FRUITA
COLORADO

2018 City Council Handbook

City of Fruita Handbook Introduction 2018

TO: MAYOR and CITY COUNCIL
FROM: MIKE BENNETT, CITY MANAGER
DATE: JANUARY 30, 2018
RE: GENERAL CITY COUNCIL ORIENTATION INFORMATION

Welcome

Congratulations to and welcome to Team Fruita! Thank you for taking such an active role of service for our community. As you are well aware—the community of Fruita is awesome, and working for the City is definitely a treat with challenges as well. As elected officials, you have the responsibility and opportunity to provide important leadership that can have lasting impacts on the community. The following is a classic quote from a thought leader in the industry, Dr. John Nalbandian: **"*Experienced elected officials understand that public policy making is not about discovering right answers. It is more accurately described as forging alliances and compromises among advocates of different, often conflicting values with the goal of building and maintaining a sense of community*."**

The following is an overview of important areas to understand in order to be highly effective in your elected roles.

City Charter

The charter is the City's primary governing document, basically our City constitution. It is the set of rules and principles that dictate how the City is operated and requires the council-manager form of government. The charter was last reviewed by City Council with no changes in 2016, and previously 2010. The last update was April 6, 2004. The next mandated review is by the end of 2022. The Charter is found on www.fruita.org.

Fruita's charter, like most home-rule cities in Colorado, establishes that the city manager is the chief administrative officer of the City and the council is responsible for policy making. This means that the council helps determine end results related to overall vision and goals of the City and the city manager oversees operations and leads the professional staff to implement and figure out how to get the City there.

The council-manager form of government is recognized as the most effective form of local government, creating a healthy balance of professional expertise and representation of the citizens of the City. For example, nearly two-thirds of Moody's AAA bond rated cities operate

this form of government. In addition to the city manager, the city council is also responsible for appointing the city attorney and municipal court judge. By charter, the manager, the attorney and the judge are the only employees that report to the city council. All other employees fall under the city manager. More information and videos on the form of government can be found at http://lifewellrun.org.

Role of Elected Officials

As a city councilor of a growing and developing community, you will be faced with many challenging situations. As a council, it is important to work through these situations in a collective and concerted fashion. The city council is a collective body, comprised of individual members. Councilors were elected to a City Council, not to an independent seat. Constituents, expect the council to function effectively as a team. There is sometimes a perception that council members need to be independent on every issue for fear of being seen as a "rubber stamp councilor." This should not be the case. Each council member should feel comfortable expressing an opinion and debating and/or discussing a point. The key is to show respect for fellow council members, to be willing to move ahead once the issue is thoroughly discussed and to live with the vote of the council. Members of the council change, but the underlying responsibilities are constant. Individual members of the council are expected to debate and raise issues at the council meeting as items are discussed. The city manager is also expected to weigh in on matters. Once a decision is made by the council, all members are expected to support that collective action, as if spoken by one voice/one council, regardless of their personal position. The council constitutes the legislative and governing body of the City. Therefore, collective support is warranted.

The most highly effective council members are those that find a way to work with the fellow council members to create a majority position. Effective council members understand that rarely is it their job to simply find the "right" answer. The job is more accurately described as working with the entire council, (including advocates and opponents) to find shared points of agreement and to implement solutions that are built on consensus, accord, consent and compromise that, in the end, create a great community. One of the main reasons Fruita is viewed in the Grand Valley as the forward thinking City that gets things done is because the council has been made up of different viewpoints and people who are comfortable to debate and seek the best solution, without pushing a personal agenda, and agreeing to move forward once a vote is final. It is truly a team effort and you will learn from one another's perspectives and the professional staff's work and recommendations.

To be effective, the council must learn to excel at solving political problems. As opposed to technical problems, a political problem (or a policy issue) is when after all the facts are known, people can still legitimately disagree on the answer (because there are many solutions available). Generally speaking, more information is not going to help solve a political problem.

Communication

As a council member, you will likely be approached about a variety of issues and hear plenty of speculation and rumors. I would simply ask that you remember there are usually at least two sides to every story. If you hear, or are informed of issues that concern you, please let me know and I can make sure the issues are addressed or at least that your questions are answered. As city manager I work for the entire council as a group. It is my job and responsibility to keep the entire council well informed. As a staff team, our job is to provide objective information to the council. Please, never hesitate to let me know if you need information on an issue or if I can be of assistance.

Rules of Thumb

In order to keep lines of communication open, there are a few rules of thumb that the council and staff have found to be effective.

1. As city manager, I work for the entire City Council as one body. A key responsibility of mine is to assist council members so please don't hesitate to ask me for assistance. I am here to help and make your job easier.

2. In an effort to make sure all city council members are equally informed, when staff distributes information, 99.9 percent of the time we will give it to all council members Occasionally, I may ask the mayor for guidance, or if the information is very specific to one council member or a typical question we may receive from any resident, I may just give it to the councilor who asked. However, 99.9 percent I strive to provide all elected officials with answers equally so that everyone is operating with the same information. We believe all elected officials having the same information is crucial to keeping the lines of communication open, effective and fair.

3. Communication between council members and department directors is often times necessary. Individual council members are certainly welcome to contact individual department directors to gain information on specific topics. It is helpful if the city manager is copied on the correspondence or given a heads up when possible. However, elected officials need to be careful not to make demands of any department directors or city staff, or assign work to them. This would be a violation of the city charter. The rule of thumb I ask the department directors to go by is this: If a council member asks for information or makes a request of the director that the director would follow through with for the general public, then do it for the council member. If the request/inquiry from the council member is not something the department director would do for everyone, the department director should direct the council member to the city

manager to make arrangements.

4. Colorado Open Meetings Act—requires that "All meetings of a quorum, or three or more members of a local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times." (C.R.S. § 24-6-402(2)(b). This means that the city clerk will post all meetings that there is a possibility of three or more members of council will attend and that as a council you must not conduct any public business outside of a properly posted public meeting. Meetings may include electronic communication and are interpreted "any kind of gathering, convened to discuss public business in person, by telephone, or by other means of communication." C.R.S. § 24-6-402(1)(b). Public meetings do not include a chance meeting of a quorum of three or more members, or social gathering of a quorum of three or more members, provided that public business is not the central purpose; however, be aware public perception may also be a factor.

5. Finally, and probably most importantly, council members need to remember that as city manager, I work for the city council as a body, not seven individual elected officials. In order to be effective, the council needs to act as a single governing body, not as seven individuals with seven different agendas. Because of that, I (or any of staff) cannot always simply "do" what one council member wants done. In order to be fair to the council as a whole and to do my job well, staff needs to do what the majority of the council wants done, not individual council members.

To be clear, this is not to say you can't ask specific questions to me, get clarification, or ask for assistance. That is my job, so please let me know how I may assist; however, for big issues, I will require direction from the majority of the council.

Following these few rules of thumb will hopefully keep the lines of responsibility relatively clear between my responsibility as city manager to manage the day to day operations of the city and council's responsibility to set policy for the city.

Weekly Information Updates

Each week, I provide council with an Information Update that is posted on the City's website. A link is automatically sent to council members via email when the update is posted to the website. The link is also emailed to all people who have subscribed to receive this notice. In this update I provide a summary of information I feel is important for the council to know and provide bullets of "tid bits" that may be informative and interesting to be aware of. In addition, I provide links to news stories that cover Fruita, as well as upcoming events. Please feel free to share any of this information freely with the public. Should you ever want more information

regarding any issue you see in these Info Updates, please let me know.

While I will put forth a great deal of effort to ensure the council is up to speed on city happenings, I would appreciate it if you would keep me informed of issues you are hearing about or issues that are on your mind. With so much going on, it will occur that I may miss something or not be aware of everything in the community, so it does help me to know what you are hearing and to understand what your priorities are. I am happy to meet with you anytime that is convenient for you—please just let me know what works. It makes my job easier when I know what is on your mind.

Constituency Requests

As a council member, community members will frequently let you know what they believe needs to be done or projects the city should be undertaking. These issues can be as simple as filling a pot hole or as complicated as building a facility. If you are unfamiliar with the issues regarding the request, you should always feel welcome to have the resident contact me or any other staff member or let me know of the issue and I can get a hold of the resident and speak to you both about it. Unless you know all the facts of the situation, it is generally not a good idea to tell the person you will get something fixed (especially in enforcement issues). There may be policies, laws or other factors at play. When you have constituency requests, please let me know and I will be more than happy to help. It is completely fine to take the request and promise a response by a staff member or yourself (however you prefer).

I do my best to keep the Council updated on the variety of issues occurring with the City. When you get asked a question to which you don't know the answer, it is absolutely okay to tell the constituent, "I don't know the answer, but I can find out and get back to you." No one legitimately expects you to know everything, so it is very appropriate to simply tell someone you will look into it and get back to them. As city manager, I use this on a regular basis.

Email Accounts and iPads

Each City Council member is issued a City email account. The email address is first initial last name@fruita.org (no spaces I.e. kkreie@fruita.org). The City will provide each council member with an iPad if you would like that is set up to receive this email account, and can be used for other council related business. If you need a particular application for council purposes, please work through the deputy clerk to have this purchased and set up. It is fine to use the iPad for personal reasons that do not cost the City any additional fees. If you already have a personal iPad that you would prefer to use, staff can set it up to receive your City email account.

It is critical that when you are sending or receiving City related emails, that you use this account. Most every email you write as a council member is a public document and are open to the public for review. In order to maintain the privacy of your personal or business email accounts, you should not write or receive publicly related emails from your private accounts, otherwise, they may become subject to public review. By strictly using your City email account, it keeps a very clear line between private and official emails. We know it is a pain to maintain

several accounts, but when/if the press ever starts making requests for email documents, you will be happy you made the distinction. Due to Colorado Open Records laws it is important that Council not utilize email to have group discussion as these may be deemed open meetings requiring public notice. We utilize a policy that you may receive an update via email sent to all of City Council, but do not "reply all" and instead communicated directly with me and we can schedule any needed discussion on an upcoming council meeting agenda abiding by the state law.

City Council Meetings

Regular (business) meetings of the city council are on the first and third Tuesday of each month beginning at 7:00 p.m. These are the meetings where the council can provide direction to staff and pass motions, resolutions and ordinances. These proceedings are generally governed by (a modified) Roberts Rule of order. The deputy city clerk takes official minutes of the meeting and prepares a vocal recording of the meeting. These minutes are typically placed on the next meeting's agenda for council to review and approve.

Council workshops are scheduled on the fourth Tuesday of each month at 6:30 p.m. Workshops are informal meetings of the council where decisions cannot be made, but direction can be given to staff. Since workshops are informal informational meetings, formal minutes are not taken. At these meetings we attempt to go over upcoming issues, dive into bigger issues with more detail and hold general informational discussions. Frequently, when individual council members ask to discuss an issue, we place that issue on a workshop agenda. Also at this workshop meeting, staff provides the council an overview of planning issues that will be dealt with at the next city council meeting.

Council Meeting Agendas

The city manager and deputy city clerk prepare a formal agenda, legally post the meeting to the public and provide a council packet the Friday prior to the meeting for the council to review and use to prepare for the meeting. If a council member would like to have an item placed on a council meeting or workshop agenda, simply let me know and I will ensure it is placed on the appropriate agenda. For nearly all items placed on the agenda, staff attempts to put together a cover sheet that provides background on the item, any fiscal impacts, the item's relationship to goals and objectives, and a recommendation from staff on how to proceed. We do our best to base these recommendations on objective information and our professional opinions, not necessarily on the political realities the council may need to consider.

Council meetings are conducted by the Mayor. In the Mayor's absence, the Mayor Pro-tem conducts the meeting. Council meetings begin with an invocation and pledge of allegiance that the Mayor invites the audience to participate in if they so choose. The next item is a call to order by the Mayor and roll call conducted by the deputy city clerk. The council then acts to adopt of amend the agenda before them. The rest of the meeting has the following sections in

the same order.

Proclamations and Presentations

It is common for council to receive requests from the public, various organizations and others to consider a proclamations that recognize a particular day, event or cause. These items are placed near the beginning of the agenda so that they may be read by the Mayor or a council member, the representatives given an opportunity for brief comments, a photo with the council and then giving the group the opportunity to leave if they do not choose to sit through the remainder of the meeting.

Similarly, presentation by various groups that would like to inform council or make a request of council are placed in this item of the agenda.

Public Participation

The council has included an agenda item at each meeting to allow public comment on issues that otherwise do not appear on the agenda. This has proven to be an effective tool to allow the public to "air out" issues of which the council may not otherwise be aware of. Comments are limited to five minutes per the agenda.

Occasionally, this time on the agenda can also be a time for members of the public to grandstand and use valuable council time. When controversial topics, complaints or other similar issues are brought up, it is usually best <u>not</u> to try and address them immediately at the meeting or for that matter quiz the person bringing up the point. It is usually a good idea to listen to the complete issue, and then, if warranted, direct staff and/or council members to meet with the individual to address the issue. This allows for quick action on the issue and also allows equal time to other scheduled items on the agenda.

Along these same lines, when people make comments during public hearings it is also usually not a good idea to interrogate the person making the statement, or for that matter let them interrogate the council. Those sections of the meeting are there for people to speak their mind, not hold a speech and debate forum. It is the Mayor's job to keep these issues under control, but the council can certainly assist.

Consent Agenda

This item is a beautiful thing. Rather than council needing to discuss every single item individually at each meeting, routine or simple items that are straight forward, and /or are easily described in the cover sheet are placed on the consent agenda. Council may then act on all items in one action or pull select items to be considered separately. The public has an option to also pull an item for single discussion.

The agenda contains the following description: *These are items where all conditions or requirements have been agreed to or met prior to the time they come before the Council for*

final action. A Single Public hearing will be opened for all items on the Consent Agenda. These items will be approved by a single motion of the Council. The Mayor will ask if there is anyone present who has objection to such procedure as to certain items. Members of the Council may also ask that an item be removed from the consent section and fully discussed. All items not removed from the consent section will then be approved. A member of the Council may vote no on specific items without asking that they be removed from the consent section for full discussion. Any item that is removed from the consent agenda will be placed at the end of the regular agenda.

Public Hearings

Public Hearings are the formal opportunity for the city council to LISTEN to the public regarding the issue at hand. For land use hearings and liquor license hearings; the Council is required to act in a quasi-judicial capacity. When acting as a quasi-judicial body, the Council is acting in much the same capacity as a judge would act in a court of law. Under these circumstances, the judicial or quasi-judicial body must limit its consideration to matters which are placed into evidence and are part of the public record. The council must base their decision on the law and evidence presented at the hearing.

1) **Applicant Presentation** (15 minutes max) The petitioner is asked to present the proposal. Presentations should be brief and to the point and cover all of the main points of the project.
2) **Staff presentation** (15 minutes max) Staff will present the comments and reports received from review agencies, and offer a recommendation.
3) **Public Input** (limit of 5 minutes per person. If two people in the audience are willing to cede their time to the speaker, that speaker may receive a total of 10 minutes, referred to as banking time). People speaking should step up to the microphone and state their name and address. Speakers should be to the point and try not to repeat the points others have made.
4) **Applicant Rebuttal (limited to 5 minutes)** The mayor will ask for the applicant's rebuttal. During this brief time, the applicant should answer the questions raised by the public.
5) **The hearing is then closed to public comments**
6) **Questions from the Council.** After a council member is recognized by the mayor, they may ask questions of the staff, the applicant, or the public.
7) **Make a motion.** A member of the city council will make a motion on the issue
8) **Discussion on the motion.** The city council may discuss the motion.
9) **Vote.** The City Council will then vote on the motion.

Administrative Agenda

Staff updates and recommendations to council that do not require public hearing are placed on this section of the agenda.

Council Reports and Actions

This item provides a time for the council and mayor to provide general updates to each other. Typically, these updates include summaries of recent board or commission meetings council members have attended. Occasionally, council requests specific items for the council to take action on and discuss that may not require a public hearing. These items are then placed on this section of the agenda accompanied by a cover sheet.

City Manager's Report

Similar to the Council Reports section, this section of the agenda provides a time for the city manager to provide general updates and reminders to council.

Actions of the City Council

The City Council formally acts in four ways, through: **(1)** ordinances, **(2)** resolutions, **(3)** motions, and **(4)** proclamations.

Ordinances are laws; therefore all legislative enactments must be in ordinance form. For example, actions required to be done by ordinance are: (a) adoption or amendment of a code, (b) setting fines or penalties, (c) conveying or leasing City property for more than a year and (d) approving franchise agreements.

Resolutions are for more policy-oriented issues. They are not legislative but do provide clear direction to staff and the public. Resolutions are official actions, but do not require the same level of formality as an ordinance. Resolutions are typically used for: (a) budget transfers and appropriations, (b) setting fees, (c) accepting annexation petitions and (d) adopting policies and procedures.

Motions are used to provide clear direction to the City Staff.

Proclamations are ceremonial actions used to declare special events or recognize someone for their achievement. They are generally one of the first actions taken on the agenda.

Quasi-Judicial Capacity vs. Legislative Capacity

(See page for a memo from the City Attorney regarding this)

Generally speaking, the city council acts in a legislative (policy making) manner through the adoption of ordinances, resolutions and the formulation of policy. In such instances, the council obviously expects input from the electorate and there should be free communication with members of the public concerning such legislative matters. This is the keystone to representative government.

However, often the council is required to act in a quasi-judicial capacity. Land use hearings and liquor licenses are the most common examples. When acting as a quasi-judicial body, the council is really acting in much the same capacity as a judge would act in a court of law. Under

these circumstances, the judicial or quasi-judicial body must limit its consideration to matters which are placed into evidence and are part of the public record.

Considerations of matters or opinions which are communicated or expressed outside of the public hearing are inappropriate for consideration and such "ex-parte communication" needs to be absolutely avoided. If they do occur, such communications destroy the credibility of the quasi-judicial process since it becomes impossible to determine whether a particular councilperson's decision is based upon the information submitted as part of the public record or is the result of influences or information obtained through ex-parte (or outside the public hearing process) communication.

Quasi-judicial decisions of the city council are subject to review by the District Court under what is called a Rule 106 proceeding. In such proceedings, the Court does not substitute its judgment for that of the council. Rather, the Court reviews the public record of the quasi-judicial hearing to determine if there is any credible evidence to support the decision of the council. If there is, the council's decision will be upheld. However, if there is evidence or substantive allegation that one or more of the council members discussed the issue with third parties or considered additional documents or information outside of the public hearing process, the decision will inevitably be overturned because of such ex-parte contacts.

If you ever have a question whether an issue before the council is quasi-judicial or legislative, please confirm with the city manager or the city attorney.

Annual Budget

It is the city manager's responsibility to develop a budget and submit it to the council for consideration. Budget preparation (staff's part) usually starts mid-summer. Although this may not be the most interesting document to read (☺), it is probably the most important document the council adopts each year. This is the document that essentially becomes the work plan for the year and sets priorities for the community. The budget is our opportunity to tie our resources to our priorities.

Once the budget is adopted by the council for the upcoming year, then it becomes the city manager's job to manage it. The 2018 Annual Budget is available for review on the City's website. If you would prefer, paper versions are available.

Colorado Municipal League

The Colorado Municipal League (CML) is an organization that 99% of the state's cities belong to. For the majority of the year it acts as a clearinghouse for municipal information and provides a great deal of training for elected officials and staff. During the Legislative Session, CML acts as our representative in the legislature, basically as our lobbyist. Over the years they have proven to be very effective lobbyists for municipal issues. The council is encouraged to attend the meetings and training sessions this organization offers. A great way to stay up to speed with

CML is to join their e-mail list. Simply send an e-mail to Deb Woods (dwoods@fruita.org) and she can sign you up to receive plenty of CML information.

Boards and Commissions/Outside Organizations

The City has a number of Boards and Commissions the council appoints to advise it on the operations of the community. A staff member is also assigned as a liaison to each City board and commission. While staff assists these boards and commissions operate, the board's and commission's role is to be advisory to the council. It is up to the council how to best utilize these citizen volunteers.

The City belongs to a number of outside organizations. In your role on Council, you may represent the City as a member of some organizations or as a board member. When attending these meetings, it is important to remember that while you are attending these meetings as a representative of the City Council, generally speaking, you cannot speak on behalf of the Council (unless of course you have clear direction from the Council). A common statement made by elected officials attending these meetings is something like, "I am only one member of the council and can't speak on its behalf, but this is what I think……" The key issue is understanding your role as a liaison to the rest of the Council and making sure you understand your role as an individual member versus speaking for the entire board.

Media Relations

As a council member, you will likely be approached by members of the media for comments on various matters. It is important to remember that any comments you make should reflect the overall views of the Council. If the council has not taken a position, at a very minimum, you should state that you are speaking as an individual and not on behalf of the Council.

It is a common practice for reporters to ask council members their individual opinions of various issues. The reporter will then have those independent opinions cumulatively published in the paper. Thus, council members learn of everyone's various opinions in the paper, rather than through a discussion at a meeting. This has not proven to be an effective method with which to legislate. If at all possible, it is generally better to share your opinion with fellow council members at a meeting, rather than through the paper.

Good advice for dealing with the media is to never go "off the record." Most members of the media represent the highest levels of journalistic integrity and ethics and can be trusted to keep their word, but you are never truly "off the record. One bad experience can be catastrophic. Be sure to use your words carefully. Finally, if you don't feel you have adequate information to discuss an issue, please don't feel as though you are required to comment. You can always simply let the reporter know that you will need to look into the issue. Of course, you should feel free to have the media call me as well. I often receive inquiries from the media and will either handle it myself or request a staff member to handle.

Official Travel and Expenses

Occasionally, council members will participate in trainings or conferences, or other official travel representing the City. Most of the time this is planned ahead of time and should be coordinated through the deputy city clerk, Deb Woods, who can make this easy on you and arrange for reservations and process appropriate per diem funding to cover food expenses. This funding is set by the state standard and requires no need to turn in receipts. A check is simply cut for the state amount for the particular meal and you may spend more or less on your own with no additional reimbursement. When a set fee for a function is required, it is best to work through the deputy clerk to take care of the payment ahead of time. If this is not possible, please submit a receipt for allowable reimbursements.

Liability Issues

Cities are continually faced with liability issues. To help mitigate this fact, cities purchase general liability insurance and have some protection under the governmental immunity act and common law immunity. As a council member, you are considered an agent of the City and are generally afforded the protections listed above, as long as you are working within the scope of your responsibilities.

There are certain situations in which council members may not be covered under the governmental immunity act or common law immunity. Council members may not be covered from liability and could be held personally responsible if an act or omission resulting in claim did not occur during the performance of your municipal duties or if the act is viewed as "willful or wanton" conduct. Willful and wanton conduct can be described as conduct "purposefully committed which the actor must have realized as dangerous, done heedlessly, and recklessly, without regard to consequences, or of the rights and safety of other."

To be safe, be sure to only take action that is appropriate to your role as a council member. The City is a member of CIRSA who administers our liability insurance and provides a wealth of assistance and direction to numerous Colorado cities. They also provide resources directly to elected officials: http://www.cirsa.org/elected-officials/elected-officials.html?AreaId=187.

City Goals & Values

In building greatness, there is no single defining action, no grand program, no one killer innovation, no solitary lucky break, no miracle moment. Rather, the process resembles relentlessly pushing a giant, heavy flywheel in one direction, turn upon turn, building momentum until a point of breakthrough, and beyond. –Jim Collins, Good to Great and the Social Sectors

Fruita is fortunate to have leadership that realizes the importance of setting specific vision and consistently aligning resources, time and efforts to achieving these goals.

Below are copies of the Fruita goals and values.

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WHY FRUITA? The City of Fruita focuses on three strategic outcomes built upon a base of providing quality core services.

Quality of Place (QP) The City of Fruita is a community where residents and visitors love where they are. The City strives to be a bike and pedestrian friendly community by providing a system of sidewalks, trails, and bike lanes that connect our parks, schools, neighborhoods, civic facilities, and commercial areas. We value safe neighborhoods, our geographic natural resources and landscapes, top tier education and healthcare, and we collaborate to provide quality essential infrastructure and services. We are an inclusive community of doers who enjoy active and healthy lifestyles.

Economic Health (EH) The City of Fruita strives to be financially sustainable by enabling a stable economy and supporting a diversity of businesses that offer well-paying jobs that attract educated employees. The City works to be fiscally responsible and continuously seeks ways to allocate resources to services and projects that have the highest impact on the City's priorities. We are the innovative leader for economic development in the Grand Valley.

Lifestyle (L) The City of Fruita fosters a fun and funky ambiance by celebrating the local arts, farm and ranching history, unique leisure opportunities, and family-friendly events and activities. As a city, we encourage a diversity of cultural opportunities, businesses, and recreational activities. We continue to improve and enhance recreational offerings from traditional to outdoor adventure sports and youth to adult activities. We are a family-friendly community with diverse cultural opportunities, businesses and recreational amenities where visitors feel like locals and locals play like visitors.

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City of Fruita staff strive to emulate these core behaviors in everything we do in order to show gratitude for public trust, build trust and maintain trust with the public, our partner agencies and with one another.

We are Fruita. We are…

Fun—This is such a critical behavior that impacts everything we do. If we are not having fun, we must ask why and recalculate and adjust. We must love what we do and where we work, live and play. We are positive and put forth focused effort to have a positive attitude. We are smiling. We are friendly. We enjoy serving the public and working together. We care about the experience those who interact with us internally and externally have.

Respectful—We are empathetic. We take an active interest in each other, residents, businesses and visitors. We listen. We talk one at a time. We compliment and build up others. We are tough on issues and easy on people. We recognize the role of City Council, Board and Commission Members, residents, supervisors, coworkers and customers. We are kind. We treat people with dignity. We embrace diversity and make every effort to think collectively.

United—We are a team. We focus on purpose and work together to achieve our goals. We communicate effectively with each other. We seek consensus, agree to disagree and move forward for the greater good. We support each other. We value partnerships that help us achieve our goals. We remember we are public stewards and serve. We are inclusive. We create synergy by recognizing our strengths and weaknesses and succeeding as a team.

Innovative—Simplicity is our key to innovation. We consider and explore alternatives to the way we've always done it. We are open to new ideas. We welcome calculated risk-taking and learning from our mistakes. We seek continuous improvement and welcome constructive feedback. We ask why and why not. We work to continually improve.

Transparent—We operate as an open book. We create, over communicate and reinforce clarity in our work. We are trustworthy. We assume a positive intent from others. We work with integrity. We seek ways to increase transparency internally and externally.

Authentic—We are unique. We are real. We are different. We are special. We are optimistic. We are exceptional and proud of it. We are comfortable being different. We are open-minded. We are honest. We embrace and value family. We live what we speak. We create clear expectations and work hard to manage those expectations.

Final Thoughts

The City of Fruita provides a lot of services including provision of irrigation water, storm water management, wastewater collections and treatment, street maintenance, park maintenance, police services, animal control , recreation programs, parks management, planning services, code enforcement, special events management, open space protection, transit service, solid waste pick-up and many more. Our service area and population tend to grow and costs inevitably increase. We focus heavily on being more efficient and effective with the City resources. The most important thing is that we know who we are as a community, where we are heading and why—then we tie our efforts and resources to achieving just that.

