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June 22, 2020

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VIA EMAIL

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VIA EMAIL

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Re: Douglas City Council Rules of Procedure and Order

Dear Mayor Paulk, Douglas City Commissioners, Mr. Davis and Mr. Adams:

As counsel for Douglas City Commissioner Olivia Coley Pearson, the University of Georgia School of Law's First Amendment Clinic and the Southern Center for Human Rights write to highlight free speech concerns raised by the Douglas City Council Rules of Procedure and Order ("Council Rules") that were first proposed by the Douglas City Mayor on or about January 18, 2020 and which were subsequently adopted by vote of the Mayor and Douglas City Board of Commissioners (hereinafter "City Council" or "Council") on March 9, 2020. The Council Rules, which are attached hereto as Appendix A, govern the

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procedures of, without limitation, the Council's twice-monthly work sessions and regular meetings.

The events culminating in the City Council's adoption of the Council Rules indicate that the Rules were intended, in whole or in part, to limit and control the speech of Commissioner Pearson. Specifically, the Mayor first proposed the Council Rules approximately five (5) days after a January 13, 2020 City Council meeting where Commissioner Pearson had questioned the factual basis for the City of Douglas' constructive discharge of Douglas City Fire Chief Larry Wilson. At this January 13th meeting, pursuant to Douglas City Charter Section 2.18 that empowers the City Council to make inquiries and investigations into the affairs of the City, Commissioner Pearson questioned witnesses and requested production of evidence relating to the factual events for which the Fire Chief was to be discharged. During the meeting, the Mayor objected to Commissioner Pearson's investigative efforts without approval by a majority vote of the City Council. The Mayor then cut off Commissioner Pearson's questioning of a witness whose testimony was starting to undermine the basis for the Fire Chief's discharge by abruptly moving the Council into executive session.¹ Five days later, on January 18th, the Mayor emailed the proposed Council Rules to the City Council members. The proposed Rules, like the Rules ultimately adopted, included a provision requiring that a majority of the Council approve any City Council inquiries or investigations initiated pursuant to City Charter Section 2.18 and explicitly prohibiting any individual council member from launching an investigation without a majority vote. *See* Appendix A, last page ("City of Douglas Charter Section 2.18. – Inquiries and investigations").

The Council was slated to discuss the Mayor's proposed Council Rules during the City of Douglas' February 8, 2020 strategic planning meeting. During the time allotted for such discussion, the Mayor, the City Clerk and a City of Douglas department head criticized Commissioner Pearson relating to her outspokenness on, without limitation, City personnel issues during City Council meetings.²

¹ The video-recording of the January 13, 2020 Council meeting is available at: <https://www.youtube.com/watch?v=RdIuv6Cj6xA> (last visited June 22, 2020)

² The video-recording of this portion of the February 8, 2020 strategic planning meeting is available at:

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At the next Council meeting, held two days later on February 10, 2020, Commissioner Pearson added two legitimate items to the agenda, one being to discuss the Mayor's proposed Council Rules. Commissioner Pearson's agenda items were placed last on the agenda and no discussion of either one took place because the Mayor and four of the six Council members voted against having such discussion and the Mayor adjourned the meeting. The Mayor and the rest of the City Council, save Commissioner Kentaiwon Durham, then exited the room while Commissioner Pearson was still speaking and calling for discussion.³ Two meetings later, on March 9, 2020, the proposed Council Rules were adopted with the Mayor and three Council members voting in the affirmative and Commissioners Pearson and Durham voting against (Commissioner Bob Moore was not present).⁴ Among other provisions, and responsive to the events of February 10, 2020 where the Mayor and other Commissioners did not want to discuss Commissioner Pearson's agenda items, the Council Rules require that the Council's meeting agenda be approved by a majority vote of the Council, and allows the Council to add or remove items from the agenda by majority vote. See Appendix A, Sections III.A & III.B.

From this sequence of events, it is clear that the Council Rules were proposed and adopted with the intent, without limitation, to curb and limit Commissioner Pearson's speech. See *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (government regulation of speech permitted so long as reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view") (quoting *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)); *Bloedorn v. Grube*, 631 F.3d 1218, 1231 (11th Cir. 2011) (restrictions on speech in limited public forums "must be reasonable and viewpoint neutral"). See also *Barrett v. Walker Cty Sch. Dist.*, 872 F.3d 1209, 1225 n.10 (11th Cir. 2017) (viewpoint discrimination "occurs when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction") (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995)).

<https://www.youtube.com/watch?v=plykAEsuL9E&list=UUXouBUerOAg75vra7x9iBGQ&index=84&t=0s> (last visited June 22, 2020)

³ The video-recording of the February 10, 2020 Council meeting is available at: <https://www.youtube.com/watch?v=E-qiEZQJZ4Y> (last visited June 22, 2020)

⁴ The video-recording of the March 9, 2020 Council meeting is available at: <https://www.youtube.com/watch?v=MiBszSFue0I> (last visited June 22, 2020)

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The chronology of events, coupled with the degree to which the Council Rules appear targeted at Commissioner Pearson’s speech, also supports that the Mayor and City Council members adopted the Rules in retaliation against Commissioner Pearson for having voiced unpopular views and positions during prior City Council meetings. Too, the Rules lay the groundwork for future retaliation by procedurally empowering the Mayor and fellow City Council members to block Commissioner Pearson’s proposed agenda items as punishment for her engaging in speech they disagree with or do not like. Regardless of whether blocking Commissioner Pearson’s agenda items would independently violate her free speech rights as an elected official, this creates a retaliation concern. *See Bennett v. Hendrix*, 423 F.3d 1247, 1253 (11th Cir. 2005) (in the context of First Amendment retaliation, “[t]he plaintiffs’ claim depends not on the denial of a constitutional right, but on the harassment they received for exercising their rights. The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right.”) (internal quotations and citation omitted); *Farrow v. West*, 320 F.3d 1235, 1248 (11th Cir. 2003) (“To state a[F]irst [A]mendment claim for retaliation, a [plaintiff] need not allege violation of a separate and distinct constitutional right. Rather, [t]he gist of a retaliation claim is that a [plaintiff] is penalized for exercising the right of free speech.”) (internal quotations and citation omitted).

