Decorum is that you will not criticize or, or use disparaging remarks to anybody on the Board or staff." Mulcahy then shifted gears and changed the subject. He was not ejected from the meeting.

Finally, on December 5, 2018, the following exchange occurred between

Mulcahy, Board Member Blaney and Board Member Head:

Mulcahy: My name is Lee Mulcahy.

Head: You have three minutes.

Mulcahy: My name is Lee Mulcahy and, as you know, we are a small community and we are about 7,000 people. Mike [Board Member] you go to my church that my mom taught Sunday school at and I think it's real shameful that you are evicting an 83 year old widow.

Blaney: Hey, Lee, you are not allowed to call out an individual – staff or member of the Board.

Mulcahy: You have a PhD I think?

Blaney: That includes me.

Mulcahy: Right, and if you think that the policy that he read is constitutional…Where did you go to school?

Blaney: This isn't back and forth. This is public comment.

Head: Do you have any comments Lee?

Mulcahy: I do have a public comment. Your university ought to be disbarred. Shame on you.

Blaney: Okay, that's also, that violates the Rules od Decorum, Lee. So we are going to have to….

Mulcahy: It's unconstitutional, I think you…

Blaney: That's fine.

Head: Lee, why don't you, you've got 2-1/2 minutes left.

Mulcahy: Okay.

Head: Do you have anything to say, let's get it out.

Mulcahy: Your attorney wrote with the United States Supreme Court, he writes on page two of his response to my mother's and I writ of certiorari, following months of investigation, APCHA determined that Mulcahy had failed to provide evidence of compliance with this requirement among others. Well, that's because this young lady over here, Cindy, refused…..

[Many people responding]

Head: Right there that violates…..

Mulcahy: She never says anything and then she takes notes and doesn't…

Head: Lee?

Mulcahy: And I think Ann said something earlier….

Head: Lee, I am going to ask you to leave. You have had your say and you are attacking Board Member according to the Rules of Decorum.

Mulcahy: You know what? I would like to start off with a joke.

Head: You're done. Thank you very much.

As summarized above, Plaintiffs argue that the Rules are facially unconstitutional under the First Amendment and unconstitutional as applied to Mulcahy in the forgoing meetings. APCHA counters that the Rules are constitutional both facially and as applied because they are reasonable, viewpoint neutral restrictions on speech in a "limited public forum.".

III. Summary Judgment Standard of Review

Summary judgment under C.R.C.P. 56(c) is "a drastic remedy, to be granted

only when there is a clear showing that the controlling standards have been met." *HealthONE v. Rodriguez ex rel. Rodriguez*, 50 P.3d 879, 887-888 (Colo. 2002); *Casebolt v. Cowan*, 829 P.2d 352, 363 (Colo. 1992) (emphasizing that summary judgment "is appropriate only in the clearest of cases"). Even where it is extremely doubtful that a genuine issue of material fact exists, summary judgment is inappropriate. *Westin Operator, LLC v. Groh*, 2015 CO 25, ¶ 21, *reh'g denied* (May 11, 2015).

The Court cannot grant summary judgment unless the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits submitted with the motion, clearly show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See*, C.R.C.P. 56(c); *KN Energy, Inc. v. Great Western Sugar Co.*, 698 P.2d 769 (Colo. 1985). "[A]ll doubts as to the presence of disputed facts must be resolved against the moving party." *Id.* at 776. "The moving party has the burden of establishing the nonexistence of a material fact." *Roberts v. Holland & Hart*, 857 P.2d 492, 496 (Colo. App. 1993). If the non-moving party cannot produce enough evidence to establish a triable issue, then the moving party is entitled to judgment as a matter of law. *Id.*; *Luttgen v. Fischer,* 107 P.3d 1152, 1154 (Colo. App. 2005).

IV. Applicable Law

Whether the Plaintiffs' First Amendment rights were violated turns on the

answers to three questions: (1) is Plaintiffs' speech protected speech? (2) what type of the forum is an APCHA Board meeting? and (3) do the justifications for restricting speech proffered by APCHA satisfy the First Amendment standard applicable to the type of forum in question? *Summum v. Callaghan*, 130 F.3d 906, 913 (10th Cir. 1997); *People v. Aleem*, 149 P.3d 765, 774–81 (Colo. 2007)("We undertake a three-step inquiry to determine whether the court's restriction is permissible under the First Amendment"); *Holliday v. Reg'l Transp. Dist.,* 43 P.3d 676, 681–82 (Colo. App. 2001).Whether particular speech is protected by the First Amendment is a question of law for the court to determine. *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983); *Lewis v. Colo. Rockies Baseball Club,* 941 P.2d 266, 270-271 (Colo. 1997).

