VILLAGE OF OAK PARK
LAW DEPARTMENT

ATTORNEY-CLIENT PRIVILEGED COMMUNICATION/CONFIDENTIAL
ATTORNEY WORK PRODUCT MEMORANDUM

To: Village President Vicki Scaman and Board of Trustees
cc: Kevin J. Jackson, Village Manager
From: Paul L. Stephanides, Village Attorney
Date: October 26, 2023
Re: Public Comment and the First Amendment

INTRODUCTION

Trustee Robinson has asked in an email whether the Village can restrict public comments that are racist, profane, or contain abusive language or are disrespectful of Village values and other standards at Village Board meetings as part of the Village Board's Protocols. This memorandum addresses this question in light of the Illinois Open Meetings Act and the First Amendment to the United States Constitution.

DISCUSSION

I. Exceptions to Protected Speech

The First Amendment to the United States Constitution prohibits the government from "abridging the freedom of speech." U.S. Const. amend. I. Recognized general exceptions to protected speech include the following:

1. Incitement to imminent lawless action - *Brandenburg v. Ohio,* 395 U.S. 444 (1969);

2. True threats – *Virginia v. Black,* 538 U.S. 343 (2003);

3. Defamation – *Gertz v. Robert Welch,* 418 U.S. 323 (1974);

4. Obscenity and child pornography – *Miller v. California,* 413 U.S. 15 (1973); and

5. Fighting Words – *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942).

The proposed addition to the Village's Protocols do not necessarily fit within any of these categories making additional analysis required.

The strength of First Amendment protection for speech varies depending on the forum where speech occurs. *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez,* 561 U.S. 661, 679 n. 11 (2010). A Village Board meeting is generally recognized as a "limited public forum" meaning "it is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Pleasant Grove City v. Summum,* 555 U.S. 460, 470 (2009).

II. Illinois Open Meetings Act

Section 2.06(g) of the Illinois Open Meetings Act requires that public bodies allow public comment at their meetings:

> Any person shall be permitted an opportunity to address public officials under the rules established and recorded by the public body.

5 ILCS 120/2.06(g). A public body must establish and record rules under this section and may only restrict public comment pursuant to those rules. Ill. Att'y Gen. Pub. Acc. Op. No. 14-009. It is a violation of this section to prohibit the public from addressing a public body in open session. *Roxana Community Unit School District No. 1 v. Environmental Protection Agency,* 2013 IL App (4th), ¶¶17, 57-58.

Under this provision, public bodies may generally promulgate reasonable "time, place and manner" regulations that are necessary to further a significant governmental interest. *Rana Enterprises, Inc. v. City of Aurora,* 630 F.Supp.2d 912, 922 (N.D. Ill. 2009). For example, a public body may legitimately prescribe reasonable time limits for public comment. *Wright v. Anthony,* 733 F.2d 575, 577 (8th Cir. 1984). In a binding opinion, the Public Access Counselor of the Illinois Attorney General's Office struck down a time restriction which required persons wishing to address a public body to submit a written request to address the body not less than five working days prior to a meeting. Ill. Att'y Gen. Pub. Acc. Op. No. 14-012.

Trustee Robinson cited the case of *Ribakoff v. City of Long Beach,* 27 Cal.App.5th 150 (2018), *cert. denied,* ___ U.S. ____, 139 S.Ct. 2640 (2019) when posing her question. In the *Ribakoff v. City of Long Beach* case, the plaintiff challenged a three-minute public comment rule. The plaintiff argued that the rule was presumptively unreasonable under the First Amendment. The court held that the rule was a reasonable time, place, and manner restriction and was not a content-based speech restriction.

The Board's Protocols currently contains a three-minute time limit for speakers "during the non-agenda public comment period or during the consideration of a specific agenda item." Village Board Protocols Adopted on May 24, 2021 at Section I(E)(1). Speakers are additionally limited to provide comment "on up to three agenda items at a Regular Meeting." *Id.* at Section I(E)(5).

III. Content-Based Restrictions

Content-based restrictions for limited public forums are permissible so long as they are "reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Education Fund, Inc.,* 473 U.S. 788, 806 (1985). A governmental body may not engage in viewpoint discrimination. *Rosenberger v. Rector & Visitors of University of Virginia,* 515 U.S. 819, 829 (1995).

Trustee Robinson cited to the case of *Steinburg v. Chesterfield County Planning Commission,* 527 F.3d 377 (4th Cir. 2008) in the body of her email in which she proposed the new Protocols provisions. In the *Steinburg* case, the plaintiff contended that his speech was unconstitutionally silenced at a plan commission meeting when the commission chair (1) enforced an unconstitutional commission policy against "personal attacks" and (2) cut off his right to speak based on his viewpoint. The court found that the commission's public meeting was a limited public forum and as such, "the commission is justified in limiting its meeting to discussion of specified agenda items and in imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose of conducting public business." *Steinburg v. Chesterfield County Planning Commission,* 527 F.3d at 385. Any restriction, however, "must not discriminate on the basis of a speaker's viewpoint." *Id.,* citing *Good News Club v. Millford Central School,* 533 U.S. 98, 106-07 (2001).