Additionally, as further explained below, the Council Rules contain multiple provisions that are impermissibly vague or otherwise afford unfettered discretion to the Mayor as presiding officer – or the City Council as a body – to determine which members of the public are allowed to speak during public comment periods, and for how long, and to control the speech of witnesses called before the Council. These provisions create substantial risk that the Mayor and Council will engage in viewpoint-based regulation of others’ speech, in violation of the First Amendment. *See Barrett*, 872 F.3d at 1226 (holding that unbridled-discretion doctrine applies in a limited public forum to “combat[] the risk of unconstitutional viewpoint discrimination”); *Acosta v. City of Costa Mesa*, 718 F.3d 800, 821 (9th Cir. 2013) (in the context of speech-prohibitive decorum rules for city council meetings, “an overbroad law hangs over people’s heads like a Sword of Damocles”) (internal quotations and citations omitted).

In light of the foregoing concerns, we identify below the most troubling provisions of the Council Rules. With the goal of early resolution, we urge amendments to the Council Rules that will both recognize the Council’s prerogative to order its own affairs while also

promoting free and fair opportunities for Commissioner Pearson and other members of the Council to speak and ensuring that the Mayor and Council's regulation of public citizen comment, and witness testimony, will be viewpoint neutral.

Sections III.A & III.B: Procedures for Bringing Matters Before City Council

Prior to the March 9, 2020 adoption of the Council Rules, Council members could place items on the Council's meeting agenda at any time prior to the meeting.

Section III.A&B of the Council Rules institute a new requirement that agenda items be noticed by noon on the Wednesday before a Council meeting. As Council meetings are held on the second and fourth Monday evenings of each month, this constitutes a notice period of 3 ½ working days for placing items on the agenda. Additionally, under Section III.A&B, the Council must approve the meeting agenda by a majority vote at the start of the meeting, with the Council also having the authority to add agenda items not timely noticed, or to remove agenda items (even if they were properly noticed) by a majority vote.⁵

⁵ Specifically, Section III.A of the Council Rules provides:

No ordinance, resolution, or item of business shall be introduced, discussed or acted upon before the Council at its meeting without before that it's having been published on the agenda of the meeting and posted in accordance with the deadline for the agenda. Only a majority vote of the Council may add an agenda item after the agenda item deadline.

During the approval of the Council's Agenda, the Mayor will recognize any "motion" to amend the agenda. Any member of the Council is entitled to make such "motion." All members are entitled to be informed in detail of the agenda item in order to be prepared to discuss the agenda item.

Section III.B of the Council Rules further states:

Matters may be placed on the agenda by any Councilmember, the City Manager, or the City Clerk by the established deadline. After the established deadline of 12:00pm (noon) on Wednesday before regularly scheduled meeting, the majority of the Council must agree to place the item

Robert's Rules of Order, Newly Revised, which the Council Rules state generally governs the Council's procedures, allows for providing advance notice of the agenda for a meeting, but does not specify how much advance notice is recommended or reasonable. *See* Henry M. Robert III, *et al.*, *Robert's Rules of Order, Newly Revised* 372 (11th ed. 2011). *Robert's Rules* also provides that it is permissible to adopt or change a pending agenda by majority vote at the start of the meeting. *See id.* at 373. Respecting these prerogatives of the Council, safeguards are necessary to ensure that these mechanisms are not used to block legitimate items for the Council's consideration from being placed on the agenda due to viewpoint discrimination. We therefore urge the following amendments to Sections III.A&B:

- 1) Shorten the notice requirement for agenda items from 3 ½ working days (Wednesday at noon) to 1 ½ working days (Friday at noon) before the Monday evening meetings. Shortening the notice period still operates to prevent surprise agenda items while also preserving some flexibility for timely noticing items that may arise shortly before the Monday evening meetings.⁶ Moreover, a 1 ½ working-day notice period is more consistent with other notice periods imposed by the Council. For instance, it is our understanding that members of the public wishing to speak during the public comment period of a meeting need only give notice that they plan to do so by noon the day of the meeting.
- 2) Revise the requirement that "All items [] placed on the agenda must have all relevant statements, reports, and/or evidence to prevent 'surprise agenda items,'" to state, "Any relevant statements, reports, and/or evidence that the person offering the agenda item plans to present or discuss at the meeting should be included with the proposed agenda item, to avoid surprise to other members and

on the agenda. An agenda item maybe added and/or removed by a majority of the Council during the agenda item "Approval of the Order of the Agenda." All items must placed [sic] on the agenda must have all relevant statements, reports, and/or evidence to prevent "surprise agenda items."

⁶ *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 149 (1969) (Timing is "often of the essence" for free speech; "It is often necessary to have one's voice heard promptly, if it is to be considered at all.").

allow them an opportunity to prepare for the discussion.” This revised language strikes a balance between avoiding surprise while also avoiding an overly burdensome requirement that the person offering the agenda item first assemble and distribute all possible relevant supporting information before being able to discuss the item at a meeting.