Article II, Section 10 of the Colorado Constitution also protects freedom of speech and provides greater protection than the First Amendment. However, unless the parties assert that the analytical framework under the state constitution differs from the First Amendment analysis under federal law, the federal analysis applies. *In re Marriage of Newell*, 192 F.3d 529,535 (Colo. App. 2008); *See, e.g., People v. Aleem*, 149 P.3d 765 (Colo. 2007); *Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999); *Holliday v. Reg'l Transp. Dist*., 43 P.3d 676, 681 (Colo. App. 2001). Neither party here has made such an argument, and the court is unaware of any Colorado precedent that would dictate a different framework, so federal case law provides the context

for analyzing the facts of this case.

V. Analysis

A. Mulcahy's Speech is Protected. There is no serious question that the speech that Plaintiffs engaged in at APCHA Board meetings is protected speech. "[E]xcept for certain narrow categories deemed unworthy of full First Amendment protection—such as obscenity, 'fighting words' and libel—all speech is protected by the First Amendment." *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 282-83 (3d Cir. 2004).

B. APCHA's Meetings are a Limited Public Forum. To determine the level of First Amendment protection given to speech on government property, courts examine the nature of the forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 44, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983); *Lewis,* 941 P.2d at 272. The Supreme Court has defined four types of fora: the traditional public forum (*e.g.*, parks and streets), the governmentally designated public forum (*i.e.,* the government voluntarily transforms a nonpublic forum into a traditional public forum, thereby bestowing all the free speech rights associated with the traditional public forum, albeit on a potentially temporary basis, onto that now "designated public forum"), the limited public forum (where the government allows selective access to some speakers or some types of speech but does not open the property as a fully designated public forum), and the non-public forum (the government retains the right to curtail

speech so long as those curtailments are viewpoint neutral and reasonable for the maintenance of the forum's particular official uses). *Perry,* 460 U.S. at 45–46, 103 S.Ct. 948; *Lewis,* 941 P.2d at 272; *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,* 473 U.S. at 800, 105 S.Ct. 3439. The type of forum where the speech occurs dictates the standard of review that applies to determine whether the government's restriction on that speech is permissible.

A "limited public forum" is a subset of the nonpublic forum classification. *See, e.g., Summum v. Callaghan,* 130 F.3d 906, 914 (10th Cir.1997)("In more recent cases, ... the [Supreme] Court has used the term 'limited public forum' to describe a type of nonpublic forum...."). A limited public forum "arises where the government allows selective access to some speakers or some types of speech in a nonpublic forum, but does not open the property sufficiently to become a designated public forum." *Id.* at 916; *Summum v. City of Ogden,* 297 F.3d 995, 1002 & n. 4 (10th Cir. 2002).

Any government restriction on speech in a limited public forum must only be reasonable in light of the purpose served by the forum and be viewpoint neutral. *Shero v. City of Grove, Okl.*, 510 F.3d 1196, 1202–03 (10th Cir. 2007); *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). The limited public forum concept has been applied by numerous federal courts to public comment periods at local, county, and municipal board meetings like

APCHA's. *See Barrett v. Walker Cty. Sch. Dist.,* 872 F.3d 1209, 1225 (11th Cir. 2017) ("[T]he public-comment portions of the Board meetings and planning sessions fall into the category of limited public fora because the Board limits discussion to certain topics and employs a system of selective access"); *Green v. Nocciero*, 676 F.3d 748, 753 (8th Cir. 2012) (school board meeting was "what has variously been called a nonpublic or a limited public forum"); *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 759 (5th Cir. 2010) ("[t]he Board meeting here—and the comment session in particular—is a limited public forum"); *Featherstone v. Columbus City Sch. Dist. Bd. of Educ.*, 92 Fed. Appx. 279, 282 (6th Cir. 2004) ("A school board meeting, when opened to the public, is a limited public forum for discussion of subjects relating to the operation of the schools"); *Norse v. City of Santa Cruz,* 629 F.3d 966, 976 (9th Cir. 2010) (en banc) (in a limited public forum such as a city council meeting, a city's rules of decorum will not be facially overbroad "where they only permit a presiding officer to eject an attendee for actually disturbing or impeding a meeting"); *Youkhanna v. City of Sterling Heights*, 934 F.3d 508, 514 (6th Cir. 2019) (City council meeting); *Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266, 270–71 (9th Cir. 1995) ("[L]imitations on speech at [city council] meetings must be reasonable and viewpoint neutral...."); *accord Steinburg v. Chesterfield Cnty. Planning Comm'n,* 527 F.3d 377, 385 (4th Cir. 2008); *Eichenlaub v. Twp. of Ind.,* 385 F.3d 274, 281 (3d Cir. 2004).