The *Steinburg* court first held that the commission policy against personal attacks was "content-neutral" and was not unconstitutional. It was "adopted and employed to serve the legitimate public interest in a limited forum of decorum and order." *Steinburg,* 527 F.3d at 387. The court stated that its holding does not preclude a challenge based on the misuse of the policy in order to chill or silence speech in a given circumstance, but the evidence was insufficient to prove that the plaintiff was silenced because of the policy. The court emphasized that the plaintiff was not treated differently than any of the other speakers at the meeting and he was argumentative and disruptive with the plan commission chair during the meeting. The plaintiff was cut off from speaking and ultimately excluded from the meeting due to his actions and the court found that the chair's exercise of discretion in taking these actions is precisely what presiding officers may do.

A contrary decision was reached in the case of *Mnyofu v. Board of Education of Rich Township High School District 227,* 2016 U.S. Dist. LEXIS 45773 (N.D. Ill. 2016). In *Mynofu*, the school district adopted a rule that prohibited speakers from criticizing public officials. The plaintiff spoke at a school district meeting and when he began to criticize school officials, his microphone was turned off. The court stated that the policy was intended to prohibit speech based on its content and the right to criticize public officials is protected by the First Amendment. The *Mnyofu* holding is applicable on the Village due to the Village being within the jurisdiction of the Northern District of Illinois.

Consistent with the *Mnyofu* case, the Public Access Counselor of the Illinois Attorney General's Office ruled in a non-binding opinion that the city of Urbana City Council violated the Open Meetings Act when it muted a citizen during public comment because she criticized a decision made by the Mayor, and when the Council also muted another speaker for being critical of city employees by name. 2021 Ill. Att'y Gen. PAC Req. Rev, Ltr., 65871, 65961, 66133 (March 16, 2021). The city adopted rules for public comment which included provisions governing public comment regarding "respect for others" and prohibiting "ridicule," "personal attacks" and "abusive" language. "Abusive" was defined to include "derogatory language which would demean the dignity of an individual or which is intended to humiliate, mock, insult or belittle an individual". The Public Access Counselor concluded that city's actions restricting public comment criticizing public officials by name in connection with a public matter is a violation of the Open Meetings Act and the First Amendment. When criticism involves the conduct of present or former public officials in the performance of their public duties, significant latitude must be allowed to the speaker.

The Public Access Counselor found that any content based public comment rules "must serve a compelling state interest and be narrowly drawn to achieve that purpose." Rules adopted to govern decorum at meetings can only regulate conduct that is "actually disturbing or impeding a meeting." 2021 Ill. Att'y Gen. PAC Req. Rev, Ltr., 65871, 65961, 66133 at 7, citing *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990). The Public Access Counselor noted that a speaker could be deemed to disrupt improperly a meeting by speaking too long, by being unduly repetitious, or by extended discussion of irrelevancies. "Such rules must tend to accommodate, rather than to unreasonably restrict, the right to address public officials." 2021 Ill. Att'y Gen. PAC Req. Rev, Ltr., 65871, 65961, 66133 at 7.

A similar holding was reached in the case of *Ison v. Madison Local School Board of Education,* 3 F.4th 887 (6th Cir. 2021). The court held in *Ison* that restrictions on "antagonistic," "abusive" and "personally directed" speech was unconstitutional because it was viewpoint based. In the case, one of the plaintiffs was stopped from further public comment by a school board president when he spoke against the school board's handling of gun-related issues. He stated that the board was trying "to suppress all opposition to pro-gun views" and "push its pro-gun agenda." *Id.* at 892. The board president stated his comments were abusive and personally directed toward the board. The court found that the board president's actions constituted viewpoint discrimination.

A contrary holding to the decision in *Ison* was reached in the case of *Moms for Liberty v. Brevard Public Schools,* 582 F.Supp.3d 1214 (M.D. Fla. 2022), *affirmed per curiam,* 2022 U.S. App. LEXIS 32064 (11th Cir. 2022). The public participation policy at issue provided that a meeting chair may "interrupt, warn, or terminate a participant's statement when the statement is too lengthy, personally directed, abusive, obscene or irrelevant." *Id.* at 1217-18. The court held that the policy was content and viewpoint neutral. "[P]rohibiting abusive and obscene comments is not based on content or viewpoint, but rather is critical to prevent disruption and preserve reasonable decorum and facilitate an orderly meeting." *Id.* at 1219 (citations and quotations omitted). The policy listed five circumstances in which the chair may

interrupt speakers and the conduct that can lead to stronger sanctions, and the meeting chair regularly explained the rules to attendees and applied them consistently. Because the policy listed what was expected of speakers, "a person of ordinary intelligence" was warned of what was prohibited conduct." *Id.*

In a similar case, a public comment policy that prohibited speakers from using "profanity or cursing, aggressive or threatening behavior" or engaging in "personal attacks" was upheld as constitutional in the case of *Alimenti v. Town of Howey-In-The-Hills,* 2023 U.S. Dist. LEXIS 48845, *26 (2023). In addition, speakers were required to be courteous in their language. The court found that the policy "was a viewpoint-neutral restriction on content" that was "evenhandedly applied without regard to the specific message being advocated." *Id.* at 27.