Fruita thrives because in general people are positive, welcoming, and love where they live. Ironically, this is not all too common among the thousands of communities across the country. Fruita does not need more critics, but doers, co-creators who get involved with a positive focus. Team Fruita is not cliché, but proven as we are viewed across the valley as the progressive community that gets things done, that leads the way, that is the fun, cool, unique and funky place that people like to be. We are most fortunate to live and serve in a community with such a high level of quality people and place. We are a safe community, where our children can walk to school. We are a friendly, welcoming community where newcomers and old timers can easily get involved, where tourists feel like locals. We are a community that is surrounded by some of the most amazing outdoor recreational opportunities within minutes and without traffic. We are a unique community with amazing small businesses and arts and culture. We have so much to enjoy and much potential. Remembering this and why we do what we do, you will love serving and we will have a fun time doing it while seeing tangible positive results.

As a City Council member it is your job to set the tone and the vision for our community**.** Your position is truly one of leadership. It is a difficult job—one that very few people outside the position understand, but it also provides great opportunities for accomplishment. You will no doubt at some point be faced with a crowd of people at a council meeting that do or do not want something to occur. When this occurs, try to remember that your job is to lead and make good decisions for the entire community, not necessarily react to the will of the crowd of people before you. Try and remember, if 100 people showed up to a public hearing, which would be a lot of people, they would still be representing less than 1 percent of the residents of Fruita. As a council member, one of your hardest jobs will be to base your decisions on the overall good of 100 percent of the community, not just those standing before you. That is a lot easier said than done.

Additional Resources

This is the section that makes the handbook seem too thick, but they are additional resources that you will find helpful, interesting and also that the city manager will refer to fairly often.

Leadership Resources

These resources are those that I have found very helpful and will refer to often. I hope you will make time to browse and think over. I would be happy to discuss at any time.

How Great Leaders Inspire Action (Start with Why) by Simon Sinek Overview

Decisive by Chip & Dan Heath WRAP Process

Good To Great and the Social Sectors by Jim Collins Book Review

Great by Choice by Jim Collins Book Review

The Five Dysfunctions of a Team Model

The advantage: Organizational Health Model

A Whole New Mind by Dan Pink Discussion Guide

Organizational Chart

ICMA Code of Ethics

Your city manager is a member of the International City/County Manager's Association and as such subscribes to this Code of Ethics.

ICMA Recommended Articles for Elected Officials

Council-Manager Relations: Finding Respectable Ground

The Ins and Outs of US City Governance

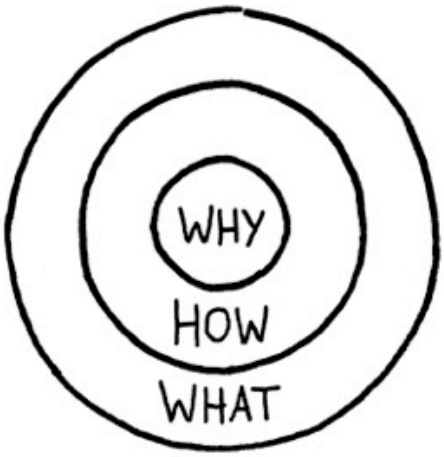
The Politics of Outcomes

What Elected Leaders Can Do

Quasi-Judicial Memo from City Attorney and supporting article

CIRSA Public Officials Liability Handbook

The Golden Circle



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What

Every organization on the planet knows WHAT they do. These are products they sell or the services they offer.

How

Some organizations know HOW they do it. These are the things that make them special or set them apart from their competition.

Why

Very few organizations know WHY they do what they do. WHY is not about making money. That's a result. It's a purpose, cause or belief. It's the very reason your organization exists.

Watching the TED talk by Simon Sinek, titled "How great leaders inspire action" is well worth 18 minutes.

https://www.ted.com/talks/simon_sinek_how_great_leaders_inspire_action?language=en

DECISIVE

THE WRAP PROCESS

To make better choices, we must avoid the most common decision-making biases. Being aware of these biases isn't sufficient to avoid them, but a process can help. The WRAP process can help us make better, bolder decisions.

WIDEN YOUR OPTIONS

Narrow framing leads us to overlook options. *(Teenagers and executives often make "whether or not" decisions.)* We need to uncover new options and, when possible, consider them simultaneously through multitracking. *(Think AND not OR.)* Where can you find new options? Find someone who has solved your problem. Try laddering: First look for current bright spots *(local)*, then best practices *(regional)* and then analogies from related domains *(distant)*.

REALITY-TEST YOUR ASSUMPTIONS

In assessing our options, the confirmation bias leads us to collect skewed, self-serving information. To combat that bias, we can ask disconfirming questions *(What problems does the iPod have?)*. We can also zoom out *(looking for base rates)* and zoom in *(seeking more texture)*. And whenever possible we should ooch, conducting small experiments to teach us more. Why predict when you can know?

ATTAIN DISTANCE BEFORE DECIDING

Short-term emotion tempts us to make choices that are bad in the long term. To avoid that, we need to attain distance by shifting perspective: What would I tell my best friend to do? Or, what would my successor do? *(Or try 10/10/10.)* When decisions are agonizing, we need to clarify our core priorities—and go on the offensive for them. *(Remember the stainless steel bolts on the Navy ship.)*

PREPARE TO BE WRONG

We are overconfident, thinking we know how the future will unfold when we really don't. We should prepare for bad outcomes *(premortem)* as well as good ones *(preparade)*. And what would make us reconsider our decisions? We can set tripwires that snap us to attention at the right moments. *(David Lee Roth's brown M&M, Zappos' $1,000 offer)*

HeathBrothers.com/Decisive

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Book Review

Collins, J.
Good to Great and the Social Sectors: A monograph to accompany Good to Great (why business thinking is not the answer).
Boulder, Colorado: author, 2005.

Reviewed by Raymond A. Lemay

This 35-page self-published monograph goes over the important lessons in Collins' earlier publication, *Good to Great,* and attempts to apply them to the social (human service) sectors. Its beginning premise is that social services should not adopt the business model. "Most businesses – like most of anything else in life – fall somewhere between mediocre and good. Few are great… So, then, why would we want to import the practices of mediocrity into the social sectors?" (p. 1).

The monograph, easily available through Chapters or Amazon, should be read as a concluding chapter to Collins original *Good to Great* book (Collins, 2001), that has been a remarkable best seller. The original book is the result of a very ambitious research project. The twenty-one members of Jim Collins' research team in Bolder Colorado, reviewed a huge amount of financial data and other documentation for 1, 435 companies that appeared in the 1965, 1975, 1985 and 1995 listings of the Fortune 500. The criteria for selecting the good-to-great companies were strict.

> "The company shows a pattern of "good" performance punctuated by a transition point, after which it shifts to "great" performance. We define "great" performance as a cumulative total stock return of at least 3 times the general market for the period from the point of transition through fifteen years (T + 15). We define "good" performance as a cumulative total stock return no better than 1,25 times the general stock market for the fifteen years prior to the point of transition. Additionally, the ratio of the cumulative stock return for the fifteen years after the point of transition divided by the ratio of the cumulative stock return for the fifteen years prior to the point of transition must exceed 3" (p. 219).

Moreover, this great performance could not be an industry event but rather had to stand-alone; in other words, the company had to standout not only from the general market but also relative to its particular industry category. The company also had to be ranked within the Fortune 500 in 1995, and still had to be performing according to the *great* criteria. At the end of this process, only eleven companies fit this metric, which meant less than one percent. Greatness, according to Collins' metric, was a rare event indeed. Collins and his team then analyzed this mountain of data and found 7 factors that best explained the differences between the great and the merely good.

1: Culture of discipline

At the outset, the author suggests is that what the social sectors require is most probably similar to what is required in the business sector. In a nutshell, Collins calls this a *rigorous or relentless culture of discipline*, something that could be useful not only for businesses but for social services. Thus, Collins proposes a language of greatness (or we could call a language of excellence); it is something that needs to be developed. This mind set of greatness is proposed as alternative to mindless reliance on standardized processes and bureaucratic controls.

The author then goes on to the important points made in his original *Good to Great* (Collins, 2001) showing how each of these might apply to the social service sector. The author recognizes the important differences between businesses and the social sectors. The most important one concerns the metrics of success; in business, these are essentially financial whereas in the social sectors money is but an input. The outputs, of course, are services, and outcomes (a word not used by the author), or what he calls the benefits accrued to clients rather than stockholders. Another important difference between businesses and social services are diffuse power structures. Social services tend to be, according to the author, less hierarchical and less chain of command oriented.

2: Defining great

In the social services sector, financial results will not be a measure of greatness. *Outputs* are the thing that Collins proposes as the metric of greatness and outputs are about what is delivered directly to clients. The author points to the problem that sometimes outputs are challenging to measure and that some of the measures will be qualitative in nature. The author points out that, in any event, all indicators are flawed whether they are qualitative or quantitative, they can never give you a picture of the whole. The important thing is to select indicators intelligently and then consistently monitor them, "and then tracking your trajectory with rigor" (p. 8). The author concludes this section by stating, "no matter how much you have achieved, *you will always be merely good relative to what you can become*. Greatness is an inherently dynamic process, not an end point" (p. 9).

If there is one thing that I would argue in this section is that the word that should be used is *outcomes* rather than *outputs*. In fact, I suspect that the author conflates these concepts and uses the expression output to include outcomes or as "result". This little section provides interesting examples of the Cleveland orchestra, the New York Police Department as well as the Stanford athletic department as exemplars of the social sector.

3: Level 5 leadership within a diffuse power structure

The author points out that at the top of the chain of command in social services, very often the CEO simply doesn't have the same power levers that a CEO has in a business. However, Level 5 leadership is not so much about using power as it is about bringing people along. Level 5 leadership is defined as humility combined with fierce resolve. It is even clearer in the social sector that authority does not come from power but rather from genuine leadership. People must

be *willing* to follow. Indeed, in a sense, there might be an argument that Level 5 leadership is particularly relevant for the social service sector. "*True leadership only exists if people follow when they have the freedom not to.* If people follow you because they have no choice, then you are not leading" (p. 13, italics in original).

4: First who – getting the right people on the bus

Having the right people in the right positions is one of the prime ingredients of greatness. The author describes the American school system as being a good example of where it would be very difficult to systematically get the right people on the bus and the wrong people off. Very simply, you have a very large and unwieldy system where no individual really has the power to do much, particularly when it comes to staff selection and ejection. The complications in the school system (in the U.S.) are long tenure, low salaries, few incentives, strong unions, and size/complexity. Here the author argues for a small is beautiful approach. Very simply, breaking down a school system or even a school into its smaller component systems, like a school department, makes good to great developmental process possible. Thus, it is not a question of transforming the school system or even a complete school but rather aiming to be good to great within one's department. The author provides an example of how this was done in one school. It is a very illustrative example and it's worth being read.

Then the author provides the following sobering comments, "the great companies … focused on getting and hanging on to the right people in the first place – those who are productively neurotic, those who are *self*-motivated and *self*-disciplined, those who wake up every day, compulsively driven to do the best they can because it is simply part of their DNA. In the social sectors, when big incentives (or compensation at all, in the case of volunteers) are simply not possible, the First Who principle becomes even more important. Lack of resources is no excuse for lack of rigor – it makes selectivity all the more vital" (p. 15).

Obviously, rigor and creativity go hand in hand for this issue particularly. A good example that is provided by the author is Wendy Kopp who began the *Teach for America* program. Wendy Kopp had a vision that was to convince the best graduates from the best universities to spend the first two years of their careers "teaching low income kids in the public education system" (p. 15). She got $26,000 from Mobil Corporation to start her venture and then she went from university to university, colleges like Yale, Harvard, Michigan and the like trying to convince graduates to work for "low pay in tough classrooms" (p. 16). The first thing she did was to tap in to people's idealistic passions. People in fact do want to do good: "she basically said to all these overachieving college students: "If you're really good, you might be able to join our cause"" (p. 16). She then set up a very rigorous screening process and made it actually difficult for people to volunteer. "As of 2005, more than 97,000 individuals applied to be part of Teach for America…, and only 14,100 made the cut, while revenues grew to nearly $40 million in annual support" (p. 16).

The author points out that the social sectors have one compelling advantage over businesses, and it obviously isn't money but rather that individuals crave for meaning in their lives. Appealing to people's ideals is indeed powerful and it is something that the author comes back to a number of times in his book.

5: Facing the brutal facts

The original *Good to Great* goes on quite a bit about the importance of facing the brutal facts and that this is the only way that one can make the first step towards achieving greatness. For many organizations, one of the brutal facts is that we are not good as we think (Lemay, 2005). On the ground, where it counts, with our clients, a lot of the folks we serve do relatively poorly and we cannot claim that there are thriving. There is only one measure of success and that is to be found in the outcomes of our clients. It is on this point where I think Collins could be a little clearer. His conflation of outputs and outcomes is to my mind problematic. In the social sector, we don't monitor outputs all that well and what we do see in fact is that the people we serve could be doing a lot better. But what we hardly do at all is monitor outcomes: client benefits. Are clients able to lead good lives after they have been served by a program in the social sector? We do need to take stock and ownership of our results. To move to greatness, we need to understand how mediocre we really are to begin with. We do need to take seriously, *on a day-to-day basis*, service screw-ups and less than satisfactory results. We need *on a daily basis* to brutally face, one case at a time, the difficulties that face us; moreover, we do need to set up powerful monitoring mechanisms that allow us to gage the extent to which we improve those results on a case by case basis and, of course, in the aggregate.

Part of the **fierce resolve** we need to develop in relation to the bad news of our current results is that getting better results, improving service outputs, and achieving greatness, will be a lot of hard work. It will take some time to get the results that we think we should be achieving.

6: The hedgehog concept

The author points out that hedgehog concept is best understood by considering three intersecting circles that must be responded to. "1) what you are deeply passionate about, 2) what you can be the best in the world, and 3) what best drives your economic engine" (p. 17).

Collins then goes on to adapt the hedgehog concepts: the economic engine is problematic; in some cases, it's not only about money but rather volunteers and good will. Thus, the author has changed the third circle and has renamed it the *resource engine* and he composes resources of three parts: *time, money and brand*. The author point out that brand is of importance, brand is the thing that people focus on and connect to. Indeed, there is a question of building an emotional connection to people who have trust in the organization and want to give to with either with money, time, or otherwise. Indeed, a good argument could be made that clients need to have confidence in the brand and such confidence enhances the effectiveness of the services provided under the brand name. Certainly in my mind, the whole issue of brand has been not well understood in the social services sector and here the author points out that it is one of the key component parts of the hedgehog concept that we must respond to.

On page 22, the author describes a Homelessness service in South Bend, Indiana, that developed its own distinct hedgehog concept. "They believed the Center could become the best in the world at breaking the cycle of homelessness in Bibletowns of the Midwest by challenging homeless people to take responsibility for their own lives. They soon realized that building a

resource engine primarily around government funding would run counter to the Center's Hedgehog Concept.

"Homelessness is a profound disconnectedness from self, family and community," explained Buscareno. "This insight fueled everything we did. We organized our whole organization around connecting people – homeless people, benefactors, volunteers, and staff – to self, family and community. Aggressively pursuing government money does not make any sense with this type of thinking, but aggressively connecting volunteers and local donors on a personal level with homeless people makes absolute sense"" (p. 22). The author quotes Peter Drucker who admonished that "the foundation for doing good is doing well" (p. 22).

7: Turning the flywheel – building momentum by building the brand

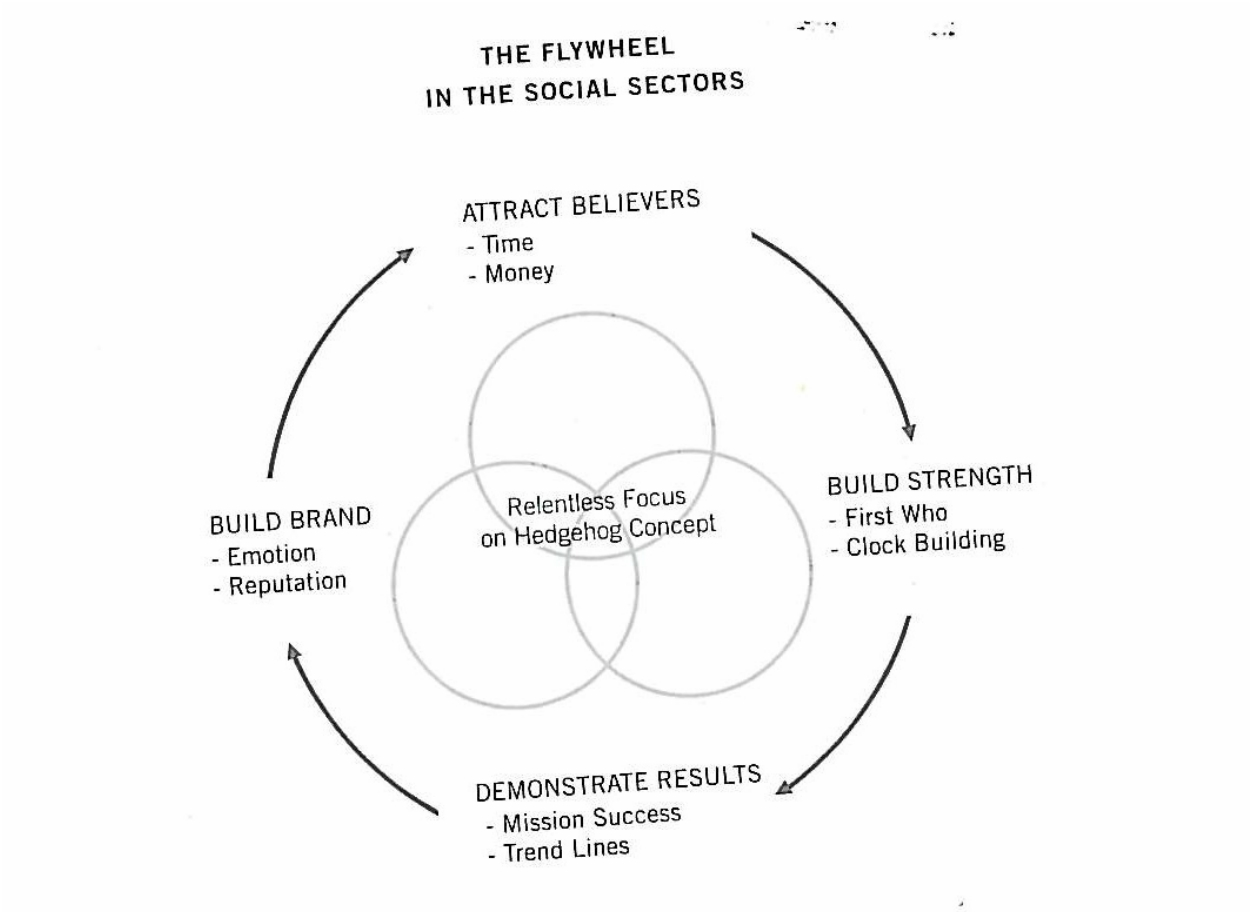
Good to great is best understood as a developmental process. The author points out that an important thing is to build momentum, at the beginning, slowly but surely but ever gathering speed. This is where the issue of brand is the most touched upon, in the business sector flywheel works very well when you have superior financial results, then people will line up to throw money at you and invest in your sector. However, when a social services agency has good financial results, run surpluses for instance, the reaction is usually the contrary: why would anybody give you any more money or new grants? However, people will give you more money if in fact you have a recognized brand that has established itself as a great organization. The author proposes a flywheel figure (next page).

At the end, the author concludes that it takes time to build greatness. It cannot be done overnight, it needs a lot of hard work, a great deal of rigor and, obviously, an obstinate belief that this is important, it needs to be done. The important thing is to embark on the journey, "it might take decades to change the entire systemic context, and you might be retired or dead by the time those changes come…" (p. 30). What the author concludes is that "greatness is not a function of circumstance. Greatness, it turns out, is largely a matter of conscious choice, and discipline" (p. 31).

Conclusion

Jim Collins in his introduction suggests that *the good is the enemy of the great* in that sometimes we become fairly self-satisfied with the fact that good is good enough, thus preventing us from making the effort and the leap to greatness. This is an interesting inversion of Voltaire's aphorism that *the best is the enemy of the good*. Voltaire's point is that very often we put off action because we simply cannot do the best and the best is unavailable. General George Patton had a similar aphorism when he suggested that a good plan today is better than the best plan tomorrow.

The issue, however, is one of being satisfied with anything less than excellence. Collins's point is that one must not be satisfied with good enough, one must strive to be the best. At the end of his book, he makes an impassioned plea for leading a meaningful life and making a significant



contribution. This can probably only happen if one strives for the best. Voltaire's point, as George Patton suggests, is one of action versus inaction. Both of these aphorisms, however, are reconcilable with the notion of developmental progress. To get to great, one will have to pass through good. The key thing to remember is that one is in fact moving towards greatness. Moreover, there are times when action is required and good enough is all that is available. In such circumstances, however, good enough must be recognized for what it is: not great.

It is in fact intriguing in Collins's book which I guess is somewhat in support Patton's law that Level 5 CEOs didn't know at the outset exactly what they were going to do to achieve greatness, but they did begin to move nonetheless. They moved and took action and what they did first was selecting the right people: People undoubtedly who had a passion for greatness, who had the potential for Level 5 leadership, and who would share in the important work of developing a great organization.

This is a good companion booklet to the Good to Great book which I heartily recommend. It demonstrates quite unequivocally that good to great thinking and its component concepts are equally applicable to social services and could serve to revolutionize a program or an organization.

Sources:

Collins, Jim, C. (2001). *Good to Great: Why Some Companies Make the Leap…and Others Don't.* New York: Harper Business.

Lemay, R. (2001). Good Intentions and Hard Work Are Not Enough: Review of: Levy, P. F., (2001). The Nut Island Effect: When Good Teams Go Wrong. *SRV-VRS: The International Social Role Valorization Journal, 4* (1&2), 94-97.

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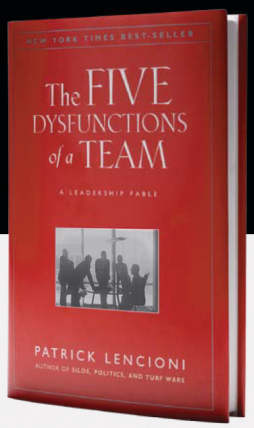
Collins described attributes of companies who achieved ten times market value of their competitors. Three main behaviors include:

Fanatic discipline
Speaks to a discipline to not go too far so as to stretch yourself thin to where you are then unprepared when unexpected things hit you. Establish a standard of performance and hold to the philosophy even in the toughest conditions. Success is based not on an average but on consistent performance. The signature of mediocrity is not in an unwillingness to change but in chronic inconsistency.

Empirical creativity
Creativity needs to be supported by empirical evidence. An analogy used was that of firing bullets to find the angle to the target so you make the most use of your gunpowder when firing the cannonball. Bet on something you know is going to work. Blend creativity and discipline. Creativity is natural, discipline is not. Discipline amplifies creativity rather than destroy it.

Productive paranoia
The only mistakes you can learn from are the ones you survive. You have to be optimistic, but there is awareness that the world is a scary place. Successful companies maintain a ratio of 3 to 10 times cash to assets, a practice started when they were small. The dedication of a financial buffer is not a luxury of size. It is what you do before you are in trouble, how you manage with discipline in good times so you can be strong when people need you the most.



The Five Dysfunctions of a Team

The Role of the Leader

Focus on Collective Outcomes

Confront Difficult Issues

Force Clarity and Closure

Mine for Conflict

Go First!

#1: Absence of Trust

The fear of being vulnerable with team members prevents the building of trust within the team.

#2: Fear of Conflict

The desire to preserve artificial harmony stifles the occurrence of productive, ideological conflict.

#3: Lack of Commitment

The lack of clarity or buy-in prevents team members from making decisions they will stick to.

#4: Avoidance of Accountability

The need to avoid interpersonal discomfort prevents team members from holding one another accountable for their behaviors and performance.

#5: Inattention to Results

The pursuit of individual goals and personal status erodes the focus on collective success.

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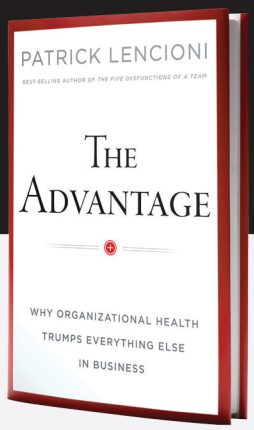
The Source For Organizational Health



The Advantage: Organizational Health Model

Discipline 1: Build a Cohesive Leadership Team

Cohesive teams build trust, eliminate politics, and increase efficiency by…

- Knowing one another's unique strengths and weaknesses
- Openly engaging in constructive ideological conflict
- Holding one another accountable for behaviors and actions
- Committing to group decisions

Discipline 2: Create Clarity

Healthy organizations minimize the potential for confusion by clarifying…

- Why do we exist?
- How do we behave?
- What do we do?
- How will we succeed?
- What is most important, right now?
- Who must do what?

Discipline 3: Over-Communicate Clarity

Healthy organizations align their employees around organizational clarity by communicating key messages through…

- **Repetition**: Don't be afraid to repeat the same message, again and again
- **Simplicity**: The more complicated the message, the more potential for confusion and inconsistency
- **Multiple mediums**: People react to information in many ways; use a variety of mediums
- **Cascading messages**: Leaders communicate key messages to direct reports; the cycle repeats itself until the message is heard by all

Discipline 4: Reinforce Clarity

Organizations sustain their health by ensuring consistency in…

- Hiring
- Managing performance
- Rewards and recognition
- Employee dismissal

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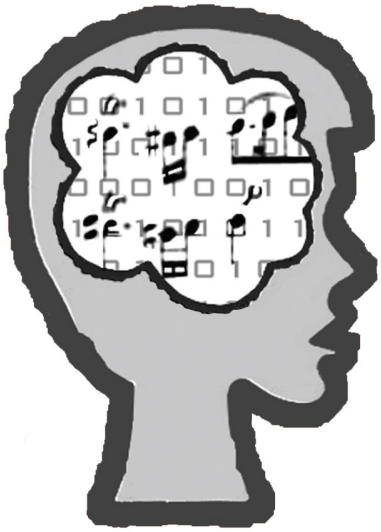
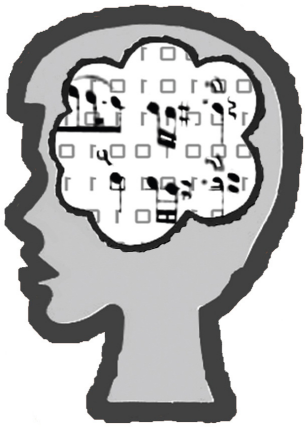
The Source For Organizational Health



A WHOLE NEW MIND
DISCUSSION GUIDE



FOR BUSINESS

1. In what ways does your current job involve R-directed thinking? Could your organization benefit from more R-directed thinking? Less?

2. How innate are the six abilities Pink discusses (Design, Story, Symphony, Empathy, Play and Meaning)? Which of them is your strongest? Weakest? Which is most important for your current job?

3. Consider the three questions Pink poses regarding your current work: Can someone overseas do it cheaper? Can a computer do it faster? Am I offering something that satisfies the nonmaterial, transcendent desires of an abundant age? Does your work pass this three-part test?

4. How will the three forces Pink describes be affected by the economic recession?

5. Did Pink convince you of the importance of design? In what ways could you and your colleagues instill design thinking in your organization?

6. What are the implications of Pink's argument for education? Are you yourself a product of the SAT-ocracy? If so, how did it help or hurt you?

7. What role does storytelling have in your work? What role could it have? Does your organization have a story to tell? Do your clients and customers know that story?

8. How do you use symphonic thinking in your job? How could this right-brain ability benefit your organization?

9. Is empathy an important part of your work? How could empathy be used in your organization to improve your offerings? How could empathy make your organization a better place to work?