Here, the court finds that APCHA's meetings are a limited public forum. APCHA is limited governmental body tasked with affordable housing duties. The scope of its work is much narrower and more focused than that of a typical school board, a city or county government, or a planning commission. The nature of the speaking forum offered to the public at its meetings is limited to matters within its jurisdiction, namely affordable housing proposals, applications, compliance, approvals, funding, and policy. Members of the public are afforded an opportunity to speak to the Board on these and other matters for a short time period at the start of every Board meeting. Given the limited nature of the public comment segment of APCHA meetings and the narrow scope of APCHA's public activities, the court finds that as a limited public forum, the APCHA Board may impose restrictions on attendees' speech if the restrictions are (1) viewpoint neutral and (2) reasonable in light of the purpose served by the Board meetings. *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1202-03 (10th Cir. 2007).

C. APCHA's Rules of Decorum Are Facially Reasonable and Viewpoint Neutral.

The reasonableness of the Government's restriction on speech "must be assessed in light of the purpose of the forum and all the surrounding circumstances." *Lee v. International Soc'y for Krishna Consciousness, Inc.,* 505 U.S. 830, 831, 112 S.Ct. 2709, 120 L.Ed.2d 669 (1992); *Hawkins v. City & Cty. of Denver*, 170 F.3d 1281, 1289 (10th Cir. 1999). Reasonableness "requires more of a showing than does

the traditional rational basis test.... There must be evidence in the record to support a determination that the restriction is reasonable." *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 966-67 (9th Cir. 2002) (citations omitted).

Here, the court finds that the Rules are reasonable. Although unwritten, the Board limits public comment to three minutes. This is reasonable in light of the Board's goals to keep meetings moving and on time. *See, Shero v. City of Grove, Okl.*, 510 F.3d 1196, 1203 (10th Cir. 2007) ("The three-minute time limitation imposed on Mr. Shero's speech was a restriction appropriately designed to promote orderly and efficient meetings"); *Tannenbaum v. City of Richmond Heights*, 663 F. Supp. 995 (E.D. Mo. 1987) (Ordinance granting any citizen two minutes in which to comment on matters pertinent to the government of the city on submission of a prior request and recognition was not an invalid restriction on freedom of speech).

The Rules also require that meetings be conducted fairly and impartially in a "courteous atmosphere" free from "intimidation, profanity, personal affronts, threats of violence, or the use of APCHA as a forum for politics." All of these restrictions are reasonably related to the effective and efficient operation and conduct of APCHA's meetings, the furtherance of its business, and to minimize disruptions and conflict.

The Rules also control the manner in which members of the public should ask to address the Board, to whom comments may be appropriately made and how a

warning should be given if a speaker violates the Rules. These are appropriate content neutral manner of speech restrictions that merely regulate the protocols of how the public should address the Board, not what a speaker may say.

Finally, a speaker may only be silenced or removed from the meeting if their words or behavior actually " impedes the orderly conduct" of a Board meeting due to being "loud, defiant, threatening, personal, vulgar, uncivil, or abusive." All of these are reasonable in light of maintaining an orderly and civil meeting atmosphere for public comments. These types of restrictions, although focused more on the content of speech, have been found reasonable since they promote an orderly meeting without interruptions and preclude conduct that actually impedes or impairs the Board's business.

For example, in *White v. City of Norwalk,* 900 F.2d 1421 (9th Cir. 1990), the plaintiffs brought a facial challenge to a city ordinance that proscribed "personal, impertinent, slanderous or profane remarks." *Id.* at 1424. The ordinance in that case stated:

> Each person who addresses the Council shall not make personal, impertinent, slanderous or profane remarks to any member of the Council, staff or general public. Any person who makes such remarks, or who utters loud, threatening, personal or abusive language, or engages in any other disorderly conduct which disrupts, disturbs or otherwise impedes the orderly conduct of any Council meeting shall, at the discretion of the presiding officer or a majority of the Council, be barred from further audience before the Council during that meeting.