- 3) To safeguard a Council member’s ability to raise a legitimate issue that was not timely noticed and/or did not command a majority vote from the Council to be placed on the agenda, amend the Council Rules to include a “New Business” section at the end of regular meetings. “New Business” is the last subdivision of the customary or standard “order of business” at a meeting. *See Robert’s Rules* at 353. Indeed, *Robert’s Rules* states that “[s]o long as members are reasonably prompt in claiming the floor [when the chair asks, “Is there any new business?”], the chair cannot prevent the making of legitimate motions or deprive members of the right to introduce legitimate business, by hurrying through the proceedings.” *Id.* at 360.

Section IV.A – Conduct of Meeting – Comments from the Public

The first paragraph of Section IV.A of the Council Rules states in relevant part:

On respect for the Council, City Manager, Staff, and citizens the Mayor is responsible for orderly and productive public comment. The Mayor will require the Council, City Manager, Staff, and citizens to refrain from using the public meeting as a forum for rude, slanderous or disruptive personal attacks on others, and the Mayor will have the authority to take the floor away from individuals who act unruly, interrupts the speaker recognized by the Chair.

Courts have recognized the right of a presiding officer to take action against a speaker who actually disrupts or impedes a limited forum meeting. However, a prohibition on “rude” or “slanderous” speech that does not actually disrupt is too vague to give adequate notice of what speech is prohibited and is so subjective that it invites arbitrary enforcement based on the Mayor’s like or dislike for the speaker and their message. *See, e.g., Acosta*, 718 F.3d at 813, 815 (city council’s prohibition, without limitation, on persons addressing the council

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making “personal, impertinent, profane, insolent or slanderous remarks” was an unconstitutional prohibition on speech; separately striking down prohibition on “insolent” action or speech by city council members because “that type of expressive activity could, and often likely would, fall well below the level of behavior that actually disrupted or impeded a city council meeting”); *Draego v. City of Charlottesville, Virginia*, 2016 WL 6834025, at *22 (W.D. Va. Nov. 18, 2016) (striking down on vagueness and arbitrary enforcement grounds a prohibition against “defamatory attacks” during the public comment period of city council meetings; “Vague laws leave citizens unsure if their actions will transgress a rule; they facilitate arbitrary enforcement based on *ad hoc*, subjective judgments by officials.”); *Essen v. Mellon*, 747 F.Supp. 692, 693 (S.D. Fla 1990) (striking down as a “clear violation of the First Amendment” and “unconstitutional prior restraint of expression” a “Decorum Rule” for administrative hearings that required attendees to avoid engaging in “disparaging personal remarks or conduct,” “vulgarity, shouting or swearing,” or verbal or non-verbal “manifestations of approval or disapproval” at any time during a hearing).

We therefore urge that the first paragraph of Section IV.A of the Council Rules be revised to comply with the First Amendment as follows:

On respect for the Council, City Manager, Staff, and citizens the Mayor is responsible for orderly and productive public comment. The Mayor will require the Council, City Manager, Staff, and citizens to refrain from ~~using the public meeting as a forum for rude, slanderous or disruptive personal attacks on others~~ disrupting or impeding the meeting, and the Mayor will have the authority to take the floor away from individuals who act ~~unruly~~ disruptively, or interrupts the speaker recognized by the Chair.

Section IV.A – Conduct of Meeting – Comments from the Public - Regular Meeting

The second paragraph of Section IV.A of the Council Rules states:

Comments from the public are not allowed during the Regular Meeting. However, the majority of the Council may allow comments for the public during the Regular Meeting to inform the community of community events and/or public awareness. If allowed, the Mayor will establish a time limit for the public comment. Additionally, the Mayor may extend or decrease

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the time limit for public comment. However, public comment during the Regular Meeting should be a rare occurrence.

The Council may constitutionally limit the content of public comments to certain designated topic areas, but the Council may not engage in viewpoint discrimination within those topic areas. *See Barrett*, 872 F.3d at 1225 (content-based discrimination is permitted in a limited public forum “if it is viewpoint neutral and reasonable in light of the forum's purpose”). Here, the danger of viewpoint discrimination looms large because the designated topics are vague. “Public awareness” is so expansive a term that an argument could conceivably be made for almost any public comment to fit within it. “Community event” also lends itself to a broad and flexible interpretation. *Cf. TURF v. City of San Antonio*, 2009 WL 10701038, at *9 (W.D. Tex. Jan. 9, 2009) (city code provision “appears to allow virtually unfettered discretion . . . to determine what qualifies as a ‘community announcement’” and could permit decisions based on viewpoint).

Thus, determining who can publicly comment during regular meetings -- which Section IV.A. states “should be a rare occurrence” -- will necessarily require the City Council to vet, in some form or fashion, proposed public comments to determine if they relate to the vague concepts of “community event” or “public awareness,” and if they do, the members of the Council will then have to vote whether to allow the speaker to make the comment. This process creates substantial risk that City Council members will arbitrarily rely on their subjective like or dislike of prospective commenters’ messages in determining which few public comments are allowed during a regular meeting. *See Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992) (“A government regulation that allows arbitrary application ‘has the potential for becoming a means of suppressing a particular point of view.’”) (quoting *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981))⁷; *Barrett*, 872 F.3d at 1225, 1226 (“Limited public fora likewise do not tolerate viewpoint discrimination”; unbridled-discretion doctrine applies in limited public forum); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1361 (11th Cir. 1999) (to avoid unbridled discretion, “[a]n ordinance that gives public officials the power to decide

⁷ *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (“[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum’s use.”).

whether to permit expressive activity must contain precise and objective criteria on which they must make their decisions”).