10. What role do play and humor have in your workplace? Could play or humor improve your service to clients? Do you agree with Pink that a sense of humor can make someone a better manager? Why or why not?

11. What do you think of Pink's assertion that "meaning is the new money"? How does your organization create meaning for its customers? For its employees?

12. Does your current job pass the Collins 20-10 test that Pink outlines in the portfolio section of Chapter 9: If you had $20 million or knew that you had only 10 years to live, would you still be doing what you are doing now? What can your organization do to ensure that its employees' experiences pass this test?

13. What do you think of Pink's suggestion that spirituality should have a place in the workplace. What is your organization's approach to spirituality? Should it change?

14. Did you do any of the exercises Pink suggests in the book? Which ones would you recommend to others in your organization? Why?

15. What are some of the barriers to developing the six abilities Pink describes in your own organization?

16. How do you think workers in Asia would react to this book?

17. Pink talks about psychological androgyny and aligns R-directed thinking with one's feminine side. Do women have a comparative advantage over men in this world? Is this true in your organization? Why or why not?

18. Would you add any other abilities to Pink's list of six senses?

19. What in this book made you laugh? What made you angry. Why?

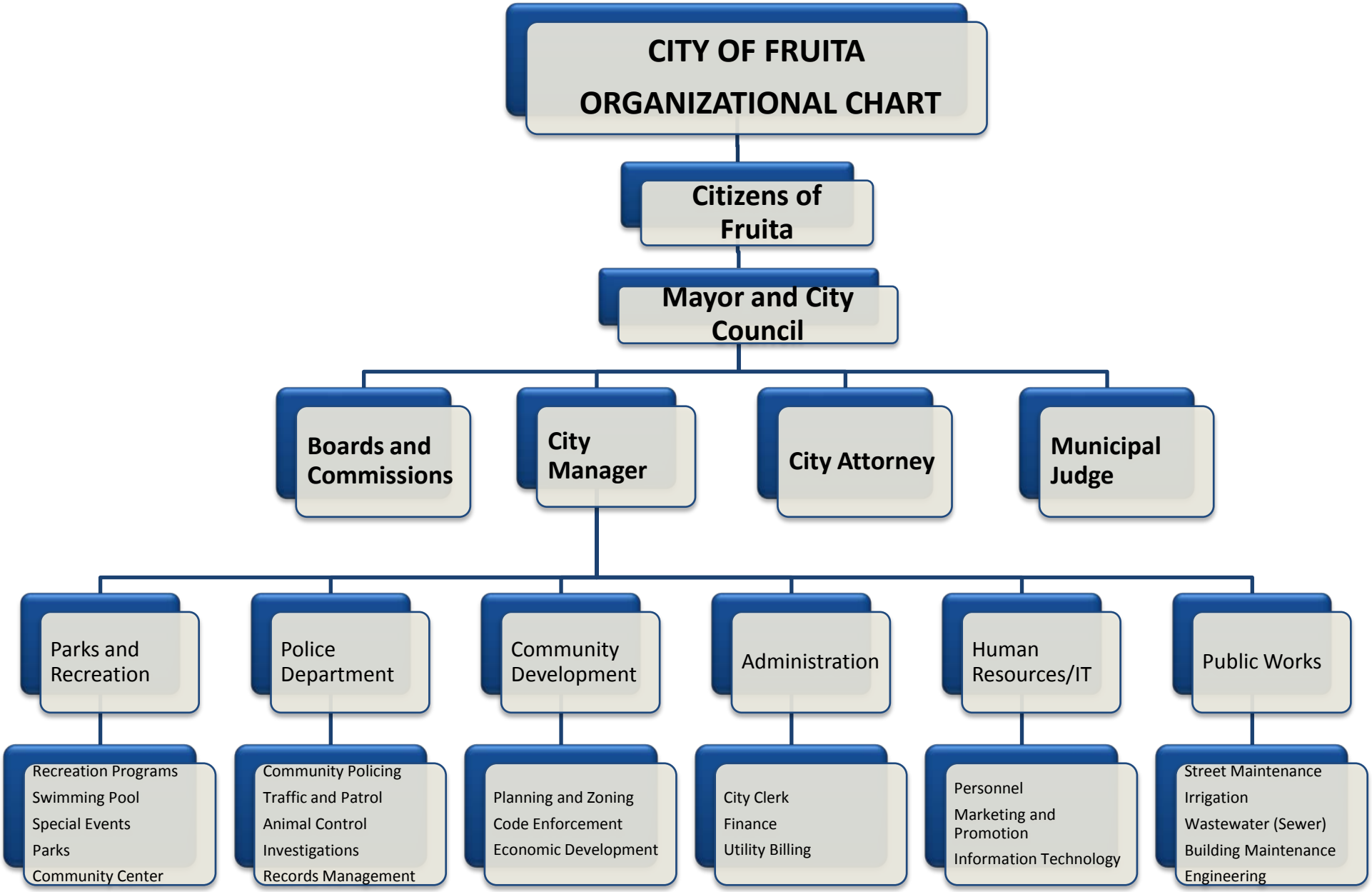
Your questions:

_____

_____

_____

CITY OF FRUITA
ORGANIZATIONAL CHART



ICMA Code of Ethics

The mission of ICMA is to create excellence in local governance by developing and fostering professional local government management worldwide. To further this mission, certain principles, as enforced by the Rules of Procedure, shall govern the conduct of every member of ICMA, who shall:

1. Be dedicated to the concepts of effective and democratic local government by responsible elected officials and believe that professional general management is essential to the achievement of this objective.
2. Affirm the dignity and worth of the services rendered by government and maintain a constructive, creative, and practical attitude toward local government affairs and a deep sense of social responsibility as a trusted public servant.
3. Be dedicated to the highest ideals of honor and integrity in all public and personal relationships in order that the member may merit the respect and confidence of the elected officials, of other officials and employees, and of the public.
4. Recognize that the chief function of local government at all times is to serve the best interests of all of the people.
5. Submit policy proposals to elected officials; provide them with facts and advice on matters of policy as a basis for making decisions and setting community goals; and uphold and implement local government policies adopted by elected officials.
6. Recognize that elected representatives of the people are entitled to the credit for the establishment of local government policies; responsibility for policy execution rests with the members.
7. Refrain from all political activities which undermine public confidence in professional administrators. Refrain from participation in the election of the members of the employing legislative body.
8. Make it a duty continually to improve the member's professional ability and to develop the competence of associates in the use of management techniques.
9. Keep the community informed on local government affairs; encourage communication between the citizens and all local government officers; emphasize friendly and courteous service to the public; and seek to improve the quality and image of public service.
10. Resist any encroachment on professional responsibilities, believing the member should be free to carry out official policies without interference, and handle each problem without discrimination on the basis of principle and justice.
11. Handle all matters of personnel on the basis of merit so that fairness and impartiality govern a member's decisions, pertaining to appointments, pay adjustments, promotions, and discipline.
12. Public office is a public trust. A member shall not leverage his or her position for personal gain or benefit.

Adopted by the ICMA Executive Board in 1924, and most recently revised by the membership in April 2015.

ICMA

Leaders at the Core of Better Communities

Council–Manager Relations: Finding Respectable Ground

by Gary O'Connell

During the 2006 ICMA Annual Conference in San Antonio, Texas, I was part of a panel that discussed differing perspectives on council-manager relationships, and what is important for understanding and working in the council-manager environment. From my discussion points for that session, I developed this article to further the debate on which issues are important to local government managers who have the most success in working with locally elected governing bodies.

This advice follows my 32 years in local government management. It is not meant to be the end-all in a discussion within our profession but is meant to share what has worked for me over time. Many of you in the management business probably have your own lists, too. My hope is that this article can directly help managers and also generate a larger debate, maybe another conference session to share more ideas on how to bring success to a sometimes extremely difficult relationship.

For me, trust, personal relationships, strong communications, and a vision for making a positive difference in the community have overall importance. My belief is that if these can be achieved with most, if not all, of your elected officials, then success will follow. I talk constantly with new councilmembers and with my staff about the importance of trust building.

These points of advice have worked for me:

Build relationships. Probably the key lesson learned in my career is that building relationships is the most important thing you can do. If you don't build relationships well, or if you don't at least make a very sincere effort, you will lose as a manager the opportunity to get to the big issues. When the issues get tough, it will be harder going. Build on these relationships early in your tenure or early in the new terms of incoming councilmembers.

Listen intently and intensely. It shows respect for the other person to listen carefully, and this skill will take you a long way. Note and follow up on what you hear, from either the individual councilmember or the council as a whole. Listening can be critical to your success.

Be patient. Timing is critical, and sometimes this the hardest lesson to learn from experience. Understanding when it is the right time to bring an issue or recommendation forward can often determine success. Experience suggests patience if your instincts tell you it's not the right time. I find this one of the hardest lessons for my staff to learn. I usually choose patience if staff members disagree on timing.

Show humility as well as self-confidence. Humility mixed with self-confidence beats out arrogance and ego. These are basic personal styles, but I find that staff and other managers who have not learned this lesson do not fare well. Being out front, arrogant, and a know-it-all manager is a recipe for disaster.

Work behind the scenes. I have found that in the council-manager form of government things work best if the manager stays back. Councils do want positive credit, and a managerial style that lets the council be visibly and publicly successful also means success for the manager. Managers who don't heed this advice, in my experience, often find themselves "in the frying pan," and they never seem able to get out of trouble.

Always treat council with respect. They are the bosses. Don't ever forget it! Offer the councilmembers policy alternatives that are thoughtful and well researched and doable. Give councilmembers a good strong recommendation they can act upon. Serve the community, but remember that if you don't serve the council well, you won't be around to serve the community.

Ask and understand why a councilmember has chosen to run for office and serve on the council. For most councilmembers, running for office is a conscious decision; because their reasons are important, it is important for you to find out their reasons. I also believe it is critical to understand what they perceive as success. Find out the specific things they wish to accomplish and what they would judge as success. Know the community-related personal interests of each councilmember; talk about their interests directly with them. The better you know them, the better off you will be.

Respect councilmembers' priorities. Part-time councilmembers are your number one relationship, but you are not their number one relationship. This is an axiom I have heard for many years. If you think about this for a minute, it really does emphasize that most councilmembers have many things on their plates, and the elected official's work is only one part of their lives. Learn to respect that, and to respect their valuable time, limited as it may be from your perspective.

Make sure councilmembers aren't surprised. Councilmembers should not be surprised by any local government news they read in the newspaper. I remind my staff of this on many occasions. Surprises usually mean a negative, defense-first reaction; avoid that with good, early communications. Find out what kind of communication works best for each councilmember, as my experience tells me that one method does not fit all work styles. Some read e-mails, others read faxes, and others want a personal phone call. I encourage you to ask each councilmember what works best, and you should understand and respect that personal work style. The mayor (even if council appointed) plays a special role. If you build on that, it could mean a special and trusting relationship.

Learn how to deal with difficult councilmembers. An encounter with a difficult member of the council can become an energy-draining event. Try to stay focused on the positive, win-win spirit. Don't allow yourself to become a magnet for the naysayers (on the council or in the community). Stay out of individual council disagreements or internal council politics. You will never win by interjecting yourself in the council's internal politics. Stay out of it.

Be disciplined in your follow-up on council issues. Track issues to completion, and set up a system that works to assure closure. It is important to your success to "sweat the small stuff" or to assign a staff member to take charge and do that. The lack of follow-up on council issues, especially constituent ones, can lead to many and bigger problems.

Discover how you and councilmembers can think big picture. Often elected officials can get stuck at pothole levels. I believe that managers are hired to play leadership roles beyond getting the potholes repaired. But to get to the leadership issues that are large and strategic, the small stuff has to be addressed and done well. Good systems and strong staff assure the small stuff gets taken care of well.

Understand that a manager is perceived as successful if councilmembers feel successful individually and as a council group. Never let your ego be bigger than the council's; give council the public credit for the successes and then step back. Councilormembers are

public people, and they want the credit for success. Let them take it. When they feel successful, you will be successful. During a crisis, however, step up front. When a situation gets negative or if things are not going well, the manager needs to step forward and be very out front. Remember, too, that the council reacts differently as a group in public than they do in private, and you must adapt to this change.

Treat the community with respect. Use a community process to build consensus on major issues before the issues reach the council agenda. Don't surprise the community, just as you don't surprise the council. When members of the community are surprised, they react negatively, and that negative feedback quickly gets to council. Good councilmembers with community roots will almost always hear things in the community about issues that you don't; be positive (not defensive) about this fact and use it as a kind of local "radar reconnaissance."

Figure out how to balance individual or neighborhood needs versus communitywide interests and council reactions. Getting the larger communitywide issues addressed by the council in the face of activist individual interests can be difficult at best. This is a growing issue in many communities. A successful manager figures out how to do both. The motivated individual with time (who is usually a naysayer or opposed to something) can always win, especially in this world of electronic communications. The media seem to love this type of individual, and they seem to get the front-page headlines. As the manager, you will have to find ways to get the broader issues in front of the council and the community.

Get buy-in and community ownership on major issues before dropping something on the council dais for action. Helping to manage the process of decision making is a new style for many managers. The community's desire to be more involved can't be ignored in this day and age, so it is up to managers to find successful and meaningful ways for the public to be involved. For the manager, it means stepping out of the comfortable box inside of city hall or county courthouse. You will have to get out into the community continually—with community meetings, meet and greets, neighborhood walks, living room meetings—but without overshadowing councilmembers. Many in our profession resist this, but I think this is the key to success for the future of our profession.

Be absolutely honest and of the highest integrity. This advice always works; this is what the ICMA Code of Ethics is all about. Adhere to the code strictly, and it will pay off positively for you. Always take the high road. Be professional. The more public the issue is, the more important it is to be extremely professional. This is easily said but hard to do at times when you get passionate about some issues. Taking the high road gets difficult when you are personally attacked in public, but you will win in the end if you stay the professional course. Don't compromise your values or ethics. Confront issues early on or they will grow out of control. This can be hard to do, but your survival is at risk if you let an issue fester. This is what professional local government management is all about.

Lead. You have an organization full of managers to motivate, but you play the community leadership role in the broadest sense. Councils expect this leadership. Have regular one-on-one meetings with councilmembers. Set aside as much time as you can. Establish a pattern early on that mutually works for your schedules. Also consider having retreats, work sessions, and issues-building sessions. Often it takes the manager's leadership to encourage these types of activities. This is critical to the trust building that leads to success.

Think greatness; constantly raise the bar. If you have your own theme to help emphasize excellence and high performance (such as building a world-class community), it goes a long way to help staff and employees understand that goal. This kind of thinking appeals to many councils and helps them think about the larger, difficult, and more strategic issues in the community.

Insist on permission to take risks. A formal, written employment agreement gives you as a manager permission to take risks and be entrepreneurial, which is the essence of the council-manager form of government. But you cannot risk your personal finances or family to do this. Get an understanding from the council that family special events come first. Being up front about this will avoid personal anger and frustration. Councils are usually very respectful of this if you bring it up early. PM

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PM Look to ICMA

ICMA's audioconference "Build Great Council Member Relationships," which was held this past summer, is available on CD. It features former city manager Martin Vanacour and Kathie Novak, mayor of North Glenn, Colorado.

Strategies for building and maintaining this important management responsibility include seven ways to help councilmembers be more effective; new roles that elected officials are undertaking and why, and what elected officials can expect from the manager and staff.

Visit the Web site at icma.org/Juneaudio and place your order online. Presentation materials in pdf format can be downloaded immediately. The CD will be mailed under separate cover.

The Ins and Outs of US City Governance

by Kevin Carter

The crucial job of governing our cities is mired in history and complexity. Here, Kevin Carter describes the US city governance system landscape, past and present.

Cities in the United States are almost universally governed by one of two forms of government: The council-manager form or the mayor-council form. Both have important implications for how constituent interests are represented and addressed. This article describes the differing board structures of the forms, how they developed, and what it means for cities.

The council-manager form of government is the most prevalent form among municipalities. Originally known as the *city manager plan*, the council-manager form of government is composed of an elected governing board (i.e., the council) and a professional manager hired by the council. The council also selects, from among its members, a mayor to serve as a ceremonial figurehead for the city. Although reformers such as Richard S. Childs insisted that a mayor chosen by and from the council (sometimes referred to as a "weak mayor") be the defining factor of the council-manager form of government,[1] today's National Municipal League endorses hybrid and alternative systems such as those in which a mayor is elected from the city at large and serves in a recognized leadership role.

FOOD FOR THOUGHT

"Right actions are those that practical reason would will as universal law."

Derived from German philosopher Immanuel Kant's preliminary statement of moral obligation; http://www.philosophypages.com/hy/5i.htm

The International City/County Management Association (ICMA) recognizes local governments as a council-manager form if the manager or administrator is appointed by and can be terminated by a majority of the council; has direct responsibility for policy formulation; prepares, presents, and administers the council-approved budget; and has full authority to hire and remove most department heads.[2]

> The council-manager form of government is the most prevalent form among municipalities.

The council, as the other half of the council-manager form of government, is responsible for setting the political agenda, approving the budget, establishing tax rates, and voting on public policy. The council's size generally ranges from five to nine seats and is elected at large in nonpartisan races.

Alternatively, the mayor-council (also known as the "strong-mayor") system is the older and more traditional form of government and consists of an elected council with a mayor serving as the chief executive. The mayor-council form of government most closely emulates the federal and state government systems with elected chief executives and legislatures. In the mayor-council form of government, the mayor oversees the day-to-day operation of departments, hiring and firing, preparation and execution of the budget, and, in some instances, has veto power over the council's legislation. As with the council-manager form of government, the council in the mayor-council form serves as the legislature, but the members are generally elected from wards. In some mayor-council cities, a professional administrator similar to a city manager is hired to assist with city operation; however, these positions lack the autonomy or responsibility granted to chief administrative officers in council-manager forms of government.

As of 2009, 49 percent of all local governments used some form of the council-manager system while 44 percent had mayor-council forms of government. A third form, the commission form, governs most of the remaining communities. In the commission form of government, council members also serve as department heads in addition to their role as legislators. For example, one council member may oversee the public works department staff, while another oversees parks and recreation.

The rise of the council-manager form of government is a product of the reform movement in the United States. As America entered the industrial age, swelling urban populations—fueled by immigration—required unprecedented infrastructure (e.g., roads, sanitation, clean water, parks, public health, social services, etc.). Political bosses stepped in to provide these services on a mostly partisan basis and primarily to their supporters. These party bosses controlled City Hall through their election to council seats representing specific wards. They used their power to provide special treatment and projects to their constituents. Although responsive to the needs of politicians' political bases, the spoils system proved to be highly inefficient, often corrupt, and expensive.

In her seminal work on municipal reform, *Morning Glories*, Amy Bridges found that by 1960 the "strong mayor" cities of New York and Chicago spent nearly twice the amount per capita on "common functions" as the council-manager cities of San Antonio and Phoenix and employed twice the number of city workers per 10,000 residents.[3]

The reformers of the late nineteenth and early twentieth centuries, inspired by the gospel of scientific management, believed that government could and should be run more efficiently using principles of business administration. To achieve these aims, reformers called for the separation and insulation of the task of governing from politics.

However, reformers should not be viewed solely as altruistic seekers of efficiency: The Progressive movement was married to the unfortunate legacy of racism, eugenics, and nativism through the tools of voter registration, literary tests, extended residency requirements, and poll taxes. In *City Politics*, Banfield and Wilson wrote:

> *Making local government "businesslike" meant "getting rid of politics," which in turn meant curtailing the representation of low-status minorities. In its early years the [council-manager] plan appealed to a good many people as a convenient means of putting the Catholics, the Irish, the Italians, the labor unions, and all other "underdogs" in their places.*[4]

The first iteration of reform occurred when Galveston, Texas, adopted the commission form of government in 1901. The commission system achieved many of the aims reformers sought, including centralization and consolidation of the legislative and administrative authorities within a council elected via at-large elections. The commission form of government offered a visible link between the board and the municipal services for which each member was responsible. By 1911, the National Municipal League recommended commission forms of government for cities of 100,000 or less (with the potential to be used in larger cities). Some 500 cities adopted the commission form of government by 1918, within two decades of its creation.

Always eager to promote the reform's businesslike efficiency, Progressives claimed the commission form mirrored a corporation with its board of directors. However, their comparison proved flawed, as Childs, the founder of the council-manager form of government, pointed out that there would have to be a manager put under that board to make it resemble a corporation.

Childs remedied the separation of powers question by proposing that an appointed executive manage city administration. A city manager, much like the CEO of a corporation, is intended to allow the council to focus on making political and policy decisions while the manager executes the council's decisions. The council-manager form was especially popular with the businesses it sought to emulate.

Between 1918 and 1923, at least 150 cities adopted the council-manager plan, and from 1947 to 1977, the council-manager form of government grew from 20 percent of all cities to approximately 55 percent. In 1972, the council-manager form overtook the mayor-council form as the most prevalent form. The tremendous growth in the council-manager form of government resulted from the concentrated and renewed efforts for reform and charter revision. Business leaders believed that the council-manager form of government offered the most effective and efficient means to meet the challenges presented by postwar growth—especially in the Southwest, where migrant populations and wartime industry fueled growth—and founded civic and commerce groups that pursued pro-growth policies, including the adoption of a city manager.

One of the first studies to examine the socioeconomic characteristics of suburban communities found that by the 1960s council-manager cities had on average smaller percentages of minority populations, higher percentages of white-collar workers, higher percentages of high school–educated citizens, and greater family incomes. Suburban communities under the council-manager form of government also experienced greater rates of growth (from 1950 to 1960), a higher average percentage of home ownership, and a smaller percentage of elderly residents.

In practice, both the council-manager and mayor-council forms

(continued on page 8)

WHEN WE SAY ...

BOARD LEADERSHIP's mission is "to discover, explain and discuss innovative approaches to board governance with the goal of helping organizations achieve effective, meaningful, and successful leadership to fulfill their missions."

Board Leadership aims to fulfill this mission by engaging its readers in a lively and illuminating inquiry into how board governance can be made more effective. This inquiry is based on three key assumptions:

- Boards exist to lead organizations; not merely monitor them.
- Effective board governance is not about either systems, structures, processes, theories, practices, culture, or behaviors—it is about all of them.
- Significant improvements are likely to come only through challenging the status quo and trying out new ideas in theory and in practice.

Uniquely among regular publications on board governance, *Board Leadership* primarily focuses on the job of board leadership as a whole, rather than on individual elements of practice within the overall job.

Over time, *Board Leadership* will provide a repository of different approaches to governance created through its regular "One Way to Govern" feature.

Here's what a few of the key terms we use mean to us:

- **Innovative:** Creating significant positive change.
- **Approaches to:** principles, theories, ideas, methodologies, and practices.
- **Board governance:** The job of governing whole organizations. ❑

Ins and Outs

(continued from page 5)

increased government accountability and responsiveness to the interests to the interests they represented. Mayor-council cities represented and rewarded the often ethnically homogeneous wards from which the council and mayor built their political bases. For example, the spoils system under Boss Tweed provided patriarchal schools, orphanages, and hospitals with government "donations," primarily to Catholic intuitions at a time of widespread anti-Catholic sentiment.

Conversely, cities with council-manager governments increased the representation and interests of those that supported the reform. The form took root in newer, less racially diverse cities. Reformers found their greatest success in the southwestern United States, where they held larger majorities and the existing political machines were newer and weaker than those established in the Northeast.

Current Charlotte, North Carolina City Manager Ron Carlee offered a compelling explanation that builds from the idea that there may be demographic factors that could rationally lead to one form of government over another. He suggested that more diverse communities (whether diverse in ethnic, racial, economic, or political composition) may require the sort of visionary leadership that is more appropriate and natural from a mayor in a mayor-council system. Because city managers are barred from taking that type of role, a leadership vacuum may exist in a diverse or conflicted council-manager city; this is especially true if there is no ceremonial mayor or if the mayor is selected on a rotating basis from among the council. Carlee said that political leadership may be needed to "create a harmonious environment needed to sell the vision."

The story of council-manager governments shows how constituents seek to alter the structure of their representation to best promote their interests. Its adoption was as much a response to the disproportionate strength of minority interests as it was about efficiency. The debate over local government structure, which continues today, should therefore be viewed as an element of a larger debate over politics: who gets what, when, where, and how. ❑

Notes

1. Bernard Hirschhorn, *Democracy Reformed: Richard Spencer Childs and His Fight for Better Government* (Westport, CT: Praeger, 1997).
2. ICMA. *Municipal Year Book 2009* (Washington, DC: ICMA Press, 2009).
3. Amy Bridges, *Morning Glories: Municipal Reform in the Southwest* (Princeton, NJ: Princeton University Press, 1999).
4. Edward C. Banfield and James Q. Wilson, *City Politics* (Cambridge, MA: Harvard University Press and MIT Press, 1963).

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BS 13500

(continued from page 7)

culture rather than rely on those whom it employs.

For those boards already using Policy Governance or any other system that allows them to meet the Code, BS 13500 will be welcome reinforcement that they are on the right track. For others, we hope it will act as a valuable benchmark for progress. ❑

Notes

1. http://www.iso.org/iso/home/about.htm.
2. http://www.bsigroup.co.uk/en-GB/standards/Information-about-standards/what-is-a-standard/.
3. The British Standards Institute has just published *BS 13500: Code of Practice for Delivering Effective Governance* (London, UK: BSI, August 2013).
4. *The Financial Aspects of Corporate Governance (Cadbury Report)* (London, UK: Professional Publishing Ltd., 1992).
5. *See note 3.*
6. *Improving Board Governance: McKinsey Global Survey Results* (New York, USA: McKinsey & Company, 2013).

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JOSSEY-BASS
A W

The Politics of Outcomes

Accountability-based government requires a culture shift for elected officials. It's a change they're not always ready to make.

BY: Babak Armajani | October 25, 2011

A hundred years ago, elected officials pressed for accountability tools that would help them demonstrate to their constituents that government was functioning properly and efficiently. In particular, they turned to measures of *inputs* to demonstrate accountability—full-time-equivalent counts, space utilization, travel expenses and other such measures.

These days, the inadequacies of such accountability arrangements are becoming increasingly apparent:

• Are more or fewer FTEs better? Doesn't it depend on what those FTEs produce?

• Does counting the number of arrests really tell us anything about how safe we are?

• Do travel expenses tell us anything about how well a government is being managed?

• Does the number of assessments carried out by the county assessor's office tell us anything about how good a job the assessor's office is doing?

As a result, the past 20 years has produced an explosion in various forms of outcome-based measurement and accountability systems, including outcome-based budgeting. Yet, at the same time, introduction of these systems has raised many new questions for elected officials: If elected officials don't use inputs like FTEs as a way of controlling for costs, how can they assure that services are being delivered efficiently? What does an outcome-based approach to policymaking look like? How can we get outcome-based data that we can trust? How much freedom do we give to managers charged with producing the outcomes?

Let's look at a large urban school district whose board chose to pursue an outcome-based approach. This case study will help illustrate some of the opportunities and pitfalls for elected officials pursuing outcome-based accountability arrangements.

The school board oversaw a community engagement process that involved teachers, students, parents, community groups, business and higher education in exploring a set of outcomes that would best serve the students of the school district. A broad consensus was ultimately built around 11 outcomes that included measuring of student achievement, reducing achievement gaps among students of various ethnic backgrounds, and improving both the learning climate in schools and instructional competency.

To gather credible, trustworthy data, the board established several different measurement systems, based both on objective data and on surveys, to gather perceptions of students, teachers, parents and school administrators. An outside polling firm used random samples to conduct the quarterly surveys and reported data to the board and to the public.