The ordinance was upheld because the City could only remove a speaker who

made a proscribed remark and the prohibited conduct had to be conduct which actually "disrupts, disturbs or otherwise impedes the orderly conduct of any Council meeting." *Id.; See also, Norse v. City of Santa Cruz,* 629 F.3d 966, 976 (9th Cir. 2010) (en banc) (a city's rules of decorum will not be facially overbroad "where they only permit a presiding officer to eject an attendee for actually disturbing or impeding a meeting"); *State v. Guy*, 196 Neb. 308, 242 N.W.2d 864 (1976) (An ordinance may establish reasonable restrictions on the conduct of persons at a lawful council meeting. The use of personal abuse and epithets followed by a declaration that the speaker is out of order and a request for his removal which is resisted constitutes conduct rather than free speech.) In other words, restrictions on speech in a limited public forum will survive scrutiny if the speech actually disrupts the orderly conduct of the meeting. The Rules in this case have similar language to the above cases. A speaker may only be removed or silenced if their "loud, defiant, threatening, personal, vulgar, uncivil or abusive language or behavior impedes the orderly conduct of an APCHA meeting." The court finds this restriction reasonable.

The court also finds that the Rules are viewpoint neutral. Although content-based discrimination is permissible in a limited or nonpublic forum if it preserves the purpose of the forum, when the government moves beyond restricting the subject matter of speech and targets "particular views taken by speakers on a subject," such viewpoint discrimination is "presumed impermissible." *Rosenberger v. Rector &*

Visitors of Univ. of Virginia, 515 U.S. 819, 829-30, 115 S. Ct. 2510, 2516-17, 132 L. Ed. 2d 700 (1995). If the government intends to restrict the particular message rather than to protect the purpose of the forum, then the restriction constitutes viewpoint discrimination. *People v. Aleem*, 149 P.3d 765, 779 (Colo. 2007).

Turning to the language of the Rules here, there is no expressed preference for any particular viewpoint anywhere in the Rules. First, public comment is expected to be polite, courteous, fair and impartial. By its terms this does not constitute viewpoint discrimination. Speakers also may not engage in "abusive or disruptive" speech. This is content-based discrimination, which is permitted in a limited public forum provided it is viewpoint neutral and reasonable in light of APCHA's purpose. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001); *Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1225 (11th Cir. 2017). As pointed out above, the content restriction only constrains speech if it actually disrupts or impedes the meeting. Likewise, the restriction on not using APCHA as a forum for politics is also viewpoint neutral because it does not limit the type of politics, whether conservative or liberal, but simply the topic of politics which is unrelated to APCHA's business.

Finally, the Rules' prohibition on personal attacks is not based on the Board's disagreement with any particular message and is unrelated to any particular viewpoint being expressed. It serves purposes unrelated to the particular content of

the speech such as maintaining an impartial and non-threatening forum. The Rules prohibit personal attacks on anyone, not just the Board members or APCHA's employees. The Rules focus on the inherently disruptive nature of a personal attack in a Board meeting and not on the expressive content of the personal attack. Therefore, the court finds the Rules of Decorum are both reasonable and viewpoint neutral and therefore not facially unconstitutional.

To the extent Plaintiffs contend that the Rules are facially unconstitutional on overbreadth grounds, the court is similarly unpersuaded. Under First Amendment overbreadth analysis, "[t]he showing that a law punishes a substantial amount of protected speech, judged in relation to the statute's plainly legitimate sweep, suffices to invalidate *all* enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Virginia v. Hicks,* 539 U.S. 113, 118–19, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2004) (emphasis in original) (quotation omitted). "Overbreadth is 'strong medicine,' and courts 'employ[ ] it with hesitation, and then, only as a last resort.'" *Faustin v. City & Cty. of Denver, Colo.*, 423 F.3d 1192, 1199 (10th Cir. 2005) (quoting *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1367 (10th Cir. 2000). The mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. "[T]here must be a realistic danger that the statute itself will significantly

compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Faustin* at 1199-200. Accordingly, to prevail on an overbreadth challenge, a plaintiff must establish *substantial* overbreadth, and the overbreadth claimant bears the burden of demonstrating, "from the text of the law and from actual fact, that substantial overbreadth exists."

