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July 25, 2013

Mayor Maryann Welcome
Town of Winchester
338 Main Street
Winsted, CT 06098

Sent via USPS First Class mail and e-mail

Dear Mayor Welcome,

We are writing on behalf of Jay Budahazy about your policy regarding public comments at Board of Selectmen meetings, effective June 3, 2013, which states in part, "[n]o one will be permitted to express personal complaints or defamatory comments about Board of Selectmen members nor against anyone connected with the Town or any individual, firm or corporation, nor against other members of the audience." This public comment policy, as presently worded, violates the First Amendment to the United States Constitution and counterpart clauses of the Connecticut Constitution.

At the July 1, 2013 Board of Selectmen meeting, Selectman James DiVita, who is also Chairman of the Recreation Board, and Selectman Althea Perez, who was leading the meeting in the mayor's absence, censored Mr. Budahazy's comments several times. For example, when Mr. Budahazy criticized Selectman DiVita's failure to address recreation issues earlier in the meeting, Selectman Perez asked him to "rephrase" his comments, which she referred to as a "personal attack." *See* Audio Recording, Track 36, 0:15. Additionally, Mr. Budahazy pointed out that "to sit there as the chairman [of the Recreation Board] and not say anything is crazy" in regards to Selectman DiVita's failure to advertise local concerts; Selectman Perez dictated what Mr. Budahazy was allowed to say about this issue by interrupting and instructing that Mr. Budahazy was allowed to comment on the concerts, but not about Selectman DiVita's failure to advertise. *See* Audio Recording, Track 37, 0:20. Selectmen DiVita and Perez essentially refused to allow Mr. Budahazy to address Selectman DiVita's failures as Chairman of the Recreation Board and as a Selectman.

Whether the public comments segment of Board of Selectmen meetings be a designated, limited or nonpublic forum, the controlling First Amendment rules are the same. The Town possesses the power to impose reasonable restrictions on the permitted subjects for public discussion: for instance, by requiring that citizens' comments relate to the meeting's agenda. But the Town cannot restrict

comments within a permitted subject area based on the speaker's viewpoint. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 59-60 (1983); Marcavage v. City of New York, 689 F.3d 98, 104 (2d Cir. 2012) cert. denied, 133 S. Ct. 1492, (2013). Under the policy as written, speech praising Board of Selectmen members and other town officials will be allowed but speech criticizing town officials or construed as a "personal complaint" will be prohibited. The policy thus promotes paradigmatic viewpoint discrimination. This the First Amendment forbids.

The policy also violates the even more speech-protective provisions of the Connecticut Constitution, Article First, Sections 4, 5 and 14. Under these provisions, speech and petitioning activities are protected on all government premises that are open to the public unless the activities are incompatible with the premises' normal uses. Leydon v. Town of Greenwich, 257 Conn. 318, 348 (2001); State v. Linares, 232 Conn. 345, 386 (1995). We acknowledge that off-agenda citizen comments, at a Board of Selectmen meeting, might be incompatible with the premises' normal use at that time because they could deflect the meeting from its purposes. However, an agenda-related comment, otherwise compatible, does not become incompatible merely because it criticizes rather than praises a Board member or other town official.

In the event litigation becomes necessary to remove this unconstitutional policy, the plaintiffs, if successful, will be entitled to recover damages and attorneys' fees from the Town pursuant to 42 U.S.C. Sections 1983 and 1988. We hope to avoid this expedient. If you wish to discuss the matter further, please feel free to contact us, bearing in mind the Second Circuit's often-repeated caution that any delay in the exercise of First Amendment rights normally constitutes irreparable injury per se. Elrod v. Burns, 427 U.S. 347, 373 (1976); Lusk v. Vill. of Cold Spring, 475 F.3d 480, 492 (2d Cir. 2007)). Thank you for your anticipated attention and the courtesy of a reply by August 7, 2013.

Respectfully,

David McGuire
Staff Attorney

Martin Margulies
Cooperating Counsel

Cc: Kevin F. Nelligan, Town Attorney via USPS mail
Dale L. Martin, Town Manager via email
Selectman George Closson via email
Selectman Michael Renzullo via email
Selectman Kenneth Fracasso via email
Selectman Glenn Albanesius via email
Selectman Althea Candy Perez via email
Selectman James DiVita via USPS to Town Hall

DJM/jjs