This approach worked well, and it yielded some lessons. The performance data were reported publicly; the local newspaper made a point of covering this "story" closely. This greatly strengthened the impetus for the board and the administration to deliver on the outcomes. The lesson: Frequency of reporting is critical. It is best to choose measures that can be reported on monthly or quarterly.

Another lesson involved accountability: The school board compensated the superintendent, in part, based on progress on the outcomes. In turn, the superintendent made school-district administrators and principals accountable through their personal evaluations. This is where things didn't go so well. The great power of an outcome-based approach is that if elected officials have credible ways to know if the outcomes are being achieved, they can relax their controls on the means taken to achieve those outcomes. This is a huge culture shift for most elected officials—and one this school board wasn't ready to make.

For example, one of the outcomes was a composite score of the school learning climate as measured by surveys of students, teachers and parents. Quarterly results were posted for each of the approximately 100 schools in the district. The superintendent told principals they were accountable for this result and encouraged them to experiment with ways to improve their scores.

Over the course of the next seven quarters, scores rose dramatically. At a regular quarterly meeting to review outcome data, the board wanted to know what practices were contributing to this great progress. The superintendent speculated that it was "probably a thousand different things," and he went on to say that as long as the principals were working within established policies, he didn't care or even need to know why they were being so successful.

The board could not tolerate this. Board members insisted that the superintendent identify "best practices" and then order all the schools to adopt those practices. After this mandate went into effect, progress flattened and in some cases began to decline.

This is an example of the old culture at work. Elected officials need to learn to trust the outcome data and allow the freedom that is so fundamental to the process of innovation. And they need to become advocates for constituent focus on outcomes rather than inputs. Doing so can help change the political dialogue.

This article was printed from: **http://www.governing.com/columns/mgmt-insights/outcome-accountability-measurement-government-political-elected-official-cultural-shift.html**

What Elected Leaders Can Do

They can be heroes of government transformation—or they can be barriers to effective change.

BY: Jim Chrisinger | March 7, 2012

For professional staff on the frontlines of transforming bureaucratic governments into results-oriented enterprises, elected leaders run the gamut from heroes to "barriers-in-chief." I recently asked several colleagues, from all corners of the country, "What do we need from our elected officials?" Their thoughts and some of mine follow in the form of a memo.

To our elected leaders:

You have tough jobs. So do we. There's a lot we'd like to tell you, but let's start with four observations.

"We're in this together."

We need each other, so we need to be on the same page. Too often we feel whipsawed by contradictory directives. Don't just get in your corners and try to out-do each other. We can better deliver for you when you act in concert.

We thrive when great elected leaders stick around. This work requires long-term culture change, and sustained leadership makes a big difference. When there are transitions, please don't just throw your predecessor's initiatives--or appointees--overboard because they are not yours. Build on the good ones. Pitch the bad ones. We can help you identify which are which.

To work as a team, we need to value each other. So it's important that ...

"You do your job; we'll do ours."

Please begin by taking the time to understand what we do. Campaigns, the 24-hour news cycle and social media create a lot of misinformation. Please don't trash our work without understanding it. We know we need change, but it needs to be change that makes things better.

Understand your role. Tell us what results you want us to accomplish, give us parameters, and then don't micromanage. (It's particularly troublesome when you try to manage by statute.)

We do need to clear away barriers to performance. Only you can remove the structural barriers; we need to remove the cultural barriers.

Be strategic. Everything can't be a priority. Across-the-board budget cuts are not strategic. You need to make choices. We can help you frame better choices.

Think of yourselves as public-sector CEOs and boards of directors. Many of you talk about running government more like a business, but then don't do it. For example, support your public employees. We've taken a lot of hits lately. And hundreds of millions of dollars of campaign ads each election cycle tell us how awful we are. When you were running your private-sector business, you probably didn't think it was a winning strategy to dump on your employees.

Our best people leave or tune out when they feel ignored or abused. We want to stop having to apologize for doing our jobs. We also know that we need to be more aggressive in helping our poorest performers either improve or move on.

You set the tone, you lead the culture. You can pander, or you can inspire us.

"Don't run from results."

We all agree that governments should be focused on results. Performance measures, results websites and "stat" programs abound. But way too many of us--you and us--fear the data. It can and will be used against you; we get that. But either we're committed to results or we aren't. We both need to own the data, make it transparent and, most important, *use* it.

Lead regular conversations about results. What is working? What is not? Make decisions with us, and then support our best efforts to improve results with the dollars we have. Challenge us to come up with better, innovative ways to achieve results. We can give you the evidence and data to support good decisions.

Better results make you look good, validate our work and build trust in both directions. Until we show we are getting the best results we can for the dollars we have now, why should anyone give us more money?

These conversations work best when they focus on learning and improvement. A tongue-lashing at a hearing is not the kind of conversation that gets better results.

Our effectiveness suffers when, for example, your initial enthusiasm for "stat" sessions gives way to enthusiasm for other initiatives. Don't start something like that if you're not going to make it consequential throughout your term. How you spend your time--along with how you spend the money--tells us what's most important.

One excellent use of time is for you to get to know each other, and us. As Cynthia Eisenhauer, a wise former chief of staff for whom I used to work, says frequently ...

"If you build the relationships, the work will get done."

More and more, our success depends on webs of relationships not only between you and us, but also across the landscape of governments, nonprofits and business.

Building relationships means getting to know each other, and that doesn't happen in the fishbowl of public meetings. When elected officials get to know each other--really understand each other even though you disagree--you will be much more likely to find common-ground solutions. Those you serve expect you to do that.

Thanks for listening. Now maybe one of you will write a memo to us. We know things look different from your perspective.

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MEMORANDUM

TO: Mayor Lori Buck and Members of the Fruita City Council
FROM: Edward P. Sands, Fruita City Attorney
DATE: April 26, 2016
SUBJECT: Conflicts of Interest, Personal Conduct, Quasi-Judicial Hearings and Public Meetings

As City Attorney, I routinely send a memo to City Council members, because as a municipal government official, you are bound by a series of special laws which deal specifically with public officials and public conduct. For those who have previously served on the Board or the Commission, this memo will simply serve as a refresher. Some of the questions I'm most frequently asked are: "What's a conflict of interest?", "Are there laws governing my conduct as a public official?", "Are there special rules governing quasi-judicial hearings?" and "When can we meet in executive session?" The purpose of this memo is to answer these questions. Fortunately, the rules are relatively clear, so if you are aware of them, you shouldn't have any trouble complying with them.

Every appointed and elected municipal official holds office as a trustee for the citizens of the community. Each of us must make certain that in our activities, we do not abuse this trust, or create in the minds of the citizens any misapprehension that the decisions we make are the result of improper influences. Acting in a proper manner also minimizes the chance the City of Fruita could be subject to litigation based upon improperly made decisions.

As a member of the City Council or Planning and Zoning Commission, you will be expected to observe the following:

1. **Standards of Conduct:** The Colorado General Assembly has passed a series of bills dealing with standards of conduct by all government officials, which specifically includes the Town's Trustees or Planning Commission. These standards are codified in Article 18 of Title 24, C.R.S. Attached to this memorandum is an article written by Gerald Dahl, a former Colorado Municipal League general counsel. This article sets out the requirements of these sections. I particularly draw your attention to the "Checklist for ethical behavior" on

page 24 of this article. Please note that Colorado law, under some circumstances, permits local government officials and employees to have an interest in certain contracts, including those awarded to the lowest responsible bidder based upon competitive bidding, or any contract with respect to which the local government official has disclosed a personal interest and not voted thereon. Also attached is another article concerning ethics in the review of land use matters by Gerald Dahl and Bart Johnson.

2. **Amendment 41:** The Colorado voters approved Amendment 41 to the Colorado Constitution ("Amendment") on November 7, 2006 and it became effective on January 1, 2007. The initiated measure added a new Article XXIX to the Colorado Constitution entitled "Ethics in Government". In general the Amendment bans public officials and employees from receiving gifts and other items of value, whether or not connected with their public duties. "Gifts" and "things of value" includes loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment or special discounts. The Amendment also provides that a "thing of value" received by a spouse or dependent of the public official is also prohibited. Section 3(2) of the Amendment prohibits public officials from receiving gifts or other things of value having either a fair market value or aggregate actual cost greater than $50.00 (as adjusted by inflation) in any calendar year. Certain exceptions apply. The Amendment established an Independent Ethics Commission with broad powers to investigate violations and may levy fines. Please note that it is immaterial whether the gift or benefit was actually provided to influence or attempt to influence official actions.

3. **Criminal Offenses:**Colorado statutes also contain a number of other provisions dealing with public servants. These are generally criminal in nature, and involve what is commonly considered bribery or corrupt influences. For the purpose of these sections, a "public servant" is "any officer or employee of government, whether elected or appointed, and any person participating as an advisor or consultant, engaged in the service of process, or otherwise performing a governmental function." These sections are as follows:

C.R.S. §18-8-302. **Bribery.** (1) A person commits the crime of bribery if: (a) He offers, confers, or agrees to confer any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, exercise of discretion, or other action in his official capacity; or (b) While a public servant, he solicits, accepts, or agrees to accept any pecuniary benefit upon an agreement or understanding that his vote, opinion, judgment, exercise of discretion, or other action as a public servant will thereby be influenced.

(2) It is no defense to a prosecution under this section that the person sought to be influenced was not qualified to act in the desired way, whether because he had not yet assumed office, lacked jurisdiction, or for any other reason.

Bribery is a class 3 felony.

C.R.S. §18-8-303. **Compensation for past official behavior.** (1) A person commits a class 6 felony if he: (a) Solicits, accepts, or agrees to accept any pecuniary benefit as compensation for having, as a public servant, given a decision, opinion, recommendation, or vote favorable to another or for having otherwise exercised a

discretion in his favor, whether or not he has in so doing violated his duty; or (b) Offers, confers, or agrees to confer compensation, acceptance of which is prohibited by this section.

C.R.S. §18-8-304. **Soliciting unlawful compensation.** A public servant commits a class 2 misdemeanor if he requests a pecuniary benefit for the performance of an official action knowing that he was required to perform that action without compensation or at a level of compensation lower than that requested.

C.R.S. §18-8-305. **Trading in public office.** (1) A person commits trading in public office if: (a) He offers, confers, or agrees to confer any pecuniary benefit upon a public servant or party officer upon an agreement or understanding that he or a particular person will or may be appointed to a public office or designated or nominated as a candidate for public office; or (b) While a public servant or party officer, he solicits, accepts or agrees to accept any pecuniary benefit from another upon an agreement or understanding that a particular person will or may be appointed to a public office or designated or nominated as a candidate for public office.

(2) It shall be an affirmative defense that the pecuniary benefit was a customary contribution to political campaign funds solicited and received by lawfully constituted political parties.

Trading in public office is a class 1 misdemeanor.

C.R.S. §18-8-306. **Attempt to influence a public servant.** Any person who attempts to influence any public servant by means of deceit or by threat of violence or economic reprisal against any person or property, with the intent thereby to alter or affect the public servant's decision, vote, opinion, or action concerning any matter which is to be considered or performed by him or the agency or body of which he is a member, commits a class 4 felony.

C.R.S. §18-8-307. **Designation of supplier prohibited.** (1) No public servant shall require or direct a bidder or contractor to deal with a particular person in procuring any goods or service required in submitting a bid to or fulfilling a contract with any government.

(2) Any provision in invitations to bid or any contract documents prohibited by this section are against public policy and void.

(3) It shall be an affirmative defense that the defendant was a public servant acting within the scope of his authority exercising the right to reject any material, subcontractor, service, bond, or contract tendered by a bidder or contractor because it does not meet bona fide specifications or requirements relating to quality, availability, form, experience, or financial responsibility.

(4) Any public servant who violates the provisions of subsection (1) of this section commits a class 6 felony.

C.R.S. §18-8-308. **Failing to disclose a conflict of interest.** (1) A public servant commits failing to disclose a conflict of interest if he exercises any substantial discretionary function in connection with a government contract, purchase, payment or other pecuniary transaction without having given seventy-two hours' actual advance written notice to the secretary of state, or to the governing body of the government

which employs the public servant, of the existence of a known potential conflicting interest of the public servant in the transaction with reference to which he is about to act in his official capacity.

(2) A "potential conflicting interest" exists when the public servant is a director, president, general manager, or similar executive officer or owns or controls directly or indirectly a substantial interest in any nongovernmental entity participating in the transaction.

Failing to disclose a conflict of interest is a class 2 misdemeanor.

C.R.S. §18-8-402. **Misuse of official information.** (1) Any public servant, in contemplation of official action by himself or by a governmental unit with which he is associated or in reliance on information to which he has access in his official capacity and which has not been made public, commits misuse of official information if he: (a) Acquires a pecuniary interest in any property, transaction, or enterprise which may be affected by such information or official action; or (b) Speculates or wagers on the basis of such information or official action; or (c) Aids, advises, or encourages another to do any of the foregoing with intent to confer on any person a special pecuniary benefit.

Misuse of official information is a class 6 felony.

C.R.S. §18-8-404. **First degree official misconduct.** (1) A public servant commits first degree official misconduct if, with intent to obtain a benefit for the public servant or another or maliciously to cause harm to another, he or she knowingly: (a) Commits an act relating to his office but constituting an unauthorized exercise of his official function; or (b) Refrains from performing a duty imposed upon him by law; or (c) Violates any statute or lawfully adopted rule or regulation relating to his office.

(2) First degree official misconduct is a class 2 misdemeanor.

C.R.S. §18-8-405. **Second degree official misconduct.** (1) A public servant commits second degree official misconduct if he knowingly, arbitrarily, and capriciously (a) Refrains from performing a duty imposed upon him by law (b) Violates any statute or lawfully adopted rule or regulation relating to his office or clearly inherent in the nature of his office; or (c) Violates any statute or lawfully adopted rule or regulation relating to his office.

(2) Second degree official misconduct is a class 1 petty offense.

C.R.S. §18-8-406. **Issuing false certificate.** A person commits a class 6 felony if, being a public servant authorized by law to make and issue official certificates or other official written instruments, he makes and issues such an instrument containing a statement which he knows to be false.

C.R.S. §18-8-407. **Embezzlement of public property.** (1) Every public servant who lawfully or unlawfully comes into possession of any public moneys or public property of whatever description, being the property of the state or of any political subdivision of the state, and who knowingly converts any of such public moneys or property to his own use or to any use other than the public use authorized by law is guilty of embezzlement of

public property. Every person convicted under the provisions of this section shall be forever thereafter ineligible and disqualified from being a member of the general assembly of this state or from holding any office of trust or profit in this state.

(2) Embezzlement of public property is a class 5 felony.

4. **Quasi-Judicial Hearings:**Quasi-judicial hearings include hearings on all land use applications, hearings on liquor license applications, and personnel hearings. Quasi-judicial hearings are governed by the rules set forth in Chapter 2.20 of the Fruita Municipal Code.

In a quasi-judicial hearing, the City Counciland the Planning and Zoning Commission act more as a judicial tribunal than as a legislative body. Under the due process clause contained in the 14th Amendment to the U.S. Constitution, a person with a legitimate property interest at stake in a quasi-judicial proceeding is entitled to impartial and disinterested decision makers.

While "lobbying" Board members on a legislative matter is certainly permissible, the same type of "lobbying" effort becomes an improper *ex parte* contact if the action before the City Counciland Planning and Zoning Commission is quasi-judicial in nature. An *ex parte* contact is defined as any contact between the applicant, proponents or opponents and members of the City Council or Planning and Zoning Commission outside of publicly scheduled hearings and meetings on the subject application. This includes telephone calls, email correspondence or merely discussing the matter over a cup of coffee. *Ex parte* contacts in quasi-judicial proceedings are strictly prohibited. For more information regarding quasi-judicial hearings in the land use context, please see the attached article, "Ethics in Land Use Law: Current Issues."

5. **Public Meetings:**The Colorado legislature has enacted statutes dealing with local government public meetings and executive sessions now codified as the Colorado Open Meetings Law, Sections 24-6-401, 402, C.R.S. Among other things, any meeting of three or more members of the City Council or Planning and Zoning Commission, at which any public business is discussed, is deemed to be a public meeting and must be advertised, and minutes must be kept. Any meetings at which the adoption of any proposed policy, position, resolution, ordinance or formal action occurs or at which a majority or quorum of the City Council is in attendance, or is expected to be in attendance, may only be held after full and timely notice to the public. At a minimum, the City Councilor Planning and Zoning Commission must post the notice of any meeting in a designated public place no less than twenty-four (24) hours prior to the holding the meeting. The posting should include a specific agenda where possible. The public place or places for posting such notice must be designated annually at the City Council' first regular meeting of each calendar year. Minutes of all meetings must be kept and such records are open to public inspection. The minutes of a meeting during which an executive session is held should only reflect the topic of the discussion at the executive session.

The City Councilor Planning and Zoning Commission may only go into an executive session (closed session) upon the announcement to the public of the topic for discussion in executive session and the affirmative vote of two-thirds (2/3) of the quorum present, after such announcement. An executive session may

only be held for the purpose of considering the following matters, except that no adoption of any proposed policy, position, resolution, rule, or formal action can occur at an executive session that is not open to the public:

1. The purchase, acquisition, lease, transfer, or sale of any real, personal or other property interest, except that no executive session shall be held for the purpose of concealing the fact that a member of the Board has a personal interest in such transaction.

2. Conferences with the City Attorney for the purpose of receiving legal advice on specific legal questions. Mere presence or participation of an attorney at an executive session is not sufficient to satisfy this requirement.

3. Matters required to be kept confidential by federal or State law or rules and regulations. However, the Board must announce the specific citation of the statute or rules that are the basis for such confidentiality before holding the executive session.

4. Specialized details of security arrangements or investigations.

5. Determining positions relative to matters that may be subject to negotiations, developing strategies for negotiations, and instructing negotiators.

6. Personnel matters, <u>unless the employee who is the subject of the session has requested an open meeting.</u> In such case, the personnel matter must be discussed in public session.

7. Consideration of any documents protected by the mandatory non-disclosure provisions of the Colorado Open Records Act (CORA), part 2 of Article 72, Title 24, C.R.S.

Except for conferences with the City Attorney, executive sessions must be electronically recorded. The tape or disc remains sealed unless otherwise ordered by the District Court.

The Open Meetings Law is not particularly difficult to understand, and was not designed to be burdensome. However, if you have any questions regarding open meetings and executive sessions, always be sure to ask.

If you have questions about any of the matters in this lengthy memo, please feel free to call me.

Legislature enacts new rules on conflicts of interest

Council and board members need to understand new voting rights and procedures in situations where conflicts of interest exist.

Gerald E. Dahl
CML General Counsel

(Editor's note: This topic has been the subject of two prior articles in Colorado Municipalities. *The first article appeared in the September/October 1976 issue and was authored by Tad Foster, Assistant City Attorney for Colorado Springs. The second article appeared in the March/April 1986 issue and was authored by Susan Griffiths, former CML General Counsel.)*

Assume that you are a member of the board of trustees in a small municipality. Your community is 30 miles from the nearest town and often isolated in winter by mountain passes. In February, a water main freezes and breaks. It needs to be dug up immediately and repaired, or the entire system will freeze, costing the town thousands of dollars to repair, with no water in the meantime. You own the only backhoe in town. The town board asks you to do the excavation work and bill them. Can you do the job?

A second example: You own the only gas station in town. Can you sell gasoline to the town, in order to save the expense of driving the police cars on a 60-mile round trip to fill up at the next community?

Under the law as it existed in Colorado prior to the spring of this year the answer to both questions would be no. Both contracts would have been prohibited conflicts of interest. No written or oral disclosures or abstentions from voting would have cured the problems. Both would have violated a portion of section 31-4-404, C.R.S., which, until March 18, 1988, read in part as follows:

> [n]or shall any such member be interested, directly or indirectly, in the profits of any contract or job for work or services to be performed for the city or town.

Editor's Note

After this issue of *Colorado Municipalities* went to press, the Colorado Revisor of Statutes issued 1988 Replacement Volume 10A, in which the material enacted by HB 1209 appears. For modification purposes, the revisor renumbered the new article of Title 24 enacted by HB 1209. All references to article 17 in HB 1209 should be changed to article 18, as they appear in the codified statute books. (Example: 24-17-101 becomes 24-18-101).

The above language was deleted by the Colorado General Assembly during its 1988 legislative session. In place of this blanket prohibition, the General Assembly enacted two bills containing significant new rules which allow municipal officials to disclose such interests and to abstain from voting on them. This procedure now allows the official to retain the interest in the contract.

This article will describe the new rules for the identification and disclosure of conflicts of interest, as well as their legal implications from the perspective of the Colorado municipal official. Naturally, this article cannot serve as the substitute for legal advice from the municipal attorney. It is intended only to alert Colorado municipal officials to significant new limits of permitted activity. You should consult your attorney for advice in specific cases.

Colorado Case Law

A quick review of the significant cases decided by Colorado courts on public officials' conflicts of interest may be helpful before describing the recently enacted statutes. The general rule at common law (law derived from decisions of the courts) was that public officials were completely prohibited from entering into any contract with the government they served. No amount of disclosure, abstention, stepping down, or other safeguards were felt to be adequate to protect the public from self-dealing by public officials.

The Colorado Courts adhered to this common law rule. In the 1926 case of *School District #98 v. Pomponi*,[1] two members of a school district board were officers of a company with which the school district had contracted. The statute prohibited officers of school districts from making contracts in which they had an interest. The Colorado Supreme Court invalidated the contract as "against public policy and void or voidable irrespective of any statute."[2] The fact that the school district had benefited financially from the contract and had not in any manner been cheated by the officials was immaterial in the face of "the rule of public policy, which prohibits public officers contracting with themselves and for their own benefit."[3]

The General Assembly enacted two bills containing significant new rules which allow municipal officials to disclose such interest and to abstain from voting on them.

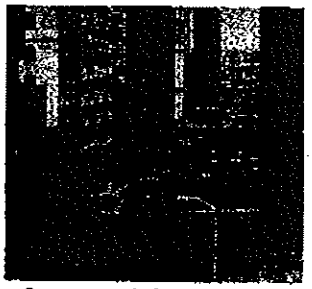
In the 1933 case of *People v. Brown*,[4] the Colorado Supreme Court relied upon *School District v. Pomponi* for the proposition that a public official may not contract with himself to his own profit. In that case, a county treasurer had speculated in tax certificates belonging to the county. The Court held that the actions of the treasurer "did not effect any change as to the rights of the county to the funds realized from the redemption"[5] and stated the common law rule in these memorable terms:

> Brown was a minister of the law, bound by his oath and every canon to be disinterested in the discharge of his official duties. On the record he did not serve with an eye single to the public weal. [h]e took advantage of the favorable action of the board to work his own enrichment and the county's undoing.[6]

The most recent decision in Colorado on this subject is *Berkley Metropolitan District v. Poland*,[7] a 1985 Colorado Court of Appeals case in which a member of a water and sanitation district board also served as a paid consultant to the board over a period of several years. After some changes in its makeup the board elected to abrogate the contract and brought suit to recover the compensation and expenses paid. The Court of Appeals applied the common law rule that public policy forbids public officers from contracting with themselves for their own benefit, citing *School District v. Pomponi and People v. Brown*.

The fact that the board member had excused himself from voting or deliberation on the contract each time it was discussed by the board was held to have no effect on its invalidity. Neither was it significant that the district had ratified the

(continued on page 20)



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payments to the board member as they were made and had, in fact, received value for its money. The Court upheld the trial court's decision that the agreement itself was illegal and therefore void at the outset.

This common law rule, in concert with the prohibition in (former) section 31-4-404, prior to its amendment in 1988, has proved a source of real hardship to Colorado municipal officials. Many situations exist, particularly in small communities, where the only provider of a vital municipal need (construction equipment, gasoline, mechanical repairs, office supplies) has been a business owned or operated by a member of the board of trustees or city council. Local businessmen in Colorado's communities have a long and proud tradition of public service. It is not surprising that conflicts of interest under the prior statute and case law have been a problem.

HB 1057 (March 18, 1988)

The General Assembly changed the statutory rules applicable to conflicts of interest of Colorado municipal officials with the passage of HB 1057, signed into law on March 18, 1988, by Gov. Romer. HB 1057, sponsored by Rep. Sam Williams of Breckenridge and Sen. Sally Hopper of Golden, eliminated the absolute prohibition of the former law, replacing it with a rule of disclosure and abstention, closely modeled on the provision of the Colorado Constitution applicable to members of the General Assembly.

Municipal officials may now participate in contracts involving their municipality if they make proper disclosure and abstain from voting and from attempting to influence other members of the government body.

The League drafted the measure and actively supported its passage. As amended, new subsections 31-4-404(2) and (3), C.R.S. now read:

(2) Any member of the governing body of any city or town who has a personal or private interest in any matter proposed or pending before the governing body shall disclose such interest to the governing body and shall not vote thereon, and shall refrain from attempting to influence the decisions of the other members of the governing body in voting on the matter.

(3) A member of the governing body of any city or town may vote notwithstanding subsection (2) of this section if his participation is necessary to obtain quorum or otherwise enable the body to act if he complies with the voluntary disclosure provisions of section 24-17-110, C.R.S.

Municipal officials may now participate in contracts involving their municipality if they make proper disclosure of their interest and abstain from voting and from attempting to influence other members of the governing body on the issue. This obviously includes refraining from participation in any deliberations, meetings, or conversations leading up to the actual vote on the contract or other matter. Finally, new subsection 31-4-404(3) allows the member to vote notwithstanding his conflict if participation is "necessary to obtain a quorum or otherwise enable the body to act," but only if the member complies with the voluntary disclosure provisions of section 24-17-110. This latter section was enacted as a part of HB 1209 during the 1988 legislative session.

HB 1209 (July 1, 1988)

Structure of the Act

The 1988 session of the General Assembly also saw the enactment of a significant and somewhat complex statute setting forth standards of conduct for public officials and employees at all levels of government in Colorado, both state and local. HB 1209, sponsored by Rep. Chris Paulsen of Englewood and Sen. Jeff Wells of Colorado Springs, specifically applies to officers and employees of local governments, which are defined to include the government of a county, city and county, city, town, special district, or school district.[8]

HB 1209 can be broken down into four groups of new standards applicable to government officials:

1. Absolute rules of conduct,
2. nonbinding ethical principles,
3. written disclosure rules, and
4. new rules relating to interests by public officials in government contracts.

The General Assembly's effort to distinguish between binding rules of conduct and nonbinding "ethical principles" is generally described in the legislative declaration, which provides in part:

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• Utility Mapping

The general assembly hereby declares that the prescription of some standards of conduct common to those citizens involved with government is beneficial to all residents of the state. The provisions of this part 1 recognize that some actions are conflicts per se between public duty and private interest while other actions may or may not pose such conflicts depending upon the surrounding circumstances.[9]

While it is helpful that the ethical principles are described as nonbinding, including both binding and nonbinding rules for conflicts of interest may lead to some difficulty in interpreting and applying the act. Because of its complexity and potential interrelationship with other provisions of law (including section 31-4-404, applicable only to municipal officials, and the criminal code sections dealing with bribery and corrupt influences), the municipal official is cautioned to seek the advice of the municipal attorney in complying with HB 1209.