Further, the Mayor’s sole and wide-ranging discretion under Section IV.A to establish a time limit for public comment, and also to extend or decrease the time limit with no upper or lower limits, further opens the door for viewpoint discrimination to infect the regulation of public comments during regular meetings. *See Barrett*, 872 F.3d at 1230 (affirming preliminary injunction of policy that gave unbridled discretion to school board president to determine who could speak or not speak at the limited public forum of school board meetings); *Santa Fe Springs Realty Corp. v. City of Westminster*, 906 F. Supp. 1341, 1364 (C.D. Cal. 1995) (“A system that endows a government official with unbridled discretion to determine who may speak and who may not implicitly vests that governmental official with the power to regulate speech on the basis of its content and/or the viewpoint of the speaker.”)

Lastly, it is no remedy for the Council or the Mayor to aver that they will not act in an arbitrary, viewpoint-biased manner when deciding which members of the public may offer comments during regular City Council meetings. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 (1988) (doctrine forbidding unbridled discretion also disallows presumption that officials “will act in good faith and adhere to standard’s absent from the ordinance’s face”).⁸

Because of the vagueness of the terms “community event” and “public awareness,” and because of the unchecked discretion afforded to the Mayor regarding the length of time a public commenter may speak (if at all), we urge that the Council Rules be amended to either blanketly allow public comment during regular meetings or not. If allowing public comment, then a uniform time limit for comments should be set. For instance, the Council Rules already provide under “Time Limit for Public Speakers at Public Hearings / Public Discussions” that “[e]ach speaker shall be limited to three minutes with the exception that one representative for a group of citizens shall be allowed five to ten minutes during the

⁸ Douglas City residents who wish to participate in public comment periods need not wait to have their speech arbitrarily suppressed at a regular meeting before challenging Section IV.A. of the Council Rules Council Rules since “[a]nyone who is or imminently will be subject to the alleged grant of unbridled discretion may challenge it.” *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1274 (11th Cir.2006).

public hearing on this matter.” These same limits could readily be applied to public comments during regular City Council meetings.

Section IV.A – Conduct of Meeting – Comments from the Public – Work Session

The third paragraph of Section IV.A of the Council Rules states:

Comments from the public are allowed during the Work Session provided the citizen completes the request form to appear before the Council during the Work Session before the established deadline. However, a majority consensus for the Council may allow a citizen to speak to the Council during the Work Session if the citizen missed the deadline. This should be a rare occurrence. As the presiding officer, the Mayor may establish a time limit for the speaker of 3 minutes.

The foregoing paragraph creates a content-neutral time, place, and manner restriction for public comments during a Council work session (i.e., the commenter must complete the request form by the specified deadline) but then permits the Council to waive the restriction when it so chooses. This standard-less grant of authority to the Council invites arbitrary, viewpoint-based application of the time, place, and manner restriction. In other words, the Council would be free to exclude a commenter who did not timely complete a request form if the Council did not like the commenter’s views or perspective, while waiving the request form requirement for a commenter to whose message the Council was sympathetic. Such a scheme does not withstand First Amendment scrutiny.⁹ *See, e.g., CAMP Legal Def. Fund, Inc.*, 451 F.3d at 1279-80 (finding that City of Atlanta’s Festivals Ordinance “grant[ed] unbridled discretion by means of a standardless exemption” from the permit requirement for city-sponsored festivals; the City could choose to co-sponsor festivals organized by private organizations based on the content of the organizations’ message and thereby exempt the festivals from the City’s permit requirement; accordingly, “[t]he [exemption] provision does not provide objective criteria that limit the ability of city officials to discriminate based on the viewpoint of the speaker or the content of the speech”).

⁹ The statement in the third paragraph of Section IV.A that waiving the procedural requirement “should be a rare occurrence” does nothing to make the Council’s use of the waiver any less arbitrary, even if it occurs infrequently.

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To remedy the First Amendment defects of the third paragraph of Section IV.A, we urge that it be revised to state:

Comments from the public are allowed during the Work Session provided the citizen completes the request form to appear before the Council during the Work Session before the established deadline. As the presiding officer, the Mayor may establish a time limit for the speaker of 3 minutes.

Section IV.A – Conduct of Meeting – Comments from the Public – Time Limit for Public Speakers at Public Hearings / Public Discussions

The fourth paragraph of Section IV.A of the Council Rules states:

Each speaker shall be limited to three minutes with the exception that one representative for a group of citizens shall be allowed five to ten minutes during the public hearing on this matter. As the presiding officer, the Mayor may extend or decrease the speakers' time limit.

As discussed above, granting the Mayor standard-less discretion to extend or decrease the time a public speaker may talk, with no upper or lower limits, invites viewpoint discrimination to affect the Mayor's regulation of public hearings and public discussions in violation of the First Amendment. We urge that the last sentence of the paragraph therefore be deleted so that Section IV.A of the Council Rules would simply state:

Each speaker shall be limited to three minutes with the exception that one representative for a group of citizens shall be allowed five to ten minutes during the public hearing on this matter.

Rules of Debate (e) - Calling Witnesses

The Council Rules, in subsection (e) of the Rules of Debate, address calling of witnesses during City Council inquiries and investigations. Subsection(e) states in relevant part:

As the presiding officer, the Mayor will establish a time limit for the witness to be asked questions. The Mayor may extend the questioning limit if the Mayor decides it's for the great good of the City. As the presiding officer, the Mayor may end the questioning if the Councilmember or witness jeopardize the decorum of the meeting.

Taking each of the foregoing provisions in turn, the first one allows the Mayor, in his sole discretion, to set a length of time for a witness to be questioned, with no guidelines or parameters for how the length of time should be determined. Thus, the Mayor is free to declare that Witness 1 will be questioned for five minutes and Witness 2 will be questioned for an hour, regardless of how much objectively relevant information Witness 1 may possess as compared to Witness 2.

