Opinion: Can local lawmakers speak freely to voters?

By Peter Scheer

Local government, Republicans and Democrats agree, is the most democratic (with a small d) form of government. The closer government is to the people, the theory goes, the more accountable it is to voters and the more responsive to the public will. Congress is the most remote, hence least accountable; your local city council is the closest, therefore most attuned to your needs and interests.

Except in California and several other states where elected, local officials can find themselves in trouble for doing exactly what elected local officials are supposed to do. Things like communicating regularly with citizens; staking out clear positions on issues that constituents care about; listening to voters' complaints about the status quo and promising, if elected (or re-elected), to make specific changes.

These communications are the lifeblood of democracy. They enable voters to make meaningful choices among candidates, while providing elected officials the information they need to represent the people's interests. The resulting feedback loop between politicians and voters is political expression of the highest order, entitled to the fullest, most robust First Amendment protection.

And yet this paradigm of government accountability is under a cloud of uncertainty.

The cause: legal rulings that force legislative bodies to function like courts when they make decisions that are – to use the applicable legalese – "quasi-judicial" in nature. In such cases, the members of a city council, school board or

county board of supervisors must be impartial and unbiased, more like judges than legislators.

What does this mean for a newly elected (or re-elected) city council member? Suppose the council will decide whether to approve expansion of a controversial housing development. If the member told voters during the election that she opposed expansion (because that is what she believed), then she may be forced – on grounds of bias – to abstain from the vote and all deliberations.

The upshot is that her constituents will be disenfranchised, which is no small penalty.

This collateral damage to free speech rights might be tolerable if local officials at least had a clear understanding of when it's OK to act politically – that is, doing what voters want – and when, instead, they must act as disinterested judges, watching what they say and disregarding what voters say. But the fact is that the distinction between legislative acts and quasi-judicial acts is anything but clear.

Take, again, the real estate example. … If the proposed housing expansion comes before the city council as a zoning code amendment – ostensibly a legal change of general applicability but also necessary for the project to go forward – the council is probably free to proceed in legislative mode, taking politics into account and honoring members' election promises. On the other hand, if the issue comes up as a vote on an application for a permit or license, the council members probably have to put on their judicial robes (figuratively speaking), ignore what voters say, and exclude from the process those council members who have spoken out on the issue.

The line separating legislative from quasi-judicial decisions is barely discernible to lawyers who practice in the

government arena — much less to the amateur politicians who predominate on legislative bodies of cities, counties, school districts and the like.

Moreover, even in cases where the line is ultimately visible, elected officials may have no way of knowing, well in advance of the decision, whether the issue will be presented to the council as a legislative matter or a quasi-judicial matter.

Faced with this uncertainty, many council members do the only safe thing: They censor themselves.

Unsure whether they will have to act like judges on a particular issue, they will act more like judges than politicians on all issues. They will curb their interaction with voters. They will refrain from making political promises. When asked by reporters and voters to comment on a local controversy, they will resort to vague generalities, avoiding specifics at all costs.

The court rulings creating this uncertainty are not new. Some have been on the books for years. What is new is that lawyers representing local governments are relying on these rulings in their advice to local officials. Because their job is to keep their clients out of trouble, the lawyers are warning public officials to curb their comments, and their candor, about local issues.

The result is a cumulative weakening of democracy, and a diminishing of political discourse and debate on the local issues that citizens care most about.

Peter Scheer is the executive director of the First Amendment Coalition. The views expressed here do not necessarily reflect the views of FAC's board of directors.