(Mandatory) Rules of Conduct

Two separate portions of the act establish mandatory rules of conduct. Section 24-17-104 establishes rules of conduct for all public officers, members of the General Assembly, and local government officials and employees, while section 24-17-109 establishes additional rules only for local government officials and employees. Section 24-17-104 primarily concerns prohibited conduct in connection with a "personal financial interest," which in turn is defined as including:

1. An ownership interest in a business;
2. a creditor interest in an insolvent business;
3. an employment or prospective employment for which negotiations have begun;
4. an ownership interest in real or personal property;
5. a loan or other debtor interest; or
6. a directorship or officership in a business.[10]

Section 24-17-104 prohibits the disclosure of confidential information acquired in the course of official duties when used to "further substantiate personal financial interest."[11] This section also prohibits accepting a gift of substantial value or of substantial economic benefit if it would "improperly influence" a reasonable person or if a reasonable person should know it is primarily a reward for official action.[12] This prohibition has a parallel in the Colorado criminal code at section 18-8-302, concerning bribery. Section 24-17-104 goes on to prohibit a public official or employee from accepting economic benefits, including loans issued at lower than the commercial rate and compensation for services rendered which exceed the fair market value of those services.[13]

Happily, section 104 lists a number of "safe harbors" items not considered gifts of substantial value or gifts of substantial economic benefit. These include campaign contributions, occasional insignificant gifts, nonpecuniary awards for public service, actual and necessary travel, and subsistence expenditures for public duties, perishable or nonpermanent items (including tickets to sporting, recreational, education, or cultural events), honoraria, and payment of salary from other government employment.[14]

Section 24-17-109 is entitled "Rules of Conduct for Local Government Officials and Employees." It should be carefully reviewed by municipal officials and municipal employees. Prohibited conduct under this section includes:

1. Engaging in a substantial financial transaction for private business purposes with a person whom the local government official or employee inspects or supervises in the course of official duties,[15] or
2. performing an official act directly and substantially affecting to its economic benefit a business or other undertaking in which the local government official or employee has either a substantial financial interest or is engaged as counsel, consultant, representative, or agent.[16]

Section 24-17-104 prohibits the disclosure of confidential information acquired in the course of official duties when used to "further substantiate personal financial interest."

Subsection (3) of section 24-17-109 duplicates the changes made to section 31-4-404 by HB 1057. That is, a member of the governing body of a local government who has a personal or private interest in any matter proposed or pending before the governing body must disclose the interest to the body, not vote thereon, and refrain from attempting to influence the other members of the body.[17] Also, and in parallel to section 31-4-404(3), it is permissible to vote despite the conflict if the official's participation is necessary to obtain a quorum or otherwise enable the body to act, but only if written disclosure is made to the Colorado Secretary of State under the written disclosure provisions enacted by section 24-17-110.[18]

Section 24-17-109 also contains some "safe harbors." It is permissible to use local government facilities or equipment to communicate or correspond with constituents, family members, or business associates, and to accept or receive a benefit as an "indirect consequence of transacting local government business."[19]

Both sections 24-17-104 and 109 employ the standard of proof "beyond a reasonable doubt."[20] This is a relatively high standard of proof. In trial practice this standard would favor the government official. It is more than a mere "preponderence" of proof and requires that the overwhelming majority of the evidence point toward a violation before it will be considered proven.

Ethical principles

Section 24-17-105 of HB 1209 is

(continued on page 22)

Interestingly, HB 1209 appears to take the minority view, that the contract is voidable rather than void. At section 24-17-203 HB 1209 provides:

Voidable contracts. Every contract made in violation of any of the provisions of section 24-17-201 or 24-17-202 shall be voidable at the instance of any party to the contract except the officer interested therein.

Home rule municipalities

HB 1057 and HB 1209 apply, by their terms, to all municipalities in the state of Colorado. However, a well-established rule of law is that statutory enactments by the Colorado General Assembly, while applying absolutely to all statutory cities and towns, apply to home rule municipalities only until those municipalities enact charter or ordinance provisions on the same subject.

Some home rule municipalities in Colorado have enacted codes of ethics which in some cases are more stringent than requirements set forth in HB 1209. Municipal officials in home rule municipalities are advised to consult with their municipal attorney to determine whether a local charter or ordinance provision establishes standards in addition to, different from, or more stringent than those discussed in this article.

Some home rule municipalities in Colorado have enacted codes of ethics which in some cases are more stringent that requirements set forth in HB 1209.

None of the reported appellate decisions in Colorado concerning conflicts of interest have involved municipal officials. Elected and appointed officers and employees in Colorado's municipalities can be justifiably proud of this fact.

In the final analysis, the amount of time, attention, and energy spent evaluating the potential for a conflict and attempting to deal with it properly under the law *before* the issue is discussed or voted upon will *always* be substantially less than that required to attempt to comply with the law after the discussion has been held or the vote taken. □

Checklist for ethical behavior

The law of conflicts for municipal officials in Colorado, never crystal clear, has been both improved and complicated by the General Assembly's adoption of HB 1057 and 1209. While not by any means an exhaustive list, the following checklist is at least a starting point for ensuring compliance with these two important new laws:

A. Always disclose your interest at the earliest stage.
   1. Make oral disclosure to the governing body under 31-4-404(2).
   2. Safer: Make written disclosure under 18-8-308 as well.

B. Don't vote (or take any other action).

C. Don't influence others.
   1. Make sure disclosure *precedes* discussion on the matter.
   2. Leave the room.
   3. Don't participate in discussion (at the time of the vote or earlier).

D. If you vote, do so *only* if:
   1. Participation is necessary to achieve a quorum or otherwise enable the body to act (31-4-404(2) and 24-17-109(3)(b)).
   2. Written disclosure is made prior to, not after, taking action:
      a. To the governing body under section 31-4-404(3) and 24-17-201(1)(a)(V), with the information as described at 24-17-110.
      b. To the Secretary of State under section 18-8-308(1) (72 hours before action) and 24-17-110.

Footnotes

[1] 79 Colo. 658, 247 P. 1056 (1926)
[2] Id., 247 P. at 1057
[3] Id., 247 P. at 1058
[4] 93 Colo. 182, 24 P.2d 759 (1933)
[5] Id., 24 P.2d at 760
[6] Id.
[7] 705 P.2d 1004 (Colo. App. 1985); cert. denied, 1985
[8] 24-17-102(5), C.R.S.
[9] 24-17-101, C.R.S.
[10] 24-17-102(4), C.R.S.
[11] 24-17-104(1)(a), C.R.S.
[12] 24-17-104(1)(b), C.R.S.
[13] 24-17-104(2), C.R.S.
[14] 24-17-104(3), C.R.S.
[15] 24-17-109(2)(a), C.R.S.
[16] 24-17-109(2)(b), C.R.S.
[17] 24-17-109(3)(a), C.R.S.
[18] 24-17-109(3)(b), C.R.S.
[19] 24-17-109(4), C.R.S.
[20] 24-17-104(1) and 24-17-109(1), C.R.S.
[21] 24-17-105(1), C.R.S.
[22] 24-17-105(2), C.R.S.
[23] 24-17-105(4), C.R.S.
[24] 24-17-105(3), C.R.S.
[25] 24-17-110, C.R.S.
[26] Id.
[27] 24-17-201(1), C.R.S.
[28] 24-17-201(1)(b), C.R.S.
[29] 18-8-301(3), C.R.S.
[30] *Delta Electric Const. Co., v. City of San Antonio*, 437 S.W.2d 602 (Tex. Civ. App. 1969); *Millbrae Assn. for Residential Survival v. City of Millbrae*, 69 Cal. Rptr. 251 (Cal. App. 1968); *Newton v. Demas*, 107 N.J. Super. 346, 258 A.3d 376 (1969); *Suffford Realty Corp v. Board of Education*, 55 A.D. 2d 652, 390 N.Y.S. 2d 155 (1976).
[31] Antieau, *Municipal Corporation Law*, Sec. 4.04.

ETHICS IN LAND USE LAW: CURRENT ISSUES

Rocky Mountain Land Use Institute Annual Conference

October 18, 2003

Gerald Dahl & Bart Johnson

A. **Bias, Prejudgment & Conflicts of Interest in Decision Makers.** The issues of bias, prejudgment and conflicts of interest can hardly be considered new in the arena of land use ethics, but they are also among the most hotly contested issues. This trend is likely to continue. It appears to arise from two related sources. First, the final decision makers in most land use cases are elected officials who also serve in a legislative and policy making capacity. Second, as growth management concerns continue to rise in the Rocky Mountain West, land use issues are becoming central to the political debate. Local elections often come down to "pro-business" candidates competing against "green" or "no growth" candidates.

1. Threshold Issue: Determine whether the action is quasi-judicial. This analysis varies from state to state. For example, some states treat all rezonings, even those that are site-specific, as a legislative action. Other states, such as Colorado, treat site-specific rezonings as quasi-judicial proceedings.

   (a) Subdivision.

   (b) Rezoning. *Snyder v. Lakewood*, 542 P.2d 371 (Colo. 1975)

   (c) Historic preservation district permit.

   (d) Special use review. *Norby v. City of Boulder*, 195 Colo. 231, 577 P.2d 277 (1978).

   (e) Building code variance. *Van Huysen v. Board of Adjustment*, 38 Colo. App. 9, 550 P.2d 874 (1976).

   (f) Sign code variance. *Moschetti v. Board of Zoning Adjustment*, 40 Colo. App. 156, 574 P.2d 874 (1977).

2. Statutory Conflicts for Local Governmental Officials. Most states have a statutory code of ethics for government officials. The Colorado Code of Ethics is fairly typical:

   (a) CRS 24-18-109(2) (Financial Interests). A local government official or employee shall not:

(i) engage in a substantial financial transaction for his or her private business purposes with a person whom he or she inspects or supervises in the course of his public duties; or

(ii) perform an official act directly and substantially affecting a business to its economic benefit in which he or she has a substantial financial interest or is engaged as counsel, consultant, representative agent.

(b) CRS 24-18-104 (Accepting Gifts). A local government official or employee may not accept a gift of substantial value or a substantial economic benefit tantamount to a gift of substantial value:

(i) Which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties; or

(ii) Which he knows or a reasonable person in his position should know under the circumstances is primarily for the purpose of rewarding him for official action he has taken.

EXCEPTIONS: Campaign contributions; occasional non-pecuniary gifts of insignificant value; payment or reimbursement for travel expenses for attendance at a convention in which the official is participating; items of perishable or nonpermanent value, including meals, lodging, travel expenses, or tickets to sporting, recreational or cultural events; etc.

(c) CRS 24-18-109(3) (Personal & Private Interests). A member of the governing body of a local government who has a personal or private interest in any matter proposed or pending before the governing body shall disclose such interest to the governing body and shall not vote thereon and shall refrain from attempting to influence the decisions of the other members.

3. Constitutional Grounds - Due Process: The analysis may not end with statutory ethical codes.

(a) Under the Due Process Clause of the U.S. Constitution, a person with a legitimate property interest at stake in a quasi-judicial proceeding is entitled to an impartial and disinterested decision maker.

(b) This requirement has been held to apply in the quasi-judicial context.

(c) Generally, there is a presumption of honesty, integrity and impartiality on the part of decision makers. *Soon Yee Scott v. City of Englewood*, 672 P.2d 225 (Colo. App. 1983); *Hadley v. Moffat County School District RE-1*, 681 P.2d

938 (Colo. 1984). This presumption can be overcome by evidence of actual bias or a conflict of interest which creates an sufficiently serious appearance of impropriety. E.g., *Stivens v. Pierce*, 71 F.3d 732 (9th Cir. 1995).

4. What is meant by a "personal or private interest"?

Examples:

(a) Zoning matter in which the Board member is or represents the applicant, and attempts to represent himself at the hearing.

(b) Board member owns or has an interest in the business which is before the public body.

(c) Board member has financial dealings with the business which is in front of the public body.

(d) Board member has a financial interest in a business which is a competitor to the business in front of the public body.

(e) Board member is a creditor of the business which is asking for action from the public body.

NOTE: Each of the above examples involves a financial interest on the part of the decision maker in the outcome of the decision. These are usually the easy cases. More difficult cases arise when the decision maker has an alleged personal or private interest in the outcome of the decision that is not financial in nature. For example, in the instance where a decision maker is an unpaid member of the board of trustees of a museum that is seeking a variance to expand its building, the decision maker may have a strong private interest in the outcome, even though he or she has no financial stake in the outcome.

5. Safe Harbors: What is not a "personal or private interest?" The following is a list of circumstances in which no impermissible personal or private interest is present. However, keep in mind that in these "non-financial" cases, the case law tends to be inconsistent from state to state.

(a) Voting on tax proposals.

(b) Voting on general regulations (example: leash law, zoning code, building code), which affect all citizens.

(c) Parking variance for church of which the decision maker is a member.

(d) Board member is related by blood or marriage to applicant, but has no financial connection or potential of experiencing financial gain or loss.

(e) Board member is next door neighbor of applicant.

(f) Board member and applicant are friends, go to the same church, are members of the same club, play golf together, like each other or hate each other.

NOTE: The above-described fact patterns all lack potential of personal financial gain or loss.

6. Bias and Prejudgment. Bias and prejudgment claims are common. They generally arise in two circumstances. First, one or more of the decision makers participates in some manner, either formally or informally, in what is perceived as a prior decision on the same case. Second, decision makers are sometimes accused of impermissible bias or prejudgment when they take a public position on a general policy question that subsequently becomes an issue in a specific quasi-judicial proceeding.

(a) Participating in prior decision-making regarding the matter.

(i) Sitting on the planning commission: neither authorized nor prohibited by statute in Colorado: CRS 30-28-103.

(ii) County commissioners appointing themselves to the board of adjustment upheld: *Fedder v. McCurdy*, 768 P.2d 711 (Colo. App. 1989) (court was not troubled by the concept of incompatible offices).

(iii) *Wood Bros. Homes, Inc. v. City of Fort Collins*, 670 P.2d 9 (Colo. App. 1983) (judge who was a member of the city planning and zoning commission when one of the plats in dispute at trial was considered and reviewed by the commission should have disqualified himself).

(iv) *Johnson v. City Council*, 42 Colo. App. 188, 595 P.2d 701 (1979) (no violation of due process existed where two council members received evidence at an informal hearing and expressed opinions prior to participating in the formal hearing; a so upholds the dual role of the City attorney as advocate for the City manager's decision and as advisor to the Mayor on procedural matters, where attorney did not participate or advise on substantive decision).

(v) *Tepley v. Public Employees Retirement Association*, 955 P.2d 573 (Colo. App. 1997), cert. denied (1998). "While a strong conviction or crystallized point of view on questions of law and policy is not grounds for disqualification, it is error for an administrative decision maker to prejudge matters of evidentiary fact that are dispositive of

the case.... To the extent the Board's final decision was a review by the same members of the Board who had initially denied Tepley's application, the Board improperly prejudged at least some of the evidence upon which Tepley relied. Further, if three panel members participated in the initial Board decision to deny benefits to Tepley, they also improperly prejudged matters of evidentiary fact."

(vi) *Booth v. Trustees of the Town of Silver Plume*, 28 Colo. App. 470, 474 P.2d 227 (1970) (fact that committee of town trustees investigated application for liquor license prior to hearing and recommended against issuance of license, with other facts, denied applicant a fair and impartial hearing).

(vii) Compare, *Johnson v. City Council of the City of Glendale*, 595 P.2d 701 (Colo. App. 1979), a personnel case in which some council members received evidence at a prior "informal hearing," and then made a final decision after a subsequent formal hearing before the entire city council. "The mere fact that a Council member has learned facts or expressed an opinion is not sufficient in itself to demonstrate that a hearing is unfair."

(b) Taking a previous policy position.

(i) Generally, it is not improper for a government official (especially an elected official who also acts in a legislative capacity) to take a position on a policy question and then later participate in a quasi-judicial decision in which that policy question becomes an issue. This only becomes a problem when the official actually prejudges the particular factual issues that arise in the quasi-judicial proceeding. See Tepley, supra.

(ii) "A decision maker is not disqualified on due process grounds simply for having taken a position, even in public, on a policy issue related to the dispute, if there is no showing that the decision maker is incapable of judging the particular controversy fairly on, 4 the basis of its own circumstances." *Mountain States Telephone and Telegraph Co. v. Public Utilities Commission*, 763 P.2d 1020 (Colo. 1988).

7. Consequences of just one member failing to properly address bias, prejudgment or conflict of interest is invalidation of the action of the entire body. *Booth v. Trustees of the Town of Silver Plume*, supra.

B. *Ex Parte* Contacts.

1. Defined: contacts between the applicant, proponents or opponents and the members of the decision making body outside of publicly scheduled hearings and meetings on the application.

2. Legislative or Quasi-Judicial? As a threshold matter, it is important to first determine whether the proceeding is legislative or quasi-judicial. It is not improper to "lobby" decision makers as they prepare to take action on a piece of legislation. However, the same type of lobbying effort becomes an impermissible *ex parte* contact if the action is quasi-judicial.

3. Why should these contacts be avoided?

   (a) The consequence of engaging in such contacts can be as severe as invalidating the action of the body.

   (b) For attorneys, engaging in an *ex parte* communication with any "official" is a violation of Rule 3.5(b) of the Model Rules of Professional Conduct.

4. The prohibition extends to written materials as well: Any materials received by board members outside of the hearing room (e.g., letters) should be copied and shared with everyone at the time of hearing.

5. Can *ex parte* contact problems be cured by disclosure? Yes, if you trust a NSFOP decision of the Colorado Court of Appeals. *Neighbors for Community v. City of Boulder*, (Colo. App. 1995):

Here, ADG representatives took several planning board members on private tours of the property prior to the public hearing. However, at the start of the hearing, the members were asked to disclose the nature and content of any communications with or information received from ADG or any other sources outside the hearing. Plaintiffs then had an opportunity to cross-examine and respond on the record... .

In adjudicatory proceedings, an agency may not base its decision on *ex parte* information of which the parties are not notified and provided an opportunity to cross-examine or rebut. However, if the administrative process places on the public record all the evidence and information presented by parties interested in the issue and allows all parties an opportunity to consider and rebut any information received outside the public hearing, no grounds exist to overturn an agency's decision on the basis of such *ex parte* contacts. See *Colorado Energy Advocacy Office v. Public Service Co.*, 704 P.2d 298 (Colo. 1985).

Here, the planning board members disclosed the nature and content of the *ex parte* contacts with ADG and its representatives. Plaintiffs were permitted to ask them questions and to present

evidence for the record. Plaintiffs introduced no evidence to demonstrate that any board member had been impermissibly influenced or that any impropriety resulted from the *ex parte* contacts. Accordingly, the district court correctly determined that these contacts did not prevent plaintiffs from receiving a fair and impartial hearing.

6. Avoiding *Ex Parte* Contacts In Site Visits.

(a) The Objective: To obtain the value of a site visit, which enables the decision-making body to get a physical sense of the property involved in the application, without running the risk of the body having impermissible *ex parte* contact with the applicant or members of the public.

(b) Independent, Informal Visits. If the site visit does not need to take place in an organized fashion, and if access to the property is not an issue (for example, the property is a single lot on a public street and can be observed from the public street or otherwise easily accessed, without the necessity of having a applicant representative present to unlock gates, etc.), the members of the body can individually visit the site on their own at any time prior to the public meeting or hearing. This is an easy way to avoid *ex parte* contacts.

(c) Formal, Group Visits. If a formal, group visit by the entire decision making body is necessary or preferable (e.g., because of accessibility issues or the need for some explanation of what is proposed and where), then the following guidelines should be followed:

(i) Ideally, prior to the day of the site visit, staff will have been able to visit the site with the applicant to learn about the layout, etc., such that the staff can adequately brief the body without the necessity of the applicant directly addressing the decision makers. It is permissible to allow the applicant to stake building locations etc., on the site prior to the visit such that it is easier for the members of the body to understand what the development involves.

(ii) Site visits are open meetings under Section 24-6-402(2)(b), C.R.S., if a quorum or three members, whichever is less, of the body is in attendance. This will require advance public notice of the meeting and arguably require the landowner to provide equal access to opponents of the project who desire to attend the meeting. If the site visit is conducted as a public meeting that is part of the public hearing process on the application and for which proper public notice is given, then theoretically it would be possible for the decision makers to hear testimony from proponents and opponents of the project. However, this is not advisable or practical because there will probably be no way to make an adequate record of the testimony. In addition,

it would be difficult to control or conduct the testimony in a way that would allow all present to hear the testimony. For this reason, it should be made clear that no testimony may be given or accepted during the site visit.

(iii) When a group site visit is needed, either because of the complexity of the development or the inaccessibility of the site, the decision-making body should be assembled on the site at the beginning of the visit and a staff person or the chair of the body should lay out the ground rules:

(1) This site visit is only for the purpose of acquainting the members of the body with the physical layout of the site itself.

(2) No testimony will be taken from the applicant or its representative or any member of the public who should happen to be in attendance.

(3) The decision makers should reserve any deliberation or discussion among themselves on the merits for the regular public meeting or hearing on the matter.

(4) The body should avoid permitting the applicant or members of the public to answer "simple informational questions" such as where property boundaries lie, etc. The next step after answering such a question is for the applicant to add his or her opinion. Instead, questions should be directed to the staff. Also, the decision makers should not ask the staff to "ask the applicant the following question." The case law establishes that the public body may not use the staff as a "human telephone" to conduct what would otherwise be an *ex parte* contact with the applicant or members of the public.

7. Pre-Application Communications: Is contact with a decision maker permissible before the application process commences?

(a) Arguably, prior to the time that a land use application has been filed, there is no ongoing "quasi judicial" proceeding. It follows, arguably, that a potential applicant can meet with officials prior to submitting the application to solicit feedback on how the application may be received and ways in which it could be improved. This can be a controversial matter.

(b) Factors for applicants and decision makers to consider prior to making pre-application contact:

(i) Probably should consult the city or county attorney in advance to get clearance.

(ii) How far in advance of submittal will the meeting occur? There is a big difference between advocating in favor of a completed application the day before it is submitted and seeking general policy guidance for an application that will not be submitted for 6 months.

(iii) How much project-specific detail will be discussed? Is the decision maker being asked to essentially help design the project?

8. *Ex Parte* Communications in Mixed Cases Involving both Quasi-Judicial and Legislative Components. Some land use actions have legislative and quasi-judicial components. Potential examples include:

(a) Annexations. In some jurisdictions (including Colorado), the act of annexing property is considered a legislative act, while, at the same time, the processes of rezoning and subdividing the property being annexed are considered a quasi-judicial actions. All three of these actions usually take place concurrently and the decision makers' consideration of the various elements are often conflated into a single process. Under this circumstance, it is very difficult to determine how to apply the rules governing *ex parte* communications.

(b) Site specific applications accompanied by requested text amendments. Sometimes applicants for site specific approvals (e.g., a rezoning) also seek textual amendments to the land use code that must be considered legislative because they will affect all landowners. The textual amendments may be critical to the project - if they are not approved, the project probably is not feasible.

(c) Questions: How should these mixed situations be handled? Is it feasible to view the process as involving two separate types of issues - one type in which *ex parte* communications are permitted and another in which they are not? Under the theory that an annexation is predominantly legislative in nature, should *ex parte* communications be permitted with respect to all aspects of the process?

C. Procedural Due Process: Do neighbors really have any right to complain about conflicts of interest, bias, prejudgment and *ex parte* communications?

1. Background. The rules governing conflicts of interest, bias, prejudgment and *ex parte* communications have their source in the Due Process Clause of the U.S.

Constitution. Under the principle of Procedural Due Process, no person may be deprived of a property interest without due process of law, which generally requires notice of the deprivation and a fair opportunity to be heard. To have a Procedural Due Process claim, a claimant must have a recognized property interest, which may be tangible physical property or a legitimate claim of entitlement to a governmental benefit.

2. Neighbors in Zoning Cases. Because neighboring landowners in land use proceedings are typically entitled, under local law, to notice of the public hearing and are allowed to participate in the public hearing, many people automatically jump to the conclusion that the neighbors have a right that is protected by the Due Process Clause. When a circumstance arises calling into question whether the hearing was conducted fairly (e.g., an alleged conflict of interest or *ex parte* communication), any neighbors who feel slighted quickly start talking about a deprivation of their rights to Procedural Due Process. Because of the damages awards and attorneys' fees available under federal civil rights statutes (42 USC 1983 & 1988), such claims can have serious implications.

3. The Law. The U.S. Supreme Court as well as many other courts have repeatedly held that a right to notice and opportunity to be heard under local law, of itself, does not create a substantive property right that is protected by the principle of Procedural Due Process. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). Just because a local government has chosen to give someone a right to be heard on a given issue does not necessarily mean that consititutional rights are at stake.

4. The Colorado Supreme Court recently recognized this rule in *Hillside Community Church v. Olson*, 58 P.3d 1021 (Colo. 2002). In that case, the City of Golden effectively granted a church a special use permit without providing notice to neighbors or conducting a public hearing as required by the Golden Land Use Code. The neighbors sued, claiming under 42 U.S.C. 1983 that they had been deprived of their right to a public hearing in violation the Due Process Clause. The trial found for the neighbors and awarded them attorneys fees under 42 U.S.C. 1988. The Colorado Supreme Court reversed, holding that the neighbors' right to a public hearing under the Golden Land Use Code did not create a property right protected by the U.S. Constitution.

5. Question: Without a claim for denial of Procedural Due Process, what avenue of relief do neighbors have for alleged conflicts of interest and *ex parte* communications? Have any of their rights really been violated?

6. Most likely answer: Though neighbors may not have a constitutional right to a fair hearing, they probably have such a right under the local jurisdiction's land use code. Most all quasi-judicial land use procedures require that neighbors be given notice of the hearing and an opportunity to be heard. If a public hearing is required under local law (even though it may not be required under the U.S. Constitution), it necessarily follows that the hearing must be conducted fairly by an impartial and unbiased decision maker. This is true not because of the Due Process Clause but

simply because a hearing that is not conducted fairly is tantamount to no hearing and all. If a governing body conducts a hearing, but does not do it fairly, then it has abused its discretion by not following the requirements of its own laws. Therefore, the remedy is found in state law and whatever procedures are available for challenging a quasi-judicial decision on the grounds that it was not conducted in accordance with the requirements of applicable law. In Colorado, this means CRCP 106(a)(4) (certiorari review of quasi-judicial decisions) and in certain limited cases CRCP 106(a)(2) (mandamus) and CRCP 56 (declaratory judgment).

Public Officials Liability Handbook

2007 Edition

1999 edition by Tami A. Tanoue, Esq., Samuel J. Light, Esq., Kathleen K. Harrington, Esq., and Mary Kay Hogan, Esq.

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Foreword

Introduction

This *Public Officials Liability Handbook* is intended to provide an overview of some of the liability issues facing public entities, as well as some suggestions for avoiding or reducing liability.

Chapter 1 describes the governmental immunity laws in Colorado that help protect public entities and public officials from liability. Governmental immunity laws vary from state to state, so it is important to research the specific laws that apply if your particular jurisdiction is outside Colorado.

Chapter 2 covers public official liability that arises under federal law rather than state law, in which cases state law protections are largely inapplicable.

Chapter 3 discusses an area of special concern to elected officials, the risks of personal liability, and provides suggestions for reducing or avoiding such liability.

Chapter 4 addresses one of the most frequently litigated areas of public official liability — liability for land use decisions.

Finally, Chapter 5 focuses on providing a fair hearing in a quasi-judicial matter.

When read together, these chapters may seem somewhat repetitive. The intent of the drafters of this Handbook was to make each chapter a separate and complete resource, enabling the reader to study the book in its entirety or to read about one aspect of public official liability without having to cross-reference throughout the Handbook in order to adequately comprehend the specific topic of interest.