Here, the Rules are not overly broad. They regulate the manner in which the public may address the Board and limitations on rude or offensive speech that are prohibited. The Rules provide for fair warning to those who violate them and permit the removal of violators only if the meeting is actually impeded. *See Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989) (Ordinance making it unlawful to disrupt or interrupt a meeting of the city commission and prohibiting the use of obscene or profane language, physical violence, or the threat thereof, or other loud and boisterous behavior intended to disrupt the meeting, was neither vague nor overbroad).

D. APCHA's Rules of Decorum As Applied to Mulcahy Are Not Viewpoint Neutral And Are Unconstitutional.

Where a statute is not facially unconstitutional, a challenger must show that the statute is unconstitutional as applied to his or her conduct. *People v. Baer*, 973 P.2d 1225, 1231 (Colo. 1999). "A plaintiff bringing an 'as-applied' challenge contends that the statute would be unconstitutional under the circumstances in which

the plaintiff has acted or proposes to act. If a statute is held unconstitutional 'as applied' the statute may not be applied in the future in a similar context, but the statute is not rendered completely inoperative." *Sanger v. Dennis*, 148 P.3d 404, 410 (Colo. App. 2006). "The practical effect of holding a statute unconstitutional as applied is to prevent its future application in a similar context, but not to render it utterly inoperative. To achieve the latter result, the plaintiff must succeed in challenging the statute on its face." *Ada v. Guam Soc. of Obstetricians & Gynecologists,* 506 U.S. 1011, 113 S. Ct. 633, 634, 121 L. Ed. 2d 564 (1992); *Sanger v. Dennis*, 148 P.3d 404, 411 (Colo. App. 2006).

"Discrimination against speech because of its message is presumed to be unconstitutional. It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Holliday v. Reg'l Transp. Dist.*, 43 P.3d 676, 683 (Colo. App. 2001); *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 828, 115 S.Ct. 2510, 2516, 132 L.Ed.2d 700, 714 (1995). With narrow exceptions in areas such as obscenity, viewpoint discrimination is almost universally condemned and rarely passes constitutional scrutiny. *Mesa v. White,* 197 F.3d 1041 (10th Cir. 1999).

In testing a policy for viewpoint discrimination, courts may consider its application as well as the language of the policy on its face. *Mesa v. White, supra* (concluding that rule of procedure used to bar speaker at county commission meeting

was a pretext for viewpoint discrimination). Viewpoint discrimination is a subset of and an "egregious form of content discrimination." *Rosenberger* at 829, 115 S.Ct. at 2516. Although public boards may exclude some types of harassing speech if it has the potential to disrupt the meeting, or threatens illegal acts, a board may not exclude speech merely because it criticizes board members or officials. *See Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).

Save for rare circumstances such as speech promoting drug use at a high school event, *see Morse v. Frederick,* 551 U.S. 393, 403, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007), the First Amendment forbids government officials from regulating speech based on their reaction to its point of view, *see Police Dep't of Chicago v. Mosley,* 408 U.S. at 96, 92 S.Ct. 2286. "Listeners' reaction to speech is not a content-neutral basis for regulation.... Speech cannot be ... punished or banned[ ] simply because it might offend a hostile" member of a City Council. *Forsyth Cnty., Ga. v. Nationalist Movement,* 505 U.S. 123, 134–35, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Here, while the Rules are facially constitutional, the court finds that the manner in which they were applied to Mulcahy is not.

At the June 6, 2018, Mulcahy asked whether he could talk about the Board's attorney. The chairperson responded "No. No. Officer?...I would like this gentleman to be escorted from the room. Thank you." Mulcahy was then escorted from the meeting by a police officer. Mulcahy never actually said anything that was offensive

or disruptive. He simply asked a question about what he could discuss and was removed for asking that question. No doubt the Board member anticipated that Mulcahy would utter some annoying or impertinent remarks based on his statements at prior Board meetings, but he was never given the chance. Moreover, it was the potential viewpoint that Mulcahy was likely to express that offended the Board. "The Supreme Court long ago explained that 'in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.' *Tinker v. Des Moines Ind. Cmty. Sch. Dist.,* 393 U.S. 503, 508, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). There is no indication that Mulcahy actually impeded or disrupted the meeting in any way. The Rules were used to stifle Mulcahy's potential criticisms of the Board's attorney. Thus, the Rules were applied based on viewpoint discrimination.