The Mayor then has discretion to extend the amount of time a witness is allowed to be questioned if, again in the Mayor's sole determination, this would serve "the great good of the City." In an analogous context, such a vague and subjective standard has been found to be a violation of the First Amendment. Specifically, in *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062 (4th Cir. 2006), the court applied an unfettered-discretion analysis to strike down a policy that allowed a school district to waive fees for third-parties' after-school use of school grounds and facilities if such fee waiver was "in the [school] district's best interest." As explained by the court:

[S]peech is not to be selectively permitted or proscribed according to official preference. The "best interest" guidelines are "a virtual prescription for unconstitutional decision making," and permit officials to regulate speech "'guided only by their own ideas' of what constitutes the good of the community." (Citations omitted.) Since "[n]othing in the [policy] or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees," (citation omitted), [the school district's] Policy did not by its terms provide the standards that the First Amendment requires.

Id. at 1070. Here, the Mayor's discretion to determine whether extending the questioning of a witness serves "the great good of the City" is closely akin to the "best interest" guideline

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invalidated by the Court in *Child Evangelism Fellowship* and does not survive First Amendment scrutiny.

Finally, subsection (e) of the Rules of Debate, allows the Mayor to end the questioning of a witness if either the council member conducting the questioning or the witness “jeopardize the decorum of the meeting.” As explained in earlier sections of this letter, the presiding officer may act to restore order when disruption to a meeting *actually* occurs, but the mere possibility or threat of disruption as implied by the phrase “jeopardize the decorum” is not sufficient grounds for curtailing speech. *See Acosta*, 718 F.3d at 811 (“actually disturbing or impeding a meeting means ‘[a]ctual disruption’ of the meeting; a municipality cannot merely define disturbance ‘in any way [it] choose[s],’ e.g., it may not deem any violation of its rules of decorum to be a disturbance.”) (internal citations omitted). Allowing the mayor to determine in his unchecked discretion what does or does not constitute jeopardy to decorum, and to allow the Mayor to then use this determination as a basis for halting relevant witness testimony, opens a wide door for the Mayor to control what information the city council is able to obtain from the witness based on the Mayor’s own likes, dislikes, and preferences concerning the content and viewpoint of the witness’s speech.

In sum, the multiple discretionary and standard-less powers that subsection (e) of the Rules of Debate afford to a single person -- the Mayor -- in the context of the Douglas City Council questioning witnesses amount to an invitation for the exercise of unconstitutional viewpoint discrimination in limiting or shutting down witnesses whose speech is not to the Mayor’s liking. This has the significant ancillary effect of interfering with the Council’s ability to obtain relevant information from witnesses. As such, we urge that subsection (e) of Rules of Debate be revised to give the City Council, as a body, control over the questioning of witnesses during Council inquiries and investigations, with clear and objectively defined standards in place for determining length of questioning and grounds for stopping the questioning.

Rules of Debate (f) - Calling the Question

The Council Rules at subsection (f) of the Rules of Debate provide that a motion to call the question (i.e., end debate and immediately vote on the motion being debated) can be

approved by a majority vote with the mover of the motion losing their right to close discussion.¹⁰

This procedure departs from *Robert's Rules of Order* which provide that when calling the question -- which is the nonstandard form of making a motion for the previous question -- if even one member objects to ending the debate, the motion to call the question must be seconded and then approved by a two-thirds vote (not simply a majority vote) in order to

¹⁰ Subsection (f) of the Rules of Debate states:

Calling the question (to end discussion and vote immediately)

- i. This is a method to close debate on a motion. It is usually made at a time when the debate has been long and repetitious. A member rises and says: "I move to call the question."
- ii. A motion to call the question (that is, to vote immediately on the motion being debated) cannot interrupt another speaker, is not debatable, is not amendable, and requires a majority vote. This requirement is important in protecting the democratic process.
- iii. A motion to call the question has precedence over all other motions except the motion to table. If the motion to call the question passes, the chair immediately proceeds to call a vote on the motion that was being debated. This means that the mover of the motion loses his/her right to close discussion. [*NOTE: Subsection (d) of the Rules of Debate contradictorily states, "When a motion to call a question is passed, the Councilmember moving adoption of an ordinance, resolution or other action shall have three minutes to conclude the debate." This internal contradiction should be corrected, preferably consistent with Subsection (d).*] If the motion is defeated, discussion on the motion before the meeting continues as if there had been no interruption.

The motion to call the question is the only proper method of securing an immediate vote.

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protect against “shut[ting] off debate against the will of even one member who wishes to speak and has not exhausted his right to debate.” *Id.* at 202.

At present, the Council Rules lack such protection, jeopardizing council members’ right to engage in robust debate. Amending the Council Rules to require a second to the motion to call the question, and at least a 5-to-2 vote in favor if any member objects to the motion, would ensure that robust debate is not suppressed. The ratio of 5-to-2 is necessary because with a 6-member Council plus the Mayor, there are a total of 7 votes. Two-thirds of 7 is 4.62 votes which must be rounded to 5 since rounding to 4 falls short of the requisite two-thirds.

In closing, having identified the most troubling provisions of the Council Rules we urge the City of Douglas to amend to the Rules as suggested herein to remedy the constitutional defects. We look forward to your response by July 6, 2020.