Nothing in this Handbook or its appendices should be used as a substitute for the legal advice of the public entity's attorney; when legal questions arise, contact legal counsel.

Except as otherwise noted, statutory citations in this Handbook are to the Colorado Revised Statutes as amended through May, 2007.

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- Tami A. Tanoue, Esq., Colorado Intergovernmental Risk Sharing Association – Chapter 3, Reducing the Risk of Personal Liability

- Kathleen K. Harrington, Esq., Light, Harrington & Dawes, P.C. – Chapter 1, Liability Under State Law: Introduction to the Colorado Governmental Immunity Act; Chapter 2, Liability Under Federal Law: 42 U.S.C. §1983; and Chapter 5, Providing a Fair Hearing

- Samuel J. Light, Esq., Light, Harrington & Dawes, P.C. – Chapter 4, Land Use Liability

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Chapter One:
Liability under state law: Introduction to the Colorado Governmental Immunity Act

Introduction

This chapter discusses the public entity liability laws as they exist in Colorado. Because these laws vary from state to state, it is not possible to address the laws of each; it is important for each jurisdiction to obtain information and advice on the particular laws that apply to it.

Types of claims to which the Act applies

The Colorado Governmental Immunity Act ("Act")[1] applies to all actions for injuries brought under state law (whether in state court or in federal court) against pubic entities and public employees which "lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant."[2] (A tort is a private or civil wrong or injury, other than a breach of contract, for which there is a judicial remedy in the form of an action for damages.) The Act is intended to provide for all the circumstances under which the state, any of its political subdivisions, or the public employees of such public entities may be liable in such actions.[3]

Types of claims to which the Act does not apply

Most of the protections of the Act likely do not apply to actions brought under federal law in federal court.[4] Examples of actions under federal law include actions for civil rights violations under 42 U.S.C. §1983, and federal antitrust actions.

Of course, the Act does not apply to actions which do not lie in tort and could not lie in tort. An example of such an action would be an action for a breach of contract.

Except as provided in the Act, a public entity's liability is determined in the same manner as if the entity were a private person.[5]

Persons and entities to whom the Act applies

The Act applies to "public entities," including "the state, county, city and county, municipality, school district, special improvement district, and every other kind of district, agency, instrumentality, or political subdivision thereof organized pursuant to law," as well as to separate entities created by intergovernmental agreement.[6] The Act applies to home rule as well as statutory municipalities. A home rule municipality may provide greater monetary compensation to injured persons than that provided for in the Act,[7] but may not impose more stringent requirements than those in the Act.[8]

The Act also applies to "public employees," defined to include generally an officer, employee, servant, or authorized volunteer of a public entity, whether or not compensated, elected, or appointed.[9] Thus, the mayor and members of the city council, board of trustees or other governing body, board and commission members, employees, as well as authorized volunteers of the public entity, are covered by the Act.

Persons and entities to whom the Act does not apply

The Act excludes from the definition of "public employee" independent contractors and persons sentenced to participate in any useful public service.[10] Thus, the protections of the Act do not apply to these persons. Perhaps more importantly, from the public entity's perspective, if the entity has contractually assumed an unlimited indemnification obligation (i.e., an obligation to defend and to pay the costs of any judgment or settlement) with respect to such persons, the entity's liability is not limited by the Act (See Chapter 3, for an example of a non-liability provision). Independent contractors should be of particular concern to the public

entity, since they are often used to perform important functions and services such as construction work, building inspection, planning, engineering, and management.

Most of the Act's protections **do not** apply to a public employee whose act or omission resulting in a claim did not occur during the performance of the employee's public duties and within the scope of the public employment, or whose act was "willful and wanton."[11] The term "willful and wanton" is not defined in the Act; a separate statute[12] defines "willful and wanton" conduct as conduct "purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff." Punitive or exemplary damages are discussed later in this chapter.

Some of the Act's protections for public employees are lost if the employee:

· Fails to notify the public entity of the existence of a lawsuit within the required time,[13] or

· Compromises or settles a claim without the consent of the public entity,[14] or

· Willfully and knowingly fails to notify the public entity of any incident which reasonably could be expected to lead to a claim, within a reasonable time after the incident occurs.[15]

Protections of the Act

The Act provides the following important protections to both public entities and public employees:

· Imposes a 180-day notice of claim requirement on persons claiming to have suffered injury because of the act or omission of a public entity or public employee.[16] The claim is forever barred if the notice of claim is not filed with the public entity's governing body or attorney within 180 days after discovery of the injury.[17]

· Imposes maximum monetary limits on the payment of any judgment or settlement of $150,000 per person and $600,000 per occurrence.[18] These monetary limits do not apply to a public employee who was not acting in the performance of the employee's public duties and within the scope of public employment, or whose acts or omissions were willful and wanton.[19]

· Provides **immunity** from liability, for public entities and public employees (except for public employees who were not acting in the performance of their public duties and within the scope of their public employment, or whose acts or omissions were willful and wanton), in actions under state law which lie in or could lie in tort.[20]

However, no such immunity exists for injuries resulting from the following six circumstances:

· The operation of a motor vehicle, owned or leased by the public entity, by a public employee while in the course of employment (unless the vehicle was an emergency vehicle operating in accordance with C.R.S. §42-4-108(2) and (3), in which case immunity may exist)[21];

· The operation of a public hospital, correctional facility, or jail by the public entity;

· A dangerous condition of any public building;

· Certain dangerous conditions of a public highway, road, or street which physically interfere with the movement of traffic;

· A dangerous condition of a public hospital, jail, public facility located in any park or recreation area maintained by a public entity, or of a public water, gas, sanitation, electrical, power, or swimming facility; and

· The operation and maintenance of any public water facility, gas facility, sanitation facility, electrical facility, power facility, or swimming facility by a public entity.[22]

Focusing loss control efforts on the foregoing circumstances will help the public entity limit or avoid losses in these areas of vulnerability.

Additional protections for employees

The following additional protections apply to public employees:

- The public entity is liable for the costs of the defense of the public employee (unless the employee's act or omission did not occur during the performance of the employee's public duties and within the scope of public employment, or the act or omission was willful and wanton);[23] and

- The public entity is liable for the payment of judgments and settlements of claims against the public employee (unless the employee's act or omission did not occur during the performance of the employee's public duties and within the scope of public employment, or unless the act or omission was willful and wanton).[24]

Both of these rights can be lost if the employee fails to meet the notification requirements described in this chapter.[25] Both rights can also be lost if the employee compromises or settles the claim without the public entity's consent.[26]

If the public entity has provided a defense for a public employee whose act or omission is later determined by a court to have been outside the performance of the employee's duties, outside the scope of employment, or willful and wanton, the employee may be required to reimburse the public entity for the costs and attorney fees incurred by the entity in providing the defense.[27]

Notification obligations for public employees

The public employee loses the right to look to the public entity for the provision of a defense and for the payment of a judgment or settlement if the public entity has not been made a party defendant in the action **and** the public employee fails to notify the public entity of the existence of the action within 15 days after commencement of the action.[28] Both rights are also lost if the employee has willfully and knowingly failed to notify the public entity of the incident or occurrence which led to the claim within a reasonable time after the incident or occurrence, if the incident or occurrence could reasonably have been expected to lead to a claim.[29]

If the public entity has been made a codefendant in the action with the public employee, the public entity must notify the employee within 15 days after the commencement of an action whether it will provide a defense to the employee; if the public entity has not been made a codefendant, the public entity must so notify the employee within 15 days after receiving written notice from the employee of the existence of the action.[30]

Additional notification obligations for CIRSA members

CIRSA's Bylaws and coverages also impose notification requirements. Member obligations under the Bylaws include the obligation to report to CIRSA all incidents or occurrences which could reasonably be expected to result in CIRSA being required to cover a claim or loss. As is typical of insurance policies, CIRSA's coverage documents also require the member to notify CIRSA promptly of any event, claim, or suit that the member could reasonably conclude is covered. In order to preserve any coverage which may exist, prompt compliance with the notification provisions of the coverage documents is critical.

Upon a member's notification to CIRSA's claims adjuster of a claim against the member or an employee of the member, the claims adjuster will provide notification as to whether coverage exists and whether a defense will be provided.

Waiving the Act's limits and immunities

No waiver occurs by the purchase of insurance in excess of the Act's $150,000/ $600,000 monetary limits, or for acts for which immunity exists under C.R.S §24-10-106. The only method by which the limits or immunities can be waived is by the public governing body's

adoption of a resolution waiving such limits or immunities.[31] The resolution can apply only to injuries occurring subsequent to the adoption of the resolution.[32] Public entities should approach such a resolution, if at all, with great caution, since insurance coverages may not apply to the increased limits or expanded areas of liability. CIRSA's coverages are not expanded by any resolution making such a waiver, and members must notify CIRSA in advance of any such waiver.

Status of punitive damages under the Act

Punitive damages or exemplary damages (the terms are synonymous) are damages awarded in circumstances where the injury complained of is "attended by circumstances of fraud, malice, or willful and wanton conduct."[33] State law limits the amount of punitive or exemplary damages that can be awarded to an amount equal to the amount of actual damages awarded to the injured person (or, in certain aggravated situations, three times the amount of such actual damages).[34]

Public entities are not liable, either "directly or by indemnification," for punitive or exemplary damages under the Act.[35] However, public employees can be liable for the payment of punitive or exemplary damages if the employee's act or omission was willful and wanton.[36] Because the type of willful and wanton conduct which results in the award of punitive or exemplary damages is likely to be the same type of conduct which results in an employee's loss of the protections of the Act, engaging in such conduct is especially risky.

If a plaintiff alleges in an action that a public employee's act or omission was willful and wanton, and the plaintiff fails to "substantially prevail" on the allegation, the court must award attorney fees against the plaintiff and in favor of the employee (unless the court determines that such an award would be "unjust").[37]

Public entities are authorized to adopt a resolution to defend a public employee against a claim for punitive damages, or to pay or settle a punitive damage claim against the employee.[38] CIRSA coverage does not exist for the payment or settlement of punitive damage claims.

Chapter Two:
Liability under federal law: 42 U.S.C. §1983

Background

Although state law provides the basis for many of the claims brought against local governments, suits against public entities and public employees under the federal Civil Rights Act of 1871 ("Act") have increased significantly over the past two decades. In fact, the greatest percentage of federal court decisions involving local governments is based on liability under §1983 of the Act (§1983).[39] These claims pose one of the greatest financial risks to local governments. Therefore, it is extremely important to have a basic understanding of the liability issues involved under §1983.

42 U.S.C. §1983 of the Act provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States…to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress." (Emphasis added).

Since §1983 pertains to the deprivation of rights, privileges, and immunities secured by the U.S. Constitution and other federal laws, many areas of local government activity are subject to scrutiny under this provision. Common claims against local governments under §1983 include those involving affirmative action, arrests, employment, land use, municipal court procedure, and code enforcement. The following information is intended to clarify some of the more crucial issues facing public officials in light of the sweeping nature of §1983 liability.

Elements of a §1983 claim

In order to prevail in a claim for relief under §1983, a plaintiff must establish that: (1) the conduct that is the basis of the claim was committed by a person acting "under color of state law"; and (2) such conduct violated a federally protected right. Each of these elements is discussed below.

· **Under Color of State Law.** This phrase refers to action or inaction by a person under the authority of state law or local ordinance or regulation. Almost every act or omission by a local government official in furtherance of his or her duties will be deemed "under color of law". This phrase can also apply to the actions of private individuals acting in concert with public officials.

· **Deprivation of Rights.** The second element of a §1983 claim refers to the deprivation of rights, privileges or immunities secured by the Constitution or laws of the United States. Section 1983 does not create an independent cause of action; rather, it must attach to another federally protected right. Section 1983 also does not pertain to rights conferred by state statute; nor does it apply to federal statutes that provide an exclusive remedy or statutes that are regulatory in nature and that do not create rights.[40]

Application of §1983 to local governments and their officials and employees

Liability under §1983 attaches to any person who, under color of law, deprives a plaintiff of his or her civil rights protected by the U.S. Constitution and other federal laws. A municipality is a "person" for purposes of §1983, and therefore may be held liable for damages and injunctive relief under the Act.[41] However, municipal liability under §1983 only extends to those situations where a plaintiff's federal rights are violated by a municipal official or employee acting pursuant to an official municipal policy or custom, and where the policy or custom causes the violation of federal rights.[42]

Official policy and custom

An official policy or custom giving rise to a violation of a plaintiff's federally protected rights can be made and implemented either by the action or the inaction of the local government's legislative body or its officials. There is no definitive test for determining whether the conduct of a public official or employee constitutes the enforcement of an official policy or custom. This must be analyzed on a case-by-case basis. In trying to clarify this requirement, the United States Supreme Court commented that the term "policy" could be "a policy statement, ordinance, regulation, or decision officially adopted and promulgated..." by the local government's legislative body.[43] As one example, if a local government adopts an unconstitutional ordinance, thus enacting an official policy, and that ordinance deprives a plaintiff of a federal right, the government would be liable under §1983.

It is more difficult to ascertain what constitutes an official "custom" of a local government. The Supreme Court has defined it as a practice "so permanent and well settled as to constitute a 'custom or usage' with the force of law."[44] A custom usually lacks formal approval by the local legislative body, but may be inferred where there is continual failure to remedy known constitutional violations or other violations of federal law. For example, one federal appellate court has held that a municipality's perpetual failure to address its police officers' indifference to the rights of arrestees is an official custom for purposes of §1983.[45]

The Supreme Court has also held that a single, isolated incident of unconstitutional activity by a low-level city employee does not constitute an official policy or custom, and therefore is not enough to establish liability for purposes of §1983.[46] However, the official policy requirement may be satisfied and liability may be imposed on a local government under §1983 where a single decision is made by an official of the government with final decision-making authority. For example, the Supreme Court found a local government to be liable under §1983 where a deputy district attorney authorized an unconstitutional search. The Court found the deputy's action to constitute an official policy because the deputy was the final decision-maker on the issue.[47]

Causal connection

In addition to proving that an employee or official acted pursuant to an official policy or custom, a plaintiff who sues a local government under §1983 must prove that the local government was the "moving force" behind the alleged deprivation of civil rights.[48] In other words, the plaintiff must establish that the action was taken with the requisite degree of culpability, and must establish a direct causal link between the action and the alleged deprivation of federal civil rights.

Deliberate indifference

To hold the local government liable, a plaintiff in a §1983 claim must also demonstrate that the defendant acted with "deliberate indifference" to the risk that his or her action would deprive the plaintiff of a particular constitutional or statutory right. This means that a defendant must have purposely acted or failed to act, knowing that such act or omission risked depriving the plaintiff of a federally protected right.

For example, the U.S. Supreme Court has found that a sheriff's decision to hire a deputy without adequately scrutinizing the job applicant's background would only constitute "deliberate indifference" where "adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right."[49]

This standard also applies to training policies. A local government policy that is constitutional on its face may be actionable under §1983 if the appropriate decision makers were "deliberately indifferent" to the training required to implement the policy.[50]

Public officials and employees

Section 1983 suits may be brought against a public official or employee in an "individual" or an "official" capacity. The critical distinction between these actions is that a local

government as an entity can be held responsible for the actions of an employee or official in an official capacity suit. Conversely, judgment against an employee or official in his or her personal capacity can be executed only against the individual's personal assets — not those of the local government.[51]

· **Official Capacity.** A suit against an individual in his or her official capacity is the same as a suit against the local government that the individual is employed by or represents.[52] Therefore, this type of suit will result in liability to the local government itself, not to the individual that violated the plaintiff's federal rights. Likewise, if an individual is sued in his or her official capacity and it is determined that he or she was not acting pursuant to official policy or custom, neither the individual nor the local government can be held liable under §1983.

· **Individual Capacity.** It is easier for a plaintiff to establish liability against a local government's official or employee in his or her individual capacity. In this type of suit, unless immunity applies (discussed below), a plaintiff need only demonstrate that the official or employee acted under color of law and caused the deprivation of the plaintiff's federal right.

Defenses to §1983 claims

State law defenses such as those found under the Colorado Governmental Immunity Act do not apply to §1983 proceedings. Defenses to §1983 claims are based on the common law theories of absolute and qualified immunity. These are the most important defenses that an official or employee has to a §1983 suit. They are not available to a local government as an entity.

· **Absolute Immunity**. Public officials who are engaged in legislative, judicial, or certain prosecutorial functions "intimately associated with the judicial phase of the criminal process" may claim absolute immunity for their actions.[53] This type of immunity is designed to protect the functions that these officers are intended to carry out. Therefore, legislative immunity applies only to legislative acts, judicial immunity applies only to judicial activities, and prosecutorial immunity applies only to prosecutors while they are performing prosecutorial acts.[54] However, not all acts by legislators should be considered legislative acts. For instance, in one recent decision, a legislative body's act of banning an individual's attendance from the body's meetings was held to be an administrative act for which no immunity existed, not a legislative act entitled to immunity.[55]

· **Qualified Immunity.** Qualified immunity extends to officials, subordinates, and non-elected officials who carry out discretionary functions other than legislative, judicial, or prosecutorial functions. It applies if the defendant had a reasonable and good faith belief in the legality of the act that allegedly deprived the plaintiff of a federal right. It utilizes an objective standard that essentially asks whether a reasonable person would have known that the defendant's actions violated a settled law and deprived the plaintiff of his or her constitutional or other federally protected rights. If the answer is yes, the defendant is not entitled to the qualified immunity defense.[56] Again, this is an individual defense only, it is not available to a local government.

Remedies

A prevailing plaintiff in a §1983 claim may be awarded the following: nominal damages; presumed damages; actual damages; punitive damages; or injunctive or equitable relief. Most importantly, pursuant to 42 U.S.C. §1988, attorney fees can be awarded to the prevailing party in a §1983 suit. However, this provision usually applies only to the prevailing plaintiff, and therefore seldom benefits a prevailing local government defendant; a defendant may only be entitled to attorney's fees if the action was brought in bad faith or is frivolous and groundless.[57]

· **Nominal Damages.** A plaintiff in a §1983 suit does not need to prove that the violation of federal rights resulted in personal injury, property damage, or impairment of dignitary

interests.[58] A plaintiff that satisfies the elements of a §1983 claim but does not demonstrate injury may be awarded only nominal damages; however, the local government may still incur substantial costs as the plaintiff may also be entitled to attorney fees. For example, in 1993 the Colorado Court of Appeals let stand a $30,000 attorneys fee award where the jury only awarded the plaintiff $2.00 in damages.[59]

· **Presumed Damages.** Under certain narrow circumstances, courts have awarded presumed compensatory damages in cases where plaintiffs have not proven economic or emotional injury. These cases involved violations of liberty interests of bodily integrity and of probable cause as the basis of an arrest, and violations of religious rights guaranteed under the Establishment Clause of the First Amendment.[60]

· **Actual Damages.** Actual damages will be awarded where the plaintiff proves that the violation of his or her federal right caused injury in fact. Actual damages may be awarded for injuries to a plaintiff's person or property, and pertains to both economic and emotional harm.

· **Punitive Damages.** In addition to actual damages, a plaintiff may seek punitive damages against a public official or employee if it is shown that the person's conduct was "motivated by evil motive or intent, or when it involved reckless…indifference to the [plaintiff's] federally protected rights."[61] These damages are not available for claims against a local government itself.

· **Injunctive and Equitable Relief.** Injunctive and equitable relief are available where no adequate legal remedy is available to the plaintiff. This type of relief ranges in significance and should not be underestimated. It can be used for wide-ranging relief, such as preventing a local government from instituting a particular zoning change, all encompassing prison reform, or school desegregation.

Typical §1983 claims against local governments

The most prevalent types of §1983 claims against local governments concern the areas of employment and personnel decisions, land use decisions, and police activities.

· **Employment and Personnel Decisions.** Fourteenth Amendment due process claims provide the basis for many §1983 claims against local governments. These claims often involve an employee's right to notice and an opportunity to be heard before certain employment or personnel decisions are made. For example, the due process clause requires that before being fired, a non at-will public employee is entitled to a pre-termination hearing, which must be followed by a more extensive post-termination hearing. The Fourteenth Amendment is also used to bring §1983 claims based on a local government's failure to provide equal service or treatment based on race, gender, or membership in other definable classes.

First Amendment free speech claims are also widely used in §1983 litigation. These claims involve a public employer's attempt to regulate employee speech. Although there are circumstances in which a government employee's speech may be regulated (e.g., discussing matters that might be privileged), unless the government interests in curtailing this right is substantial, the employee's First Amendment rights will prevail. Generally, a public employee's speech will be protected if it addresses a "matter of political, social, or other concern to the public."[62] An example of this is a suit in which a professor's speech attacking the mismanagement and misappropriation of funds by university administration was found to be protected by the First Amendment.[63]

· **Land Use Decisions.** The Fifth and Fourteenth Amendment's prohibition on taking private property for public use without just compensation also provides a basis for §1983 claims against a local government. These claims may involve total, partial, or temporary physical or regulatory takings. These types of cases have involved challenges to a broad

range of land use policies from dedication requirements to historic preservation ordinances.[64] These types of cases are further discussed in Chapter 4.

· **Police Activities.** One of the most heavily litigated areas of local government liability involves claims of excessive force and illegal search and seizure by police officers. Reasonableness of force will be judged from the perspective of a reasonable police officer at the time and place of the incident in question, without the benefit of hindsight.[65] Search and seizure issues usually revolve around the sufficiency of a warrant and probable cause. Failure to adequately train police officers may also constitute grounds for liability under §1983.[66]

Suggestions for avoiding §1983 liability

It is imperative that public officials familiarize themselves with the primary sources of potential liability. The following non-inclusive list is intended to provide a starting point:

· Review personnel manuals and ordinances for compliance with the U.S. Constitution and other federal laws.

· Periodically review and amend ordinances and regulations for constitutional deficiencies. The ever-changing nature of constitutional law and the sweeping nature of §1983 necessitates timely review of these laws.

· Impress upon heads of departments and other final decision makers the importance of seeking advice of counsel before making even ad hoc decisions that could lead to litigation.

· Establish written policies on high-risk law enforcement areas such as search and seizure, arrest, deadly force, and privacy issues, which comply with constitutional standards and other applicable laws. Review and update these and other law enforcement policies periodically.

· Implement thorough training, supervision, and discipline policies for law enforcement officers and other employees. Training is the primary method by which rules of conduct can be properly understood by employees. Supervision, discipline, and a commitment to ethical conduct and professionalism also play an important role.

· Do not ignore civil rights violations committed by employees. Be particularly careful not to permit personnel to continue to engage in known conduct that is inconsistent with established standards. Such inaction may be deemed an authorization of the type of abuse at issue.

· Educate persons serving on boards and commissions, such as planning commissions, boards of adjustment, licensing boards, career service boards, and city councils and boards of trustees, in understanding their functions, particularly when taking actions which may affect an individual's property rights or other constitutionally protected interests.

· Keep public officials and employees up-to-date on current developments and changes in the law.

· Be wary of taking disciplinary action against a public employee based on disagreement with the content of the employee's public comments.

· Obtain the advice of your local government attorney whenever the potential for §1983 liability may arise.

Chapter Three:
Reducing the risk of personal liability

Introduction

An award of punitive damages in the amount of $1,500,000 (reduced by the court from $2,250,000 after the trial) against a mayor was upheld by the 10th Circuit Court of Appeals.[67] The Court rejected the mayor's argument that the award was excessive. The award resulted in part from a jury's finding that the mayor had made disparaging comments about a former city employee, and had deprived her of a post-termination contract, because of her association with African-American groups. A punitive damages award of $1,000,000 against a supervisor found by the jury to have been discriminatory towards the same employee in connection with her termination was also upheld.

An award of punitive damages against a manager of Denver's Department of Health and Hospitals was upheld in part by the Colorado Supreme Court.[68] The award resulted from the manager's involvement in the termination of a subordinate's employment.

Because punitive damages usually must be paid from personal funds, these cases illustrate an area of growing concern. While reported judgments against officials personally are still relatively rare, such claims appear to be made with greater frequency, particularly in the areas of law enforcement, land use, personnel, licensing, and permitting decisions. Reasons for the increase vary and are not always apparent. In some cases, there may be a belief that fear of personal liability, or a desire to protect public employees from personal liability, will provide elected officials an additional incentive to settle a claim. A plaintiff who has lost a job, liquor license, or land use decision may want retribution in addition to compensation. Moreover, punitive damages are generally not insurable, so the official may not be able to look to an insurance policy for protection.

Protections against such claims do exist for public officials, and the risk of such claims – or the risk of such claims being successful – can be reduced by understanding and acting within those protections.

Protections from personal liability

At least three sources of protection from personal liability exist: state statutes (the Colorado Governmental Immunity Act or "Act", described in detail in Chapter 1)[69], common law (court-made law), and insurance. These protections have limits; none are absolute. The following describes the general scope and limits of each.

· **The Act.** The Act provides five important protections to public officials[70] from claims actionable in tort. The five protections include a 180-day notice of claim requirement[71]; a maximum judgment of $150,000 per person, and $600,000 per occurrence (where more than one person is injured)[72]; payment by the public entity of any judgment or settlement resulting from the claim[73]; payment by the public entity of the cost of defense[74]; and, immunity from liability for all actions which lie or could lie in tort **except** where the injury results from an activity specifically defined in the Act.

These protections are available only under specified conditions:

· You must be an officer, employee, servant, or authorized volunteer of the public entity.[75]

· The injury must have resulted from your act or omission occurring during the performance of your public duties and within the scope of your public employment.[76]

· Your act or omission must not have been willful and wanton.[77]

· You must not compromise or settle the claim without the consent of your public entity. If you do, the public entity is not liable for payment of the judgment, settlement, or cost of defense.[78]

· You must notify your public entity of the existence of the lawsuit, in writing, within 15 days after commencement of the lawsuit, if your public entity is not named as a defendant. If you or the plaintiff fail to so notify your public entity, it is not liable for payment of the judgment, settlement, or cost of defense.[79]

· You must notify your public entity of any incident which reasonably could be expected to lead to a claim, within a reasonable time after the incident occurs. If you do not and your failure is found to be willful and knowing, the public entity is not liable for payment of any judgment, settlement, or cost of defense of a claim resulting from that incident.[80] (Written notice of the incident is advisable.)

· The public entity is not required to pay an award of punitive damages against you.[81]

Whether any of the Act's protections apply to claims brought under federal law is doubtful.[82] The requirement that the public entity pay for the judgment, settlement, or cost of defense of a claim against a public official (subject of course to the previously described limits) may apply to federal claims; the wording of the Act[83] is very broad, and payment by the public entity would not limit the federal claim.

The two types of federal claims primarily brought against public officials have been federal antitrust claims and federal civil rights act claims. The risk of monetary liability under the federal antitrust laws, for public officials acting in an official capacity, was removed by adoption of the Local Government Antitrust Act of 1984.[84] The risk of monetary liability under the federal civil rights act statutes remains, as discussed in Chapter 2.

· **Common law immunity.** Courts, both federal and state, protect or immunize public officials from personal liability in certain instances. The following is often given as the reason:

> It does indeed go without saying that an official who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative.[85]

This common law immunity is in addition to the protections provided by the Act[86] and applies to claims brought under federal law as well as state law. The immunity exists only for discretionary decisions. Chapter 2 discusses more specifically the circumstances under which the immunity exists under federal law. Generally speaking, federal courts consider public officials to be absolutely immune from liability claims

when acting in a legislative or judicial capacity.[87] If the public official is exercising a discretionary function but in an executive or administrative capacity, the official is immune from liability unless the conduct violates a clearly established federal constitutional or statutory right of which a reasonable person would have known.[88]

The immunity recognized by Colorado state courts on claims brought under state law is less well settled; nevertheless, public officials are entitled to some immunity for discretionary acts or decisions,[89] that is, for acts or decisions which involve judgment, planning, and policies.[90] Whether public officials are entitled to absolute immunity for legislative or judicial functions is not settled in Colorado. However, in exercising discretion in an administrative or executive capacity, a public official will not be personally liable for damages unless the conduct is willful, malicious, or intended to cause harm.[91] Stronger protection should be extended to public officials performing legislative or judicial functions.