Similarly, at the July 18, 2018, meeting Mulcahy again stated that he wanted to talk about the Board's attorney. At that point Board Chairperson Erickson stated: "No, you cannot. That part of the, part of the Rules of Decorum is that you will not criticize or, or use disparaging remarks to anybody on the Board or staff." The Board member's comments are problematic for two reasons. First, the Board member's comment that the Rules require that a speaker "will not criticize or, or use disparaging remarks to anybody on the Board or staff" is flatly incorrect. The Rules do not say that. They do not prohibit remarks that are critical of the Board or its

members, and if they did, they would be facially unconstitutional. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (collecting cases).

Second, this is a textbook example of viewpoint discrimination. The Board member is expressly stating that Mulcahy is prohibited from making kind of criticism of the Board or its members. The flip side of that restriction is that the Board would tolerate speech that was either neutral or supportive of the Board. That is viewpoint discrimination. *R.A.V. v. St. Paul,* 505 U.S. 377, 392, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) ("[Government] has no [authority] to license one side of a debate to fight freestyle, while requiring the other to follow the Marquis of Queensbury rules."). The Rules imposed at this meeting were flatly based on viewpoint discrimination and as applied were unconstitutional.

Finally, on December 5, 2018, Mulcahy was told that he was "not allowed to call out an individual – staff or member of the Board", that he violated the Rules of Decorum by doing so, and that "I am going to ask you to leave. You have had your say and you are attacking Board Member according to the Rules of Decorum…You're done. Thank you very much." Again, Mulcahy's comments may have been annoying to the Board members, but his remarks were not intimidating,

profane, threating violence, or an expression about politics. His remarks were all made within his allotted three minutes of time. Nor was Mulcahy loud, defiant, threatening, vulgar, uncivil or using abusive language or engaging in behavior to that extent that he actually impeded the orderly conduct of the meeting. Just as in the previous incidents, his speech was again curtailed based on its viewpoint and criticisms of the Board.

Even in a limited public forum like a city council meeting, the First Amendment tightly constrains the government's power; speakers may be removed only if they are actually disruptive" and not based on their viewpoint. *Norse v. City of Santa Cruz,* 629 F.3d at 979 (Kozinski, C.J., concurring, joined by Reinhardt, J.). In *Norse,* a speaker was expelled from a city council meeting for rising out of turn and making a Nazi salute at the mayor while the mayor was speaking. *See Norse v. City of Santa Cruz,* 586 F.3d 697 (9th Cir. 2009). The Honorable Alex Kozinski, Chief United States Circuit Judge for the Ninth Circuit, stated in his concurrence: "Councilman Fitzmaurice clearly wants Norse expelled because the 'Nazi salute' is 'against the dignity of this body and the decorum of this body' and not because of any disruption. But, unlike der Führer, government officials in America occasionally must tolerate offensive or irritating speech." *Norse* at 979.

Like Councilman Fitzmaurice, the members of the APCHA Board cannot simply expel or silence Mulcahy because of the annoying content of his speech. By

creating a limited public forum, the Board has elected to expose itself to criticism. So long as such criticism does not actually disrupt the orderly conduct of the meeting Mulcahy cannot be silenced merely because his speech is irritating and repetitive. Because the Board's application of the Rule of Decorum to Mulcahy in these instances were based solely on the viewpoint he was expressing, the court finds that the Rules are unconstitutional as applied to him.

VI. Conclusion and Order

For the forgoing reasons, the court enters partial summary judgment in favor APCHA on the question of whether the Rules are facially unconstitutional. The court finds they are not facially unconstitutional.

The court enters partial summary judgment against APCHA on the issue of whether the Rules of Decorum are unconstitutional as applied to Mulcahy. The court finds that as applied, they are unconstitutional as to Mulcahy.

As to the remedy, the court's order resolves the declaratory relief claim as to the facial and as applied constitutionality of the Rules. Plaintiffs also requested injunctive relief ordering APCHA "to cease using their decorum policy during citizen public comment." As for that claim, the court denies the requested relief and declines to enter any injunctive remedy prohibiting the use of the Rules of Decorum as written. The remedy on the "as applied" constitutional claim is to order that the Rules "may not be applied in the future in a similar context, but the statute is not

rendered completely inoperative." *Sanger v. Dennis*, 148 P.3d 404, 410 (Colo. App. 2006). The court so orders.

SO ORDERED this 19th day of September, 2019.

BY THE COURT:

John F. Neiley
District Court Judge