Sincerely,

Clare R. Norins

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First Amendment Clinic
UGA School of Law

Gerald Weber

Gerald Weber
Sarah Geraghty
Southern Center for Human Rights

Cc. Commissioner Olivia Coley Pearson

Appendix A

**AGENDA
CITY OF DOUGLAS
MAYOR AND COMMISSION**

**WORK SESSION
March 9, 2020**

DATE: 3/9/2020

WORK SESSION AGENDA ITEM TAB

FROM: Mayor Tony L. Paulk

RE: Discuss and Adopt Refined Council Rules and Protocol for Meetings

PURPOSE:

For Mayor and Council to adopt the enhanced Council Rules of Procedures and Orders to facilitate more orderly and professional City Commission meetings.

BACKGROUND:

Currently, the City of Douglas' meetings are governed by the Charter which includes the generally usage of Robert's Rules of Order. In order to facilitate more orderly and professional council meetings, I have included fine tuned council rules of procedure and orders.

See attached document.

FUNDING:

N/A

RECOMMENDATION:

Mayor and Council to adopt the enhanced Council Rules of Procedures and Orders to facilitate more orderly and professional City Commission meetings.

APPENDIX:

- 1. COUNCIL RULES OF PROCEDURE AND ORDER COUNCIL RULES OF PROCEDURE AND ORDER.docx**

COUNCIL RULES OF PROCEDURE AND ORDER

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Douglas that the following rules of the City Council shall govern all proceedings of the City Council therein described in this document. The City of Douglas Charter clearly states: **Sec. 2-28. -**

Parliamentary procedure-- The proceedings of the city commission **shall be generally governed by Robert's Rules of Order**, Newly Revised, so far as applicable and not inconsistent with the special rules of the city commission, the charter and this Code. This document is being created in accordance with the Charter Section 2-28 "not inconsistent with the special rules of the city commission" and this document will serve as special rules created by the City Commission to ensure orderly and professional execution of all City Commission meetings.

BE IT FURTHER RESOLVED, that violation of these rules shall not be construed as a penal offense, excepting that breach of the peace or willful failure to comply with the lawful orders of the Council or its presiding officer shall be punishable as misdemeanors under applicable law.

DUTIES

A. DUTIES OF MAYOR

City of Douglas Charter - Sec. 2-29. - Presiding officer.

- (a) The mayor shall preside at all commission meetings, preserve order and decorum, and shall appoint all committees, unless the commission shall otherwise direct in which case they shall be appointed by ballot.
- (b) In the absence of the mayor, the mayor pro tem shall preside; and in the absence of both, a chairman shall be appointed by the board of commissioners and he shall be vested with all the powers of the mayor or mayor pro tem during their absence.

The Mayor shall preside at the meetings of the Council and shall preserve strict order and decorum at all regular and special meetings of the Council. The Mayor shall state every question coming before the Council and announce the decision of the Council on all subjects.

B. DUTIES OF COUNCILMEMBERS

Promptly at the hour set by law on the date of each regular meeting, the members of the Council shall take their regular stations in the Council Chambers, and the business of the Council shall be taken up for consideration and disposition.

C. MOTIONS TO BE STATED BY MAYOR

When a motion is made, it may be stated by the Mayor before debate.

D. DECORUM BY COUNCILMEMBERS

While the Council is in session, the members must preserve order and decorum, and a member shall not, by conversation or otherwise, delay or interrupt the proceedings or the peace of the Council nor disturb any member while speaking, nor refuse to obey the orders of the Council, or the presiding officer.

E. VOTING DISQUALIFICATION/CONFLICT OF INTEREST

No member of the Council who is disqualified shall vote upon the matter on which he is disqualified. Any member shall openly state or have the presiding officer announce the fact and nature of such disqualification in open meeting, and shall not be subject to further inquiry.

Where no disqualifying conflict of interest appears, the matter of disqualification may, at the request of the member affected, be decided by the other members of the Council, by motion, and such decision shall determine such member's right and obligation to vote. Any member having a "remote interest" in any matter as provided in Government Code shall divulge the same before voting. The member of the Council with the conflict of interest may leave the chambers to prevent the appearance of influencing the outcome of the vote by their mere presence and/or body language.

Open Mind

No member of the Council shall pledge or promise to vote in any particular manner.

F. REQUESTS FOR TECHNICAL ASSISTANCE AND/OR REPORTS

A **majority vote** of the Council shall be required to direct staff to provide technical assistance, develop a report, initiate staff research, or respond to requests for information or service generated by an individual Councilmember that requires more than one hour of personnel time. The report **MUST** be provided to all members of the Council to ensure transparency.

II. MEETINGS

A. CALL TO ORDER - PRESIDING OFFICER

The Mayor, or in the Mayor's absence, the Mayor Pro Tem, shall take the chair precisely at the hour appointed by the meeting and shall immediately call the Council to order. Upon the arrival of the Mayor, the Mayor Pro Tem shall immediately relinquish the chair at the conclusion of the business presently before the Council. In the absence of the two officers specified in this section, the Councilmember present with the longest period of Council service shall preside.

B. QUORUM CALL

During the course of the meeting, should the Chair note a Council quorum is lacking, the Chair shall call this fact to the attention of the City Clerk. The City Clerk or City Manager shall issue a quorum call. If a quorum has not been restored within ten minutes of a quorum call, the meeting shall be deemed automatically adjourned.

C. COUNCIL MEETING SCHEDULE

Regular meetings of the City Council shall be held on the 2nd and 4th Monday's of each month; the schedule to be established annually by Council resolution taking into consideration holidays and election dates. The Council meetings shall commence at 7:00 p.m. with the work session beginning at 6:00 p.m.