· **Insurance.** Most public entities obtain public officials' liability insurance, sometimes referred to as errors and omissions insurance.[92] The insurance offers protection to the public entity and public officials from the increasing[93] costs of defense, and from judgments and settlement of claims.

Typically, public official liability insurance covers public officials only when they are performing public duties.[94] It is often written on a "claims-made" basis.[95] Aggregate limits on all losses in any one policy year (rather than a limit on each individual loss) sometimes are imposed, and defense costs may be included with the aggregate limits, further reducing the protection afforded by the policy. Punitive damages are often excluded from coverage, explicitly, implicitly from interpretation of policy wording, or based on the insurance company's interpretation of "public policy."

Reducing remaining risks

Since all three sources of protection from personal liability — statute, common law, and insurance — have limits, self-protection is advisable. The following lists a few suggestions for self-protection. The list is not exhaustive,[96] and the suggestions appear in no particular order of importance.

· **Know the limits of your authority and act within those limits.** As previously discussed, the protections provided by the Act, common law, and insurance policies generally extend to an act or omission occurring in the performance of your public duties and within the scope of your office or employment. Consequently, knowing the limits of your authority and acting within those limits is important in reducing the risk of personal liability.

Obtain legal advice prior to acting where a question exists and a claim is possible; educate employees and officials about their office or employment and the limits of their authority; ensure that adequate training and supervision are provided to the employees.[97]

Avoid any conflict of interest and the appearance of a conflict and do not act from personal motivation; otherwise, your conduct may appear to be outside the scope of your public entity duties. As a practical matter, the likelihood of suit can increase if personal motivations appear to be involved; emotions may rise, making resolution of the suit more difficult; and judges and juries are less likely to be sympathetic to your position.

Understand the rules applicable to your actions and decisions, follow the rules, apply the rules even-handedly, and don't play favorites. Change the rules if they don't work.

Elected officials, by and large, act only as part of a governing body (such as a city council or board of trustees), and by voting on matters in the context of a public meeting. An elected official should be particularly cautious about acting outside this context, or taking an individual action which has not been specifically authorized by a motion, resolution, or ordinance. Potentially "outside the scope" activities could include:

· Speaking to the press on personnel matters, particularly when you are not the public entity's authorized spokesperson.

· Making promises (or threats) to the public; an individual employee; a citizen; a contractor or vendor.

· Waiving the attorney-client confidentiality that runs between your public entity attorney and the governing body.

· Revealing confidences that you learned in an executive session.

· **Avoid willful, wanton, and malicious conduct.** Again, the Act's protections do not extend to such conduct, most common law immunities will not be available, and insurance policies often exclude such conduct from coverage. Punitive damages are more likely if such conduct is found to exist.

· "Willful and wanton" is not specifically defined in the Governmental Immunity Act; another statute[98] defines the term "willful and wanton conduct" as "conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff."

· Acting maliciously, vengefully, or out of personal motives,

· Acting in a manner that is motivated by evil motive or intent, or that is recklessly or callously indifferent to someone's legally protected rights.[99]

· Ignoring professional advice without adequate basis.

· Acting to benefit oneself or other individuals financially: any profit gained by virtue of holding public office should raise red flags from an ethical, civil liability, and criminal liability standpoint.

· Retaliating because you disagree with an opinion expressed or legal right exercised by another.

· **Establish and follow where required, understandable, practical, and legally sufficient procedures which meet due process requirements.** Due process violations often provide a basis for federal civil rights act claims, particularly with respect to land use, employment, licensing, and permitting decisions. Typical claims often allege inadequate or improper notice, lack of a hearing, inadequate hearing procedures, improper timing of the hearing, biased decision makers, failure to follow required procedures, consideration of improper evidence, and so forth.[100] The risk of liability can be reduced if the public entity creates basic procedures to be followed whenever due process requirements must be met, and periodically reviews those procedures for legal sufficiency.

The development of an understandable due process hearing manual containing the procedures to follow — a standard preliminary statement by the presiding officer, an outline of the order of the hearing, guidance on prehearing contacts and admission of evidence, and related matters — is helpful in establishing a standard process, thereby reducing the chance of error. The public entity's attorney must, of course, be closely involved in the preparation of the procedures and manual to ensure legal sufficiency. See Appendix A for one example of a standard hearing procedure.

· **Be wary of involvement in personnel decisions.** Both cases described at the beginning of this chapter involve an award of punitive damages against elected or management public officials. Each award resulted from a personnel decision, the dismissal of a public employee. Increasingly, personnel decisions form the basis for lawsuits against public officials. The law in this area is developing, and awards such as those described encourage the filing of other suits. Moreover, personnel decisions are often fraught with emotion, and the risk of suit is thereby increased.

For elected officials, in particular, personnel policies should be fashioned to delegate, insofar as practicable, most personnel decisions to staff. Such delegation is particularly appropriate in those municipalities that have a city/town manager or city/town

administrator form of government. Allowing the administrator or manager to handle most personnel issues, reserving to the city council or board of trustees only those issues that concern the council's or board's "direct reports," is a wise use of administrative resources as well as a liability-reducing tool.

· **Avoid independent contractor status.**[101] The Act specifically excludes an "independent contractor" from the definition of public employee and thus from the Act's protections.[102] An independent contractor may or may not be excluded from coverage under a public official liability policy.[103]

If you are an independent contractor, you might seek to have your position identified as a "public officer" in the contract, ordinance, home rule charter, state statute, or similar document. It is unsettled whether a public "officer" — who is entitled to the protections of the Act[104] — loses the protections when retained under a contract. By obtaining "officer" status, an argument for those protections can be made.

· **Keep good records of what you do and why you do it.** Being right is good; being able to prove you're right is even better. The increasing volume of paperwork becomes frustrating at times, but it is vital that accurate records of your public activities be kept, that proper and lawful reasons are expressed for the actions you take, and that those reasons are recorded in some fashion.

While public employees maintain records of formal meetings of the council, boards, or commissions, it is wise to keep your own personal records and calendar of those significant events which occur outside recorded meetings. Lawsuits can take months or years to bring and years to conclude. Determining what happened in preceding years may be important in successfully resolving the lawsuit. Memories fade, but documents often remain available.

Be aware of video and/or audio recordings, and anything written in an e-mail. Be guided by an assumption that what you say and write relating to your public entity will become public knowledge and evidence in a lawsuit. To illustrate: evidence which supported a punitive damage award in one case was provided by a tape recording secretly made by one councilmember during a "private meeting" among the mayor and councilmembers, at which the dismissal of the employee was discussed. The councilmember who recorded the meeting was not sued by the employee.[105]

· **As elected officials, focus your efforts on legislative and significant quasi-judicial decision-making.** Common law immunities do not protect elected officials in every action they take; instead, the immunities protect governmental operations of a legislative, judicial, executive, or administrative nature. Legislative and judicial actions are afforded greater protection by the courts than are administrative actions. Thus, while limiting the involvement of elected officials in administrative matters is sometimes suggested as a good management practice, it also is a good method of reducing their risk of personal liability.

Reduced risks of personal liability also can be achieved by delegating (assuming the delegation is lawful, of course) authority to specialized boards, commissions, or job positions where particular expertise is necessary and the risk of litigation is greater (for example, establishing a beer and liquor licensing board to make or recommend licensing decisions).

· **Periodically review public services and regulations, and consider liability effects of proposed new services and regulations.** Most services and regulations of cities and towns are discretionary; that is, most services are not required to be provided or regulations required to be adopted. It is important to at least consider potential liability before taking on new services or adopting new regulations.

Periodic review of existing services and regulations is also important to ensure that the services can be adequately provided and the regulations adequately enforced. If any cannot, changes should be made to protect the public entity and its officials.

In adopting regulatory codes, such as the Uniform Building Code, the public entity might consider including a non-liability provision. Such a provision might help reduce

potential liability by expressing the public entity's intention not to create a private civil liability remedy for an injury resulting from the public entity's failure to enforce the code adequately.[106] The following is one example of such a non-liability provision:

> Section ___. Non-liability. The adoption of this ordinance, and of the _____ code provided for herein, shall not create any duty to any person, firm, corporation, or other entity with regard to the enforcement or non-enforcement of this ordinance or said code. No person, firm, corporation, or other entity shall have any civil liability remedy against the (City)(Town), or its officers, employees, or agents, for any damage arising out of or in any way connected with the adoption, enforcement, or non-enforcement of this ordinance or said code. Nothing in this ordinance or in said code shall be construed to create any liability, or to waive any of the immunities, limitations on liabilities, or other provisions of the Governmental Immunity Act, C.R.S. §24-10-101 et seq., or to waive any immunities or limitations on liability otherwise available to the (City)(Town), or its officers, employees, or agents.

· **Have a written public policy addressing payment of defense costs, judgments, settlements, and attorneys' fees for claims not covered by the Act.** Such a policy can resolve many questions raised by the wording of the Act, by common law, and by insurance policies. For example, the public policy could address payment of defense costs, judgments, settlements, and attorneys' fees for any federal claim. (Providing for payment of attorneys' fees in addition to other costs is important since those are commonly made to a plaintiff who prevails on a federal claim[107] and can even exceed the amount of damages awarded.[108])

The Act's protections apply only to tort claims, or claims actionable in tort; other claims can be brought against public officials, such as claims for declaratory or injunctive relief. Defense costs exist, and attorneys' fees may be awarded to a prevailing plaintiff for certain federal claims, even though money damages are not sought.[109] Thus, the policy could address payment of defense costs and attorneys' fees for claims other than claims for money damages.

The policy might also address such payments for a claim brought or continued after an official leaves public office or employment, but based on an act or decision occurring during the term of office or employment. The Act is and insurance policies may be unclear with respect to coverage under these circumstances.

Such a policy should be carefully drafted to define the circumstances under which any payment would be made. Care should be taken so as not to waive the monetary limits of and immunities provided by the Act, unless the public entity intends to do so. (The Act's monetary limits and any immunity granted by the Act can be waived by resolution of the governing body of the public entity.[110]) Legal limits on the expenditure of public funds should be identified and met in drafting the policy.[111] The policy might be adopted as an ordinance to give it greater degree of permanence. An example of such a policy is provided in Appendix B.

Chapter Four:
Land use liability

Introduction

The regulation of land use and development has been a traditional role of local governments. As a consequence, legal challenges to local land use decisions are nothing new. However, with burgeoning land use activity, and expanding theories of liability at both the state and federal levels, it is increasingly likely that a local government will at some point face a legal challenge to its land use decisions.

This chapter provides an overview of the potential sources of land use liability. It also identifies the boards, commissions, and officials who should be most concerned about land use liability, and briefly outlines the major sources of land use authority and how those authorities are exercised. Finally, it makes some suggestions for avoiding or reducing the risk of legal challenge. In light of typical insurance coverage exclusions (such as exclusions for "inverse condemnation" or "takings" claims, and for breach of contract) which may negate coverage for many types of land use actions, taking prudent measures to avoid or reduce liability risks is particularly important in the land use arena.

Who should be concerned about land use liability?

From the elected governing body to the building inspector, a variety of boards, commissions, and officials are involved in the regulation of land use and development. All of the following should understand their roles in the land use process and their potential liabilities:

- City councils or boards of trustees;
- Planning and zoning commissions and other bodies with land use functions (such as historical commissions);
- Boards of adjustment;
- Planning departments;
- Building inspectors and officials; and
- Code enforcement officers.

Sources of land use authority

Under Colorado law, local governments are vested with extensive authority to regulate the use and development of land. For example, municipalities are authorized to adopt master plans,[112] subdivision regulations[113] and zoning regulations,[114] with key decisions in these areas typically made by the governing body and the planning commission.[115] Boards of adjustment typically hear appeals regarding how the zoning regulations are administered, and may grant variances to strict application of the zoning code.[116]

Other statutes authorize regulation of planned unit developments (PUDs),[117] local regulation of certain "matters of state interest"[118], and adoption of building codes.[119] State law also authorizes the annexation of land into municipalities,[120] and various types of intergovernmental planning.[121] Finally, the Colorado Constitution grants home rule municipalities broad power to regulate land use.[122]

Exercising land use authority

Local government actions in the land use arena can be "quasi-judicial," "legislative," or "administrative." As discussed in Chapter 5, the type of process and hearing required for each type of action varies. For quasi-judicial actions, it is critical to provide proper notice and a fair

hearing. Quasi-judicial land use actions include but are not limited to rezoning decisions;[123] action on a development plan (site plan);[124] the grant or denial of a variance;[125] and the grant or denial of a special use permit.[126]

Legislative land use actions include the adoption of a master plan;[127] vacation of a roadway;[128] annexation of property;[129] setting of general rates and fees applicable to development;[130] and approval of a zoning ordinance amendment of general application.[131] Though these actions are more general in nature, state statutes or ordinance or charter provisions may require the local government give notice to ensure public input into these legislative processes.[132]

In most local governments, administrative land use actions occur daily in the carrying out of the land use regulations. In addition to the three types of actions described above, land use regulators must recognize that certain types of land use functions are "ministerial." For these types of functions, the local government has no discretion; rather, these functions must be performed once applicable requirements are met.[133] The most common example is the issuance of a building permit. When an applicant meets the requirements of the building code, the issuance of a building permit is a ministerial act which the building official must perform as part of his or her duties.[134]

All of these types of land use actions can raise potential liability, under both state and federal law.

Land use liability under federal law

Although land use has traditionally been an area of local control, federal law is one of the most significant sources of land use liability. Both the United States Constitution and federal statutes provide bases of potential liability, which are briefly discussed below.

· **Constitutional Claims.** Most land use claims asserting a violation of the U.S. Constitution are in fact brought pursuant to a federal statute — 42 U.S.C. section 1983 ("§1983"). §1983 does not itself grant any substantive rights; rather, it is a remedial statute that authorizes persons to sue for damages and other relief for violation of rights secured by the U.S. Constitution or federal statute. Liability under §1983 is premised upon (a) action under color of law, and (b) a violation of a constitutional or statutory right.[135] Land use actions of local government entities and officials in the course of their duties or employment will be considered actions "under color of law."

The more common federal land use claims — those for takings, due process, and equal protection — are based on the amendments to the U.S. Constitution. These guarantees apply to state and local governments through the Fourteenth Amendment, which states that no state shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."[136] This prohibition extends to political subdivisions of a state.[137]

· **The "Takings" Claim.** A federal takings claim is based on a clause in the Fifth Amendment to the U.S. Constitution which prohibits the taking of private property for public use without "just compensation."[138] One type of takings claim concerns a physical taking of someone's property, which always requires compensation.[139] Another type of takings claim in the context of land use regulation is an inverse condemnation claim, which is not premised on a physical taken, but rather upon an allegation that a local government's regulation has denied a property owner all reasonable use of the owner's land.

The United States Supreme Court has held that a regulation "goes too far" and results in a taking when no productive or economically beneficial use of land is permitted.[140] It has also held that such a regulation — even if temporary — may constitute a taking,[141] though temporary takings claims are often unsuccessful. Takings claims can center on local government regulations requiring the dedication of land,[142] the completion of public improvements, the payment of impact fees,[143] and other matters.

A federal takings claim is a powerful tool because it is a claim for money damages that is not subject to the monetary limits or other protections of the Colorado

Governmental Immunity Act. Additionally, a successful claimant may be able to recover compensatory and punitive damages, as well as attorneys fees.[144] However, a court typically will not hear a takings claim under federal law until the property owner has first sought compensation under state procedures.

· **Due Process Claims.** The U.S. Constitution also requires that no person be deprived of property or liberty without due process of law.[145] This requirement encompasses both a right to substantive due process and a right to procedural due process.

A substantive due process claim is in essence a claim that the government's decision is without reason. The standard for winning this type of claim is high; for example, one court has said a landowner cannot recover damages "unless no articulated basis for the decision bears any rational relationship to a legitimate governmental interest."[146]

A procedural due process claim is generally based on an allegation that an owner was deprived of a property interest without notice or hearing. This type of claim does not apply to legislative acts, but applies to quasi-judicial and administrative actions. To win such a claim, a plaintiff must show that it was deprived of the opportunity for an appropriate hearing granted at a meaningful time and conducted in a meaningful manner.[147] For land use proceedings, these claims can usually be defeated by showing that the various requirements of a fair hearing were met.

· **Equal Protection Claims.** Land use regulations often have the effect of creating different classes of persons. For example, a zoning ordinance may exclude manufactured homes from certain residential zone districts, thereby creating different classes of homeowners.[148]

An equal protection claim is based on the allegation that the claimant is among a class of persons that, without reason, is being treated differently than others, in violation of the Equal Protection Clause.[149] As long as a claimant is not being discriminated against because of the exercise of a fundamental right (such as the right to vote) or membership in a protected class (such as an ethnic or racial minority), the equal protection claim is more likely to fail. However, the courts will overturn a regulation if the plaintiff can show that the distinctions being made are not rationally related to a legitimate government interest.[150]

· **Other Federal Constitutional Rights.** Land use regulations and actions may also implicate other rights protected by the U.S. Constitution. For example, regulations of signs and sexually oriented businesses have been challenged as violative of the First Amendment right to freedom of speech.[151] Restrictions on the location of religious institutions have been challenged under the Establishment Clause, which protects religious freedom.[152] Growth restrictions have been challenged as a violation of the Commerce Clause.[153]

· **Federal Statutory Claims.** An increasing number of federal statutes also impact local government land use regulation. These statutes typically provide for specific rights and remedies if violated. The following is not intended as an exhaustive list of federal statutes that affect local land use; rather, it is intended only to identify a few of the significant federal laws that should be of concern to local planning officials.

· The **Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[154]** With respect to individualized land use determinations, such as conditional or special use applications, RLUIPA prohibits a government from substantially burdening a person's religious exercise unless the government demonstrates that the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[155] RLUIPA is construed in favor of broad protection of religious exercise, and provides a basis for setting aside land use decisions that are contrary to the provisions of the Act.[156]

· The **Federal Fair Housing Act.**[157] This Act prohibits discrimination in housing based on race, ethnicity, national origin, religion, gender or disability. This Act has been used to challenge local government land use decisions which interfere with the development of low income housing or housing for mentally retarded or other disabled person.[158]

· The **Telecommunications Act of 1996**.[159] Among other things, this Act affects the ability of local governments to regulate the location of wireless telecommunications facilities, including towers and dishes. For example, local land use regulations for these facilities cannot discriminate between providers, and cannot be based on health effects of radio frequency emissions. A denial for such a facility must be in writing and supported by substantial evidence in a written record. Providers also have an expedited right of review.[160] Besides the risk that its decision will be reversed, local decision makers could be subject to §1983 liability, though the law is unsettled on this issue.[161]

· **Federal Antitrust Liability**. The **Sherman Antitrust Act** and later amendments to federal antitrust law[162] prohibit acts to monopolize markets or restrain trade, or to conspire to do these things. While local governments enjoy several protections against antitrust liability,[163] and few successful cases against zoning officials have been reported, the potential liability should still be considered. For example, a credible case exists where a zoning board acts in concert with a major developer to "zone out" its competitors.[164]

· The **Endangered Species Act** (ESA).[165] Designed to prevent the taking of endangered and threatened species, the ESA can impose additional requirements on land use development. For example, the United States Supreme Court has upheld regulations stating that the Act's prohibition on the taking of endangered species includes private activities that result in significant habitat modification.[166] This may have the effect of prohibiting uses that might otherwise be permitted under local zoning regulations.

Land use liability under state law

Colorado laws provide a variety of methods to challenge local land use decisions. This section briefly describes the more common methods, which may be grouped as challenges based on court rules, the Colorado Constitution and state statutes, and the common law.

Challenges pursuant to Colorado court rules

Under the Colorado Rules of Civil Procedure (C.R.C.P.), property owners may seek court review of a quasi-judicial function in what is called a certiorari action. They may also seek declaratory relief and may seek to compel the performance of a ministerial act. These types of actions pursuant to court rule are discussed in turn.

· **Certiorari Review Under C.R.C.P. 106(4)(a).** An action for certiorari review may be brought to review the decision of any governmental body or officer "exercising judicial or quasi-judicial functions."[167] Legislative and administrative acts are not subject to certiorari review under C.R.C.P. 106(a)(4).[168] The court's review in a certiorari proceeding is limited to a determination of whether the body or officer exceeded its jurisdiction or abused its discretion, and to cases where the law provides no other plain, speedy or adequate remedy.[169]

Under this standard courts give deference to the decision maker, upholding its decision when there is "any competent evidence" in the record to support it.[170] An action for certiorari review must be brought within 30 days after the final decision.[171] Also, the Colorado Supreme Court has held that an action for certiorari review is the exclusive method to obtain review of the merits of a quasi-judicial decision.[172] Therefore, certiorari claims can be common and quick to follow a controversial decision.

If a claimant is successful in a certiorari claim, the court will reverse the local government's decision and remand the case. However, damages are not available under

certiorari review, and attorneys' fees are rarely awarded. Therefore, claimants seeking damages or attorneys fees often will add a §1983 claim or similar claim in their lawsuit.

· **Declaratory Relief.** Under C.R.C.P. 57, persons may seek a declaratory judgment regarding their rights and obligations under, among other things, a statute, local ordinance or contract. This is a common method for challenging a legislative act, often on the grounds that the act is unconstitutional. For example, actions have been brought requesting that sign ordinances be declared unconstitutional as violations of free speech rights.[173] Declaratory actions can also be used to determine rights under annexation and development agreements,[174] and these types of cases are likely to become increasingly common as voluntary agreements become an increasingly common method of land use control.[175]

· **Mandamus.** Under C.R.C.P. 106(a)(2), a person may seek a court order compelling an official to comply with a clear legal obligation owed to the claimant. This type of action is one for mandamus (literally "we command.") Mandamus is not available when the official's action involves some exercise of discretion. Rather, a court will only order an official to perform a non-discretionary action which the law requires the official to perform by virtue of an office, trust or station.[176] Unlike certiorari review, a judgment for mandamus shall include any damages sustained.

The most common land use claims for mandamus center on the issuance of building permits or the approval of subdivision plats. In the first instance, the general view is that the building official must issue a building permit if the property use is lawful and the proposal meets all requirements of the building code.[177] In the second instance, at least one Colorado case has said that the approval of a final subdivision plat is mandatory if the proposal meets all of the technical criteria of the subdivision regulations.[178]

State constitutional and statutory claims

As noted above, the Colorado Constitution contains guarantees of just compensation, due process, and equal protection which are similar to the U.S. Constitution. These guarantees may serve as bases for state claims.

Additionally, Colorado has a number of statutes that may serve as the bases of claims challenging a land use decision. These include but are not limited to state civil rights laws and the Colorado Vested Property Rights Act,[179] the latter of which is in addition to the long-standing rules judges have made concerning the common law vesting of development rights. The Colorado legislature has also codified certain common-law takings principles, as well as principles related to the setting of impact fees. The takings statute creates an alternative method to challenge conditions and exactions imposed on development, and places the burden on the government to establish that any land dedication or payment requirement meets legal standards.[180] There are also a number of statutory restrictions on the ability of local governments to regulate specific types of land uses, such as oil, gas and electric facilities,[181] and group homes.[182]

State common law claims

As noted in Chapter 1, the Colorado Governmental Immunity Act (the "Act") provides public officials with significant protections against tort liability. The areas in which governmental immunity has been waived generally have little relationship to land use regulation. Nonetheless, the Act does not protect an official whose conduct was willful and wanton or outside the scope of the official's employment. In these situations, officials — from the planning official to the public entity's attorney — are unprotected against state tort claims seeking to recover money damages.[183]

Apart from tort claims, the Colorado courts have recognized other claims of concern in the area of land use regulation. For example, Colorado recognizes a common law theory of vested rights. Under this rule, a property owner has the right to develop property free from subsequent regulation once the owner has in good faith relied to its detriment on a government action – which typically has meant actual construction under an issued building permit.[184]

In situations where the owner has gone this far in developing property, courts have found it unfair to subject them to new regulations.

Another area of potential liability is a claim for equitable estoppel. When applicable, equitable estoppel requires a local government to follow through on a previous representation that a party has reasonably relied upon to its detriment.[185] Where the vested rights theory would require action taken in reliance on an issued permit, equitable estoppel may be used to hold a local government to a representation regarding its land use policy, even if the property owner had no permit, and even if the local government later decides to change its policy.[186]

Finally, a local government may be liable for breach of contract, and contract and quasi-contract claims are likely to increase as land use agreements grow in popularity.[187] Therefore, officials making land use decisions must understand and comply with their obligations under annexation, subdivision and development agreements. Similarly, while land use permits and licenses are generally not contracts, planning and building officials must understand this distinction and avoid both permit forms and actions that appear to promise the issuance of a permit as a matter of contract.[188]

Voter control of the land use process: initiative and referendum

Finally, but perhaps most importantly, public officials must be aware of the public's role in the land use process. While much of the quasi-judicial process is focused on affording due process to the applicant, the public plays an equally important role. Statutes regulating zoning, PUDs and subdivisions all require ample notice to neighbors and other affected parties, and these parties often have standing to challenge a rezoning, site plan approval, or granting of a variance.

By initiative or referendum, the voters can also assume control of the land use regulatory process. Except for emergency measures, any legislative act – such as a general rezoning or an annexation ordinance – may be referred to the voters if a petition is filed for the same.[189] If a complying petition is presented, the governing body's options are to undo the action, or to refer the measure to a vote.[190] Irrespective of action by the governing body, the voters may also initiate land use controls.[191] It is possible for an initiative to give the voters the final say on a land use decision that would otherwise be left to the governing body.[192]

Ways to avoid land use liability

Having surveyed the potential liabilities in the area of land use regulation, a common question among planning officials is "How do we avoid a lawsuit?" No action, no matter how prudent, can fully insulate a local government from being sued. However, prudent action can certainly deter litigation and help avoid or reduce liability. The following are some methods to reduce the risks of land use liability:

· **Always Provide a Full and Fair Hearing**. To landowners and public officials alike, the land use process can seem deliberate at best, interminable at worst. However, the process should never be short-circuited in hopes of short-term results. The decision-making body or official should always provide a full and fair hearing, with proper notice. For quasi-judicial actions, decision makers must be impartial and must not prejudge the matter. They must not engage in ex parte (outside the hearing) contacts or participate in the discussion or decision if they have a conflict of interest.

If there is any question about the validity of notice given prior to any action, it is better to re-set a matter for a later date and correct any deficiencies. At the hearing, allow persons ample time to speak, and prohibit testimony only if plainly irrelevant or redundant. If there is a desire to revise or revisit a land use decision, provide full notice to all parties before doing so, and carefully consider the rights of all parties.

· **Do Your Homework**. Prior to adopting any land use regulation, several questions should be asked. First, is there authority to do this? Check state statutes and where applicable your own charter, to answer this question. If the answer is not clear — and to simply confirm what you believe to be authorized — consult with your local government attorney.