The city of Santa Cruz, California had a decorum policy for its city council meetings that prohibited the actual disruption of a meeting which was upheld by the court in the case of *Norse v. City of Santa Cruz,* 2002 U.S. Dist. LEXIS 29857 (N.D. Cal. 2002). The plaintiff in the case was removed from a city council meeting for a gesture that mimicked a Nazi salute. The court stated a Nazi salute is offensive and is conduct that could otherwise disrupt council proceedings. The court found there was no constitutional violation in removing the plaintiff from the meeting. A caution about the *Norse* decision – it has not been cited by any other court as precedent and it was not appealed to a higher court. Thus, it is of questionable precedential value outside of the federal Northern District of California where it was decided.

Finally, in the case of *Mama Bears of Forsyth County v. McCall,* 642 F.Supp.3d 1338 (N.D. Ga. 2022), the court struck down a rule that restricted profane remarks adopted by a school board. The court found that the restriction was content-based and "profane language or profanity" are generally protected speech. *Id.,* 642 F.Supp.3d at 1355. The court did note that courts are split on whether profane remarks or profanity constitute protected speech. The court endorsed a prohibition against profane remarks with the added proviso that such remarks must "disrupt or otherwise impede the orderly conduct of a meeting." *Id.* (citation and quotation omitted) The court stated, "[A]n outright restriction on profane remarks or profanity with no limitation was unreasonable and unconstitutional, but a restriction on actually disruptive profane comments were not."

The court in *Mama Bears* relied on a Ninth Circuit Court of Appeals holding in the case of *Acosta v. City of Costa Mesa,* 718 F.3d 800 (9th Cir. 2013). The plaintiff in *Acosta* was removed from a city council meeting for violating an ordinance which made it an offense to engage in "disorderly, insolent or disruptive behavior." *Id.* at 806. The ordinance also prohibited the use of profanity. The plaintiff spoke against a proposed agreement between the city of Costa Mesa and Immigration and Customs Enforcement ("ICE") at the meeting. Toward the end of his comments, he called the mayor a "racist pig" and later use profanity in referring to the mayor and the mayor then cut him off from speaking. *Id.* at 808. At a later meeting, he again commented on the agreement, and was physically escorted from the council chambers. The court held Costa Mesa's ordinance was "overbroad because it

unnecessarily sweeps a substantial amount of non-disruptive, protected speech within its prohibiting language." *Id.* at 816. A restriction on actually disruptive profane comments would be constitutional. *Id.* at 813.

IV. Content Neutral Restrictions

The court in *Rana Enterprises, Inc. v. City of Aurora* cited above found that a city of Aurora council rule limiting public comment to subjects on the agenda was a reasonable time, place and manner restriction. The court stated the rule was permissible because of the "significant government interest in effectively conducting business." *Rana,* 630 F.Supp.2d at 924. Similarly, in the case of *Gilmore v. Beveridge,* 2022 U.S. Dist. LEXIS 140026, at 19-20 (2022), the court upheld a rule that public comment must be "germane to the business of the Board." The court stated, "The fact that certain topics might straddle the line does not make the language unconstitutionally vague." *Id.* at 20.

CONCLUSION

I believe Illinois state and federal courts would follow the court's holdings in the *Ison* and *Acosta* cases. A court would more than likely find that a Board restriction on public comment must also contain language that the comment be actually disruptive to a meeting. Based on these cases, Illinois case law, and the Public Access Counselor opinions cited above, the Board may adopt new Protocols provisions that are content neutral and are intended to prevent disruption, preserve reasonable decorum and facilitate an orderly meeting. Such rules could prohibit the use of abusive or profane public comments with the added prohibition that such comments are actually disruptive to a meeting. Certain racist comments, gestures or paraphernalia may also be so offensive as to be deemed disruptive to a meeting and may be prohibited under the First Amendment.

I also recommend the terms "abusive" or "profane" be defined to the extent possible in order to give the public advance notice of what is prohibited. I do not recommend that public comments that might be deemed to be against Village values be prohibited as a court would most likely hold that such a prohibition is viewpoint based. Finally, the Board may also adopt a rule prohibiting public comment that is not related to Board agenda items. This would mean, however, that the non-agenda public comment portion of a Board meeting would need to be eliminated.

If the consensus of the Board is to move forward with new Protocols provisions regarding public comment, this could be accomplished in the form of a Board motion when the Protocols are scheduled for discussion. Please let me know if you have any questions.