D. ADJOURNMENT

1. No Council meeting shall continue past 10:00 p.m. unless a majority of the Council votes to extend the meeting to discuss specified items; and any motion to extend the meeting beyond 10:00 p.m. shall include a list of specific agenda items to be covered and shall specify in which order these items shall be handled.
2. If a Council meeting is continued past 10:00 p.m., it shall end at 11:00 p.m.
3. Any items not completed at a regularly scheduled Council meeting shall be continued to the next regular business meeting.

III. AGENDA

A. DECLARATION OF POLICY

No ordinance, resolution, or item of business shall be introduced, discussed or acted upon before the Council at its meeting without before that it's having been published on the agenda of the meeting and posted in accordance with the deadline for the agenda. Only a majority vote of the Council may add an agenda item after the agenda item deadline.

During the approval of the Council's Agenda, the Mayor will recognize any "motion" to amend the agenda. Any member of the Council is entitled to make such "motion." All members are entitled to be informed in detail of the agenda item in order to be prepared to discuss the agenda item.

B. PROCEDURE FOR BRINGING MATTERS BEFORE CITY COUNCIL

Matters may be placed on the agenda by any Councilmember, the City Manager, or the City Clerk by the established deadline. After the established deadline of 12:00pm (noon) on Wednesday before regularly scheduled meeting, the majority of the Council must agree to place the item on the agenda. An agenda item maybe added and/or removed by a majority of the Council during the agenda item "Approval of the Order of the Agenda." All items must placed on the agenda must have all relevant statements, reports, and/or evidence to prevent "surprise agenda items."

C. AGENDA SEQUENCE AND ORDER OF BUSINESS

Work Session

- a. Starts at 6:00 p.m.
- b. Discussion of Work Session Agenda Items to be considered to take forward into the Regular Meeting
- c. Consent Agenda
 - ❖ Requires a unanimous consent of Council or quorum
 1. Approval of the minutes;
 2. Appointment to committees
 3. Purchase of approved budgeted items
 4. Purchase of non-budgeted items (after discussion)
 5. Policy (after discussion)
 6. Amendments to policy (after discussion)
 7. Waivers to policy (after discussion)
 8. Resolutions
 9. Proclamations
 10. Contracts (after discussion)
 11. Any work session agenda item that receives a unanimous consent of the Council

Regular Meeting

- a. Call to Order (Regular Meeting at 7:00 p.m.)
- b. Invocation
- c. Pledge of Allegiance
- d. Order of Agenda
- e. Items placed directly on the agenda
- f. Consent Agenda Items
- g. Work Sessions Items Brought Forward
- h. Other Business
- i. Executive Session (If Necessary)
- j. Adjourn

IV. CONDUCT OF MEETING

A. COMMENTS FROM THE PUBLIC.

On respect for the Council, City Manager, Staff, and citizens the Mayor is responsible for orderly and productive public comment. The Mayor will require the Council, City Manager, Staff, and citizens to refrain from using the public meeting as a forum for rude, slanderous or disruptive personal attacks on others, and the Mayor will have the authority to take the floor away from individuals who act unruly, interrupts the speaker recognized by the Chair. As the presiding officer, the Mayor may establish a time limit for each speaker ranging from 3-5 minutes to include members of the Council. If a group representative of 5 or more, the Mayor may allow the representative of the group to speak for 5 to 10 minutes.

Regular Meeting

Comments from the public are not allowed during the Regular Meeting. However, the majority of the Council may allow comments for the public during the Regular Meeting to inform the community of community events and/or public awareness. If allowed, the Mayor will establish a time limit for the public comment. Additionally, the Mayor may extend or decrease the time limit for public comment. However, public comment during the Regular Meeting should be a rare occurrence.

Work Session

Comments from the public are allowed during the Work Session provided the citizen completes the request form to appear before the Council during the Work Session before the established deadline. However, a majority consensus for the Council may allow a citizen to speak to the Council during the Work Session if the citizen missed the deadline. This should be a rare occurrence. As the presiding officer, the Mayor may establish a time limit for the speaker of 3 minutes.

TIME LIMIT FOR PUBLIC SPEAKERS AT PUBLIC HEARINGS / PUBLIC DISCUSSIONS.

Each speaker shall be limited to three minutes with the exception that one representative for a group of citizens shall be allowed five to ten minutes during the public hearing on this matter. As the presiding officer, the Mayor may extend or decrease the speakers' time limit.

SPEAKER PROTOCOL.

Each person addressing the Council shall first give his name, address, and telephone number in an audible tone of voice for the record. All remarks shall be addressed to the Council as a body and not to any member thereof. No one other than the Council and the person having the floor, shall be permitted to enter into any discussion, either directly or through a member of the Council, without the permission of the presiding officer. No question shall be asked by a Councilmember WITHOUT obtaining the floor. As the presiding officer, the Mayor may establish a time limit for members of the Council to ask questions.

COUNCIL SPEAKING PROTOCOL

City of Douglas Charter Sec. 2-36. - Interruptions not permitted.

No interruptions shall be permitted while a member is speaking on such matters as may be before the board of commissioners.

RESPECTING THE ORDER OF THE PROTOCOL

The Councilmember must yield the floor back to the presiding officer at the conclusion of the established limit. As the presiding officer, the Mayor may extend the establish time limit

ENFORCEMENT OF DECORUM

Any law enforcement officers on duty or whose services are commanded by the presiding officer shall be Sergeant-at-Arms of the Council meetings. He/she, or they, shall carry out all orders and instructions given by the presiding officer of the purpose of maintaining order and decorum at the Council meetings. The law enforcement officer must make a determination to place any person who violates the order and decorum of the meeting under arrest and cause him to be prosecuted under the provisions of applicable law.