Second, is this regulation fair? In takings parlance, fairness requires that a regulation demanding something of a property owner be based upon an "essential nexus" between the type of demand and the type of impact being regulated.[193] There must also be a logical relationship between the amount of the exaction and the amount of impact the exaction is intended to offset.[194] These relationships should be documented, explained, and made part of the record. If the regulation makes distinctions between different classes of persons, document why those distinctions are reasonable and how they help further a legitimate goal to be achieved.

Third, is this regulation specific enough? If the regulation is to provide standards for a decision, those standards must be sufficiently specific to allow persons to determine what is required of them. A reviewing court must also be able to make sense of them.[195] If the regulation has no standards — and decisions are left to the whim of the decision maker — the regulation and decisions will likely be declared invalid.

In quasi-judicial proceedings, the homework includes preparation of a thorough staff report analyzing the application against the standards that apply. If a condition of approval is recommended by staff in advance, or is suggested at the hearing, ensure the condition is clear, authorized by law, and made a part of the record. If there is uncertainty on any of these points, take a recess or continue the matter in order to reach a firm conclusion. Last-minute conditions should not be viewed merely as bargaining tools or methods to push a clearly inadequate application to the finish line. Unlawful conditions are subject to §1983 claims certiorari review, and the procedures set forth in C.R.S. §29-20-204.

· **Make a Record.** Every land use decision should be documented. If the action is quasi-judicial, the record of the decision maker should include specific written findings that support the decision being made. If written findings are not available at the conclusion of the hearing, continue that matter if possible, so that written findings may be prepared and brought back for review and action. Maps, reports and any other documents or evidence presented at a quasi-judicial hearing should be clearly marked and preserved in their entirety.

Legislative and administrative actions should also be well documented. Ordinances and other legislative acts should be supported by findings, and legislators should be provided copies of studies, reports and other data that are pertinent to the action being taken. Drafts of general ordinances should be preserved. An action taken at the administrative level should be supported by a complete and accurate file. Administrative personnel should keep accurate notes of conversations and meetings.

· **Understand and Follow Your Own Regulations.** The state laws authorizing local land use regulation are often very broad, and details are often found only in local regulations. All planning officials should know and follow the local regulations, and these regulations should be consistently applied. All staff members should keep current on any changes to the regulations. Similarly, written regulations should reflect current policy and be updated as necessary. If there is disagreement or uncertainty about how a regulation is to be applied, consult with your local government attorney.

· **Avoid Improper Conduct.** As explained in other chapters, the protections and against individual liability can be lost when conduct is willful, wanton, malicious, or contrary to the clear rights of another party. In the land use arena, decisions based on emotion, irrelevant criteria and personal interests must be avoided. Officials with a conflict of interest or bias should recuse themselves; further, they should not participate in the hearing or attempt to influence others.[196] Supervisors in the planning and building departments should periodically follow-up with those they supervise to make sure that decisions and instructions are being properly implemented, and that those they supervise are trained to properly handle difficult situations.

· **Take a Breather if Necessary.** If faced with rapid growth and development, a local government may have little time or resources to update or adjust its regulations and

processes, even if sorely needed. Further, a crush of on-going work may lead to inadequate review, unintended departures from set procedures, and improper or unsupported decisions.

A local government in these situations may consider establishing a moratorium on certain types of land use actions. Temporary moratoria of reasonable duration, which are enacted in good faith without discrimination, have been upheld as reasonable methods to bring about effective decision making.[197] These breaks can provide needed time to study and consider new regulations. However, a moratorium must be adopted by proper procedures,[198] and should not be viewed as a method for imposing new regulations upon developments which already enjoy vested rights.

· **Provide Opportunities for Appeal.** Another method to reduce the risk of litigation is to include in your land use code opportunities for appeal or reconsideration. While these procedures may lengthen agendas and increase work loads, they also provide internal mechanisms to take a second look at a decision before litigation is launched. For non-home rule municipalities, an opportunity for appeal must be provided if the governing body has delegated its functions to a subordinate body.[199] In other situations, providing a right of appeal or reconsideration, upon narrow and specific grounds, may on that (hopefully) infrequent occasion allow the local government to correct its mistake – and avoid land use liability – before a court takes the opportunity to do so.[200]

Chapter Five:
Providing a fair hearing

Introduction

Federal civil rights[201] lawsuits (discussed in greater detail in Chapter 2) are among the most expensive faced by local governments and their officials. The expense includes the cost of defense, any judgment awarded to the plaintiff, and – if the plaintiff prevails on any significant issue in the case – the court may award the plaintiff's attorney fees.[202] Judgments and attorney fees are not limited to any maximum amount; the Colorado Governmental Immunity Act and its $150,000/$600,000 limits likely do not apply.[203]

Violation of "due process" in a notice or hearing is a frequent federal civil rights complaint against local governments. Deciding when and what "process" is "due" requires advice from legal counsel. The following is a general introduction only.

Who should be concerned about providing a fair hearing?

Any public official, or local government body, potentially will be involved at some point in a proceeding that triggers due process requirements. The following, to name a few, should know how to provide procedural due process:

- City councils, boards of trustees, and other governing bodies;
- Planning commissions;
- Boards of adjustment;
- Career service commissions and personnel boards;
- Liquor licensing authorities; and
- Managers, clerks, fire chiefs, police chiefs, personnel directors and finance directors.

When are notice and a fair hearing (procedural due process) required?

Under the United States Constitution, no local government may "deprive any person of life, liberty, or property without due process of law. . . ."[204] In order to satisfy the procedural due process requirement, an individual must be given notice and an opportunity to be heard. A violation provides a basis for a claim under the federal civil rights statutes, as discussed in Chapter 2. In order to bring a claim, a "life," "liberty" or "property" interest must exist. Any doubt as to whether such an interest exists should be settled by providing due process.

Generally, quasi-judicial proceedings must be conducted in accordance with procedural due process, as guaranteed by the Colorado and United States Constitutions.[205] That means adequate prior notice and an opportunity to be heard; and basic fairness in procedure, including a neutral and impartial decision maker.[206]

Failure to provide procedural due process in a quasi-judicial proceeding may lead to claims against the local government including, among others, violation of 42 U.S.C. § 1983, discussed in Chapter 2. However, the Colorado Supreme Court has confirmed that public officials cannot be sued in their individual capacity under § 1983 for actions taken in a quasi-judicial capacity; they are absolutely immune.[207]

According to the Colorado Supreme Court, whenever a local government board or official takes action in a quasi-judicial capacity, procedural due process is required.[208] Thus, in order to provide a fair hearing, the official must understand the concept of what a quasi-judicial proceeding is, and what process is due in the context of that proceeding.

What is a "quasi-judicial" proceeding?

The actions of local governments can generally be categorized as "quasi-judicial," "legislative" or "administrative" in nature. Due process notice and hearing are not generally required for legislative actions.[209] Examples of local government actions that qualify as quasi-judicial (requiring due process notice and hearing) and legislative or administrative (not requiring due process notice and hearing) include the following:

- **Quasi-Judicial:**
  - Action on a development plan.[210]
  - Rezoning decisions.[211]
  - Individual license or permit decisions, such as liquor and beer licensing and massage parlor licensing decisions.[212]
  - Various career service or civil service commission decisions or decisions by other public officials on personnel terminations (and perhaps other significant personnel disciplinary decisions), at least where the employee has a property interest in employment.[213]
  - A decision on a county-planned unit development sketch plan.[214]
  - Grant or denial of a zoning variance by a board of adjustment.[215]
  - Apportioning the cost of special improvements to properties within a special improvement district.[216]
  - Grant or denial of a special use permit or special review use.[217]
  - Tax assessment.[218]
  - Approval or denial of a subdivision plat.[219]
- **Legislative:**
  - Adoption of a non-binding land use plan or master plan.[220]
  - Adoption of an amendment to a mountain view ordinance, extending building height restrictions to several hundred lots.[221]
  - Setting of salaries and establishment of prevailing rates as an incident to fixing salaries.[222]
  - Vacating a roadway.[223]
- **Administrative:**
  - Amendment of a lease agreement.[224]
  - City's decision to exterminate prairie dogs in a City park.[225]

However, not all actions of local governments fall neatly into one category or another. For example, rezoning decisions are quasi-judicial for the purpose of judicial review, but are legislative for the purpose of initiative and referendum.[226]

What if it is unclear whether the matter is quasi-judicial?

Ask your public entity attorney for guidance. Colorado courts have developed some general tests to help determine whether particular actions are quasi-judicial, legislative or administrative in nature. The general distinctions between quasi-judicial and legislative actions were described by the Colorado Supreme Court as follows:

> Legislative action is usually reflective of some public policy relating to matters of a permanent or general character, is not normally restricted to identifiable persons or groups, and is usually prospective in nature.
>
> …

> Quasi-judicial action, on the other hand, generally involves a determination of the rights, duties or obligations of specific individuals on the basis of the application of presently existing legal standards or policy considerations to past or present facts developed at a hearing conducted for the purpose of resolving the particular interests in question. … If a statute or ordinance authorizes the exercise of quasi-judicial authority but does not provide for notice and hearing, these basic requirements may properly be implied as a matter of fundamental fairness to those persons whose protected interests are likely to be affected by the particular government decision.
> …
> [I]t is the nature of the decision rendered by the governmental body, and not the existence of a legislative scheme mandating notice and hearing, that is the predominant consideration in determining whether the governmental body has exercised a quasi-judicial function in rendering its decision.[227]

What "process" is "due" to ensure due process requirements are met?

"The essence of due process is fundamental fairness," and includes adequate advance notice and an opportunity to be heard.[228] Specific notice and hearing procedures required to afford fairness vary depending upon "the type of proceeding involved and the interests at stake."[229]

Notice + Hearing = Procedural due process

· **Notice** requirements may vary depending upon the nature of the case; therefore, the local government should obtain the advice of its attorney when any question exists as to the adequacy of the procedure.

Despite the fact that the specific nature of a case is a factor in determining the adequacy of notice, there should be – at a minimum – compliance with statutory, charter, or ordinance notice provisions.[230] Some general rules which may be helpful in reducing the risk of liability for failure to provide adequate notice include the following:

- Notice must reasonably describe the subject matter of the hearing, any charges to be considered, and the action contemplated;
- Notice must be given to all persons whose protected interests are likely to be affected by the decision; and
- Notice must convey information sufficient to allow persons a reasonable opportunity to prepare for the hearing.[231]

Be sure to identify the date, time, location, purpose of, and entity holding the hearing. Consider providing copies of rules governing the hearing and identifying whom to contact for additional information and how they may be contacted. Have standard notice forms prepared and periodically reviewed by your attorney for recurring actions.

· **Hearing** procedures required by due process also vary depending on the nature of the case. Due process requires some kind of hearing appropriate to the nature of the case; therefore, it is advisable to obtain legal advice whenever any question exists concerning the adequacy of hearing procedures.

Some local governments have adopted standard rules applicable to all of their quasi-judicial hearing matters. The following suggestions provide some practical and legal procedures to those serving on hearing panels or as a hearing officer, to help avoid due process challenges:

· **Before the Hearing:**

- Have written rules of procedure, which afford minimum due process protections, drafted by or with the assistance of an attorney.

- The rules of procedure should include such matters as the order of testimony, right of cross-examination, presence of counsel, and rules of evidence to be followed.[232]
- Periodically review and revise the procedures as necessary or appropriate.[233]
- Be sure that you, as the hearing officer or member of the hearing panel, understand the rules of procedure.
- Have an opening script, prepared by your attorney, describing the purpose of the hearing, establishing any rules and the order to be followed, identifying the parties and hearing panel members, and so forth. One example of such a script is provided in Appendix A.
- Request a specific response on the record from the parties on matters that may become legal issues. For example, ask:
    - Are you prepared to proceed?
    - Do you have any objection to the procedures to be followed in this hearing as described by me?
    - Do you object to the participation of _____ in this hearing?
    - Do you object to an extension of time to _____ for _____?
- Try to obtain the consent of all parties, on the record, to any variation from standard procedure; acquiescence may help avoid future challenge.
- Set the stage for the hearing. A courtroom set-up helps maintain control.

- **During the Hearing:**
    - Follow the rules of procedure.
    - Record the hearing by reliable electronic means or a court reporter. Test any recorder periodically to make sure it is working.
    - Swear in all the witnesses (not the attorneys). Have a standard oath available to read.
    - Require that all comments be directed to the hearing panel or officer, that individuals speak only when recognized, and that individuals and hearing panel members are referred to formally (Mr., Mrs., Ms., Councilmember, or Trustee). Formality helps retain control.
    - Exercise control over repetitive and irrelevant matters, and prevent personal attacks and references.
    - Where one party has on objection, permit the other party to respond before ruling on the objection.
    - Provide all parties adequate time to present their sides and to respond to the other side.
    - Do not permit general public comment before the adjudicatory panel or officer on the matter at issue prior to a decision.[234]
- **After the Hearing:**
    - Have a formal conclusion to the hearing, including a closing script where appropriate.
    - Whenever possible, postpone the decision to permit drafting of a written decision meeting all legal requirements, reflecting factual findings supported by the evidence, and reaching supportable legal conclusions with reasons

articulated for the decision.[235] Obtain the advice of your attorney when drafting the decision.

· Do not reopen a closed hearing and take further evidence unless all parties are notified in advance and are given an opportunity to be heard.[236] Be certain reopening is legally authorized before proceeding.

· Use executive sessions only to discuss evidence presented at a hearing, and only if your attorney advises that such sessions are permitted. Make no final decisions, and take no "straw votes" in any session closed to the public unless your attorney advises that such action is legal.[237] Limit persons present at any such sessions to the hearing panel and its attorney.[238]

· Consider only evidence presented at the hearing.

· Provide a copy of the written decision to the parties.

· **Always:**

· Permit the parties to be represented by counsel.

· Be sure the local government's attorney does not both prosecute and advise the hearing panel or officer.[239]

· Be impartial and maintain the appearance of your impartiality.[240] Avoid conversations or contacts with counsel or witnesses for only one side, or one of the parties, while the matter is pending;[241] do not prejudge the matter;[242] have no financial, personal, or private interest in the matter or outcome;[243] avoid participation in prior decision-making on the matter;[244] and avoid contact with the parties or their counsel prior to the hearing, except through officially-approved processes. Impartiality is discussed in further detail below.

Why is impartiality so important?

The Colorado Court of Appeals summed up the importance of impartiality succinctly as follows:

> It is fundamental to the vitality of our judicial system that litigants believe in the fairness of the process. An unfavorable decision perceived to be the result of an impartial consideration may be bearable, but an unfavorable decision tainted by even the appearance of partiality cannot be condoned.[245]

Courts presume integrity, honesty and impartiality by those serving in a quasi-judicial capacity. However, this presumption can be overcome if a party shows that a decision-maker has a personal, financial or official stake in the decision evidencing a conflict of interest.[246]

Persons conducting quasi-judicial proceedings are treated as the equivalent of judges and, therefore, must be impartial and maintain the appearance of impartiality.[247] Guidance on when impartiality does or does not exist can, and perhaps should, be obtained from rules applicable to judges, such as the Colorado Rules of Judicial Discipline, the Colorado Code of Judicial Conduct, Rule 97 of the Colorado Rules of Civil Procedure (change of judge), C.R.S. §13-1-122 (when judge shall not act except by consent), and related cases.

How is impartiality (or the appearance of impartiality) lost?

Impartiality, or the appearance of impartiality, may be lost by:

· Having *ex parte* (outside the hearing) conversations with counsel or witnesses for only one side while the matter is pending.[248]

· Having participated in prior decision-making regarding the matter under review.[249]

· Depending upon the circumstances, investigating a matter prior to the hearing.[250]

· Having a financial interest in the matter, a party, or the outcome of the proceedings. Conflicts of interest arising out of financial and business relationships to the subject matter of the hearing often lead to questions of integrity, honesty and impartiality.[251]

· Having prejudged the matter.[252]

· Being, or being related to, a party, an officer, director, or trustee of a party, a lawyer in a proceeding, a material witness in the proceeding, or being known to have an interest that would be substantially affected by the outcome.[253]

· Being an employee of one of the parties.[254]

What should be done if an actual or apparent conflict exists?

If an individual feels he or she can be impartial despite appearances, it is recommended that the advice of the local government's attorney be obtained. The safest approach, next to the individual disqualifying himself or herself, is for that individual to disclose the matter of concern to the parties on the hearing record at the beginning of the hearing, state that he or she believes they can be impartial in reaching a decision, and ask the parties if they object to or will consent to his or her participation in the hearing. Giving consent, or the failure to object, by a party may result in waiver of the objection.[255]

Similarly, if it appears that all members of the hearing panel may be biased, the advice of the local government's attorney must be obtained. The "rule of necessity" might apply; that is, disqualification will not be permitted to destroy the only entity with the power to act.[256] An option might be retaining an independent hearing officer to hold a hearing, determine the facts, and make recommendations, with the final decision retained by the "biased" entity.

Endnotes

1. The Colorado Governmental Immunity Act is codified at C.R.S. §24-10-101 through -120.
2. C.R.S. §24-10-105, §24-10-102.
3. C.R.S. §24-10-102.
4. Martinez v. County of El Paso, 673 F.Supp. 1030 (D. Colo. 1987); Chacon v. Zahorka, 663 F. Supp. 90 (D. Colo. 1987). See Felder v. Casey, 487 U.S. 131 (1988); Martinez v. California, 444 U.S. 277 (1980).
5. C.R.S. §24-10-107.
6. C.R.S. §24-10-103(5).
7. DeLong v. City and County of Denver, 195 Colo. 27, 576 P.2d 537 (1978).
8. Lipira v. City of Thornton, 41 Colo. App. 401, 585 P.2d 932 (1978).
9. C.R.S. §24-10-103(4)(a).
10. C.R.S. §24-10-103(4)(a).
11. C.R.S. §24-10-118.
12. C.R.S. §13-21-102(b) (applicable to the award of punitive or exemplary damages generally).
13. C.R.S. §24-10-110(2).
14. C.R.S. §24-10-110(1.5)(b).
15. C.R.S. §24-10-110(2).
16. C.R.S. §24-10-109, §24-10-118(1)(a).
17. C.R.S. §24-10-109(1).
18. C.R.S. §24-10-114(1), §24-10-118(1)(b). These are the limits as of the date of this publication.
19. C.R.S. §24-10-118(1).
20. C.R.S. §24-10-106(1), §24-10-118(2).
21 Corsentino v. Cordova, 4 P.3d 1082 (Colo. 2000); see also Tidwell v. Denver, 83 P.3d 75 (Colo. 2003).
22. C.R.S. §24-10-106.
23. C.R.S. §24-10-110(1)(a).
24. C.R.S. §24-10-110(1)(b).
25. C.R.S. §24-10-110(2).
26. C.R.S. §24-10-110(1)(b), §24-10-110(1.5)(b).
27. C.R.S. §24-10-110(1.5)(a).
28. C.R.S. §24-10-110(2).
29. C.R.S. §24-10-110(2).
30. C.R.S. §24-10-110(4).
31. C.R.S. §24-10-104, §24-10-114(2).
32. Id.
33. C.R.S. §13-21-102.
34. Id.
35. C.R.S. §24-10-114(4).
36. C.R.S. §24-10-118(1)(c).
37. C.R.S. §24-10-110(5)(c).
38. C.R.S. §24-10-118(5).
39. John C. Pine, Public Official Liability: Decisions in Federal Court, Volume 2, No. 3.
40. Maine v. Thiboutot, 448 U.S. 1, 7 (1980).
41. Monell v. Dept. of Social Services, 436 U.S. 658, 658 (1978).
42. Id. at 690.
43. Id.at90.
44. Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-168, 90 S.Ct. 1598, 1613-1614, 26 L.Ed.2d 142 (1970).
45. Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981).
46. Oklahoma City v. Tuttle, 105 S.Ct. 2427, 2429 (1985).
47. Pembauer v. City of Cincinnati, 475 U.S. 469 (1986).
48. Bryan County v. Brown, 117 S.Ct. 1382, 1388 (1997).
49. Id. at 1392.
50. City of Canton v. Harris, 489 U.S. 378, 389 (1989).
51. Kentucky v. Graham, 473 U.S. 159, 166 (1985); See Wm. ReMine, Civil Suits for Civil Rights: A Primer on §1983, 26 Colo. Law 5 (Nov. 1997).
52. Brandon v. Holt, 105 S.Ct. 873, 878 (1985).
53. John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, 84 Virginia L. Rev 47 (1998).
54. Bogan v. Scott-Harris, 523 U.S. 44, 54 118 S.Ct. 966, 968 (1998)(legislative immunity); Pierson v. Ray, 386 U.S. 547, 553 (1967) (judicial immunity); Imbler v. Pachtman, 424 U.S. 409, 430 (1976) (prosecutorial immunity).
55. Kamplain v. Curry County Board of Comm'rs, 159 F.3d 1248, 1252 (10th Cir. 1998).
56. Hunter v. Bryant, 502 U.S. 224, 229 (1991).

57. Glass v. Pfeffer, 849 F.2d 1261 (10th Cir. 1988).
58. ReMine, supra.
59. Rogers v. Board of Trustees of the Town of Fraser, 859 P.2d 284 (Colo. App. 1993).
60. Memphis Community School Dist. V. Stachura, 477 U.S. 299, 3111, 106 S.Ct. 2537, 2545 (1986).
61. Smith v. Wade, 461 U.S. 30, 51 (1983).
62. See, e.g., Garcetti v. Ceballos, 126 S.Ct. 1951 (2006); See, e.g., Connick v. Meyers, 461 U.S. 138, 142, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).
63. Cotter v. Bd. Of Trustees of University of Northern Colorado, 971 P.2d 687 (Colo. App. 1998).
64. See, e.g., Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (building permit conditioned upon granting of easement); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) (construction proposal denied on grounds that it failed to comply with historic preservation ordinance).
65. Graham v. Connor, 109 S.Ct. 1865 (1989); Jiron v. City of Lakewood, 392 F.3d 410 (10th Cir. 2004).
66. City of Canton v. Harris, 489 U.S. 378 (1989); Brown v. Gray, 227 F.3d 1278 (10th Cir. 2000).
67. Hardeman v. City of Albuquerque, 377 F.3d 1106 (10th Cir. 2004).
68. Trimble v. City and County of Denver, 697 P.2d 716 (Colo. 1985).
69. C.R.S. §24-10-101 et seq.
70. As used throughout this chapter, reference to "public officials" is intended to include public employees.
71. C.R.S. §24-10-109 and §24-10-118(1).
72. C.R.S. §24-10-114 and §24-10-118(1). The Colorado Supreme Court has unanimously upheld the constitutionality of the monetary limits against an equal protection challenge. Lee v. Colorado Department of Health, 718 P.2d 221 (Colo. 1986).
73. C.R.S. §24-10-110.
74. C.R.S. §24-10-110.
75. C.R.S. §24-10-103(4).
76. C.R.S. §24-10-110 and §24-10-118.
77. C.R.S. §24-10-110 and §24-10-118.
78. C.R.S. §24-10-110.
79. C.R.S. §24-10-110(2).
80. C.R.S. §24-10-110(2).
81. C.R.S. §24-10-114(4).
82. C.R.S. §24-10-119 seeks to extend the Act to federal claims brought in a state court having jurisdiction over the claim, if the action lies in or could lie in tort. The viability of this section is doubtful, at least as to claims under 42 U.S.C. §1983. Howlett v. Rose, 496 U.S. 356, 110 S.Ct. 2430 (1990). For cases addressing application of the Act's notice requirement to federal claims, see Deason v. Lewis, 706 P.2d 1283 (Colo. App. 1985); and Miami Int'l Realty Co. v. Town of Mt. Crested Butte, 579 F. Supp. 68 (D.C. Colo. 1984).
83. C.R.S. §24-10-110.
84. 15 U.S.C. §§34, 35 (1984).
85. Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950).
86. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982).
87. See Chapter 3.
88. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982).
89. Trimble v. City and County of Denver, supra note 3.
90. Id.
91. Id. The Colorado Supreme Court has recognized that members of the state parole board are entitled to absolute immunity when exercising quasi-judicial functions. State of Colorado v. Mason, 724 P.2d 1289 (Colo. 1986).
92. Public Officials Liability Insurance: Understanding the Market, by James A. Swanke Jr., at page 41.
93. Public Officials Liability Insurance: Understanding the Market, supra note 29, at pages 13 - 14.
94. For example, one policy covers an official, trustee, director, officer, volunteer, or employee of the municipality while "acting within the scope of his duties as such..."
95. Generally, a "claims-made" policy covers only claims actually made during the policy period. In some circumstances an extension of the period for reporting the claim can be purchased. In comparison, an "occurrence" policy covers an occurrence during the policy period regardless of when a claim based on the occurrence is actually filed.
96. Other lists exist. See, e.g., Chapter 15 of Civil Rights Litigation and Attorney Fees Annual Handbook, Vol. 1 (1985), entitled "Avoiding Sec. 1983 Claims: Checklists for Municipal Officials", by John B. Murphy.
97. Under certain circumstances, municipal officials may be held liable for negligently selecting or supervising subordinates or directing or authorizing their wrong. See, e.g., Liber v. Flor, 415 P.2d 332 (Colo. 1966); and cf. Brown v. Reardon, 770 F.2d 896 (10th Cir. 1985).
98. C.R.S. §13-21-102).
[99] Hardeman v. City of Albuquerque, supra note 1.
100. See, e.g., Miller v. City of Mission, Kan., 705 F.2d 36 (10th Cir. 1983).

101. This chapter focuses on reducing the liability of the public official, rather than of the public entity. However, if a public entity wished to reduce its own risk, it might pursue services by independent contractors and require that they indemnify the entity and provide proof of their own insurance.
102. C.R.S. §24-10-103(4).
103. Some policies cover persons with whom the public entity is obligated by virtue of a contract to provide insurance, but only in respect to operations by or on behalf of the public entity. From the public entity's perspective, any such contract should be carefully worded to limit the obligation to the extent of the insurance coverage available.
104. C.R.S. §24-10-103(4).
105. Miller v. City of Mission, Kan., supra note 34.
106. See Moreland v. Board of County Commissioners, 764 P.2d 812 (Colo. 1988).
107. 42 U.S.C. §1988.
108. City of Riverside v. Rivera, 477 U.S. 561 (1986).
109. See, e.g., 42 U.S.C. §§ 1983 and 1988, and 15 U.S.C. §26.
110. C.R.S. §24-10-104 and §24-10-114(2).
111. For example, public funds generally may be expended only for public purposes; and Colorado Constitution, Art. XI, Sections 1 and 3 limit a municipality's authority to pledge its credit, become responsible for debt, contract, or liability of another, or make donations to or in aid of specified persons or entities.
112. C.R.S. §31-23-206.
113. C.R.S. §31-23-214.
114. C.R.S. §31-23-301 et seq.
115. See, e.g., C.R.S. §§31-23-215 (approval of subdivision plats); -304 to -306 (adoption of zoning regulations).
116. C.R.S. §31-23-307.
117. C.R.S. §24-67-101 et seq.
118. C.R.S. §24-65.1-101 et seq. For example, under this article, municipalities may regulate development in mineral resource areas, natural hazard areas, and other "areas of state interest"; and may regulate certain "activities of state interest," such as the siting of airports, water and sewer treatment plants, and other facilities.
119. C.R.S. §31-15-601.
120. C.R.S. §31-12-101 et seq.
121. See, e.g., C.R.S. §§29-20-105 (authorizing and encouraging local governments to cooperate or contract with one another for the purposes of planning or regulating land development); 31-23-212 and -213 (authorizing adoption and enforcement of major street plans outside of municipal boundaries).
122. Colo. Const. art. XX