



March 10, 2023

Via Email and First Class Mail

Massachusetts Municipal Lawyers Association
115 North Street
Hingham, MA 02043
Attention: James Lampke, Executive Director, jlampke@massmunilaw.org

Massachusetts Association of School Committees
One McKinley Square
Boston, MA 02108
Attention: Executive Director Glen Koocher, gkoocher@masc.org

Re: Implementation of the recent SJC decision about public comment sessions –
Barron v. Kolenda

Dear Massachusetts Municipal Lawyers Association, Massachusetts Association of School Committees and your members:

On behalf of the American Civil Liberties Union of Massachusetts, Inc. (“ACLUM”) and in light of the Supreme Judicial Court’s recent decision in *Barron v. Kolenda*,¹ we wanted to reach out in the spirit of collaboration with thoughts about how the decision can and should be implemented. We hope to work together to maintain peaceable and orderly meetings and to preserve constitutionally protected input by the public. We ask that you kindly share this letter with your memberships.

We understand that there is much to digest in the Court’s opinion and that some public bodies fear the decision will lead to disorderly public meetings. This fear is not warranted. For the reasons discussed below, we believe—and the Court clearly believed—that meetings can and should be run in an efficient, orderly way while still preserving freedom of expression. Crucially, this means retaining opportunities for community members to address their public servants in an orderly and peaceable manner.

¹ Available here <https://www.mass.gov/files/documents/2023/03/07/k13284.pdf> and now published at 2023 WL 2375687.

We understand that some communities or government bodies within certain communities are considering terminating public comment periods altogether in response to this decision. As discussed below, we think this would raise serious constitutional questions, be contrary to core democratic values, and give rise to political tensions. The proper option is for municipalities to implement the Court's decision using the basic strategies laid out below.

Conducting orderly and productive meetings in light of *Barron*

Consistent with the decision, public bodies have plenty of tools to continue public comment sessions and conduct orderly meetings. Such tools include the following:

1. A rule that only speakers recognized by the chair can speak is lawful, as are other provisions of the Open Meeting Law, G.L. c. 30A, § 20(g), as long as they are applied in a reasonable and content- and viewpoint-neutral manner.
2. Public comment can be for a reasonably limited overall period of time and scheduled wherever on the agenda the chair chooses.² An overall limit ensures that time remains to address specific agenda items.
3. Individual speakers can be limited to a certain number (often up to 5) minutes per person. Having an individual time limit ensures others have a fair chance to speak and that the meeting moves along. It also means that anyone concerned about the content of any message being delivered need only wait patiently for a few minutes for time to expire.
4. If more individuals seek to speak than can be accommodated in the total time allotted for public comment, the body can enforce a fair, transparent, and content- and viewpoint-neutral system for deciding how the available slots will be allocated. Of course, on any occasion, the body can vote to extend the overall time for public comment in that meeting to be able to receive additional input.
5. Speakers can be required to address a matter within the jurisdiction of the public body, and topics can be limited to those either on the agenda, not on the agenda, or some combination. Special meetings dedicated only to certain topics are allowed.
6. Members of the audience are not free to interrupt recognized speakers or the discussion of the body. Those who are warned and persist can be required to leave the meeting.

² We recommend having public comment at the beginning of the meeting so that there is an opportunity to hear from those who might not be able to stay for all of the meeting due to caretaking responsibilities, the need to do homework, or other reasons.

7. Rules that require members of the body not to engage in dialogue with individual public commenters are lawful. Such rules can ensure that the body itself does not inadvertently conduct business on non-agenda items in contravention of the Open Meeting Law; they also can reduce the opportunity for tensions to flare. But of course, such rules can also reduce opportunities for productive engagement and are not necessary to comply with the Open Meeting Law. If members of the public body are allowed to respond or ask questions of the commenter, the time taken for that engagement should not count against the speaker's time limit or the time available for other speakers.
8. Anyone who makes a true threat of violence or incites imminent lawless conduct by others (as defined under established constitutional case law) can be directed to cease and, if they persist, can be ordered to leave.
9. Physically disruptive or physically threatening *conduct* can always be forbidden.
10. The chair can request that people be respectful and courteous and both the chair and the members of the body can model respectful and courteous behavior and thoughtful discourse, including with those whose views they do not share.

Risks of ending public comment sessions

Some public bodies are reportedly considering eliminating public comment sessions in response to the Court's decision. We urge them not to follow this course, both to avoid legal and political issues that would arise from such a course of action and to preserve this important forum in our representative democracy.

The Court's decision discusses the vital role and historical significance of these sessions, and the strong protection afforded them by Article 19 of our Declaration of Rights. As the Court emphasized and has long has been recognized, Article 19 protects the right to assemble in municipal meetings to provide "consultation" on matters of "the public interests." *Barron*, slip opinion p. 13 (quoting *Fuller v. Mayor of Medford*, 224 Mass. 176, 178 (1916)). After reviewing historical context dating back to before the American Revolution, the Court makes clear that "[f]rom the beginning, our cases have also emphasized that 'the fullest and freest discussion' seems to be 'sanctioned and encouraged by the admirable passage [in Article 19].'" *Id.* at p. 16 (quoting *Commonwealth v. Porter*, 1 Gray 476, 478, 480 (1854)).

In light of this history and function, it is clear that public comment sessions are vital and traditional public forums, and that closing them would raise serious issues constitutional questions. Contrary to what has been asserted by some, bodies

are not necessarily free under the law to simply cease having public comment sessions. Specifically, in light of the Court's discussion summarized above, there is strong reason to believe that terminating public comment sessions may well violate the spirit and the letter of Article 19. And since such closures would clearly be in response to the Court's ruling that the expression of viewpoints that are critical of government actions is robustly protected by our state constitution, serious questions would also arise under the First Amendment to the U.S. Constitution. As the U.S. Court of Appeals for the First Circuit has put it, forum closures are unconstitutional if they are conducted "merely as a ruse for impermissible viewpoint discrimination." *Ridley v. Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 77 (1st Cir. 2004); *see also Student Gov't Ass'n v. Bd. of Trustees of Univ. of Massachusetts*, 868 F.2d 473, 480 (1st Cir. 1989) ("Once the state has created a forum, it may not condition access to the forum on the content of the message to be communicated, or close the forum solely because it disagrees with the messages being communicated in it").

Moreover, such closures would be short-sighted as a strategic matter. Allowing brief comment at public meetings provides an important outlet for expressions of concern. If community members are denied the right to express themselves for a few minutes on issues within the body's jurisdiction at public meetings, they will inevitably find other ways and places to express themselves, including at other places frequented by their officials that may be subject to less control.

Most importantly, however, forum closures would deprive public officials—and other members of the public who can often learn about issues by listening to the questions and concerns of their neighbors—of important feedback and information that can enable them to respond appropriately. Loss of this vital function would be inconsistent with the foundational principles underlying the Court's decision in *Barron*.

Conclusion

ACLUM shares an interest in public meetings being orderly, peaceable and productive. We stand ready to partner with you as you consider how to respond to the Court's ruling in *Barron*. We hope the information provided in this letter is useful and we invite you to contact us if further discussion may be helpful.

Sincerely,

Carol Rose
Executive Director

Ruth A. Bourquin
Senior & Managing Attorney