ROBERTS RULES OF ORDER

City of Douglas Charter Sec. 2-28. - Parliamentary procedure

The proceedings of the city commission shall be generally governed by Robert's Rules of Order, Newly Revised, so far as applicable and not inconsistent with the special rules of the city commission, the charter and this Code.

Voting on a Motion:

The method of vote on any motion depends on the situation and policy. Currently, the Council votes "by voice."

RULES OF DEBATE

1. Allow motions that are in order. (Presiding Officer)
2. Have members obtain the floor properly. (Presiding Officer)
3. Speak clearly and concisely. (Entire Council)
4. Obey the rules of debate. (Entire Council)
5. Most importantly, *BE COURTEOUS*. (Entire Council)

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- a) Presiding Officer May Debate. The presiding officer may debate from the chair, subject only to such limitations of debate as are by these rules imposed on all members, and shall not be deprived of any of the rights and privileges as a member of the Council by reason of his acting as the presiding officer.
- b) Getting the Floor - Improper References are to be avoided. Every member desiring to speak shall address the Chair, and upon recognition by the presiding officer, shall confine himself to the question under debate.
- c) Interruptions. A member, once recognized, shall not be interrupted when speaking **unless it is to call him to order**, or as herein otherwise provided. If a member, while speaking, be called to order, **he shall cease speaking until the question of order is determined**, and, if in order, he shall be permitted to proceed. As the presiding officer, the Mayor may interrupt the speaker if the speaker continues after their established time limit.
- d) Privilege of Closing Debate. The Councilmember moving the adoption of an ordinance or resolution shall have the privilege of closing the debate. When **a motion to call a question** is passed, the Councilmember moving adoption of an ordinance, resolution or other action shall have three minutes to conclude the debate.
- e) Calling Witnesses to include City Manager, Department Directors, etc.: The councilmember will be respectful to all witnesses. Each member must be informed of any witnesses called by a councilmember prior to witness giving testimony. If a witness is called without prior notice to the Council, the Council must reach a consensus of the Council before the witness begins to speak. As the presiding officer, the Mayor will establish a time limit for the witness to be asked questions. The Mayor may extend the questioning limit if the Mayor decides it's for the great good of the City. As the presiding officer, the Mayor may end the questioning if the Councilmember or witness jeopardize the decorum of the meeting.
- f) Calling the question (**to end discussion and vote immediately**)
 - i. This is a method to close debate on a motion. It is usually made at a time when the debate has been long and repetitious. A member rises and says: "I move to call the question."
 - ii. A motion to call the question (that is, to vote immediately on the motion being debated) cannot interrupt another speaker, is not debatable, is not amendable, and requires a majority vote. This requirement is important in protecting the democratic process.
 - iii. A motion to call the question has precedence over all other motions except the motion to table. If the motion to call the question passes, the chair immediately proceeds to call a vote on the motion that was being debated. This means that the mover of the motion loses his/her right to close

discussion. If the motion is defeated, discussion on the motion before the meeting continues as if there had been no interruption.

The motion to call the question is the only proper method of securing an immediate vote.

DEBATE LIMITED

Each matter coming before the Council shall be limited to twenty minutes from the time the matter is first taken up, at the end of which period of debate the debate terminates and the matter shall be voted upon or tabled by Council. Unless, a motion to extend consideration which, if passed, shall commence a new twenty-minute period for consideration.

In the interest of expediting the business of the City, failure by the presiding officer or any Councilmember to call attention to the expiration of the time allowed for consideration of a matter, by point of order or otherwise, shall constitute unanimous consent to the continuation of debate of the matter beyond the allowed time; provided, however, that the presiding officer or any Councilmember may at any time thereafter call attention to the expiration of the time allowed, in which case the Council shall proceed to the vote.

Work Session and Regular Meeting:

Each member of the Council must be given the opportunity to speak at least two or three minutes on each item that is before the Council. At the conclusion of the three minutes, the Council member must yield the floor back to the presiding officer. If a Council member has spoken and another Council member during their three minutes time to speak addresses another Council member, the Council member that was addressed must be given the opportunity to respond at least once.

Presiding Officer:

As the Presiding Officer, the Chair will be given the opportunity to participate in the debate continuously and throughout the debate. The Presiding Office at their discretion may allow a back and forth between members of the Council if the Presiding Officer deems the robust debate as necessary for the good of the City. After all member that wish to participate in the debate have spoken at least once, the Presiding officer may close the debate. At the discretion of the Presiding Officer, the Presiding Officer sets the order of the Council member three-minute debate time. The order of the debate is solely at the discretion of the Presiding officer. The Presiding officer is authorized to vote and make motions.

Nonparticipating Council Member:

If the Presiding Officer calls upon a member of the Council to debate or speak for three minutes and the Council member does not speak, the Presiding Officer will move to the next Council member. If the initial nonparticipating member decides to participate later in the debate, the non-participating member is restricted to a two-minute debate time or forfeit their opportunity to debate.

City of Douglas Charter Section 2.18. - Inquiries and investigations.

The city commission may make inquiries and investigations into the affairs of the city and the conduct of any department, office, or agency thereof and for this purpose may subpoena witnesses, administer oaths, take testimony, and require the production of evidence. Any person who fails or refuses to obey a lawful order issued in the exercise of these powers by the city commission shall be punished as provided by ordinance.

- Inquiries and investigations by the Council requires a majority vote. No individual councilmember is authorized to launch an investigation without the majority vote of the Council.

V. SUNSET SUNSHINE LAW

BE IT FURTHER RESOLVED, that Resolution and all resolutions amendatory thereof are hereby rescinded and that this resolution shall sunset on December 1, 2019. With a majority vote, this resolution will be the governing document for the City of Douglas meetings in accordance with the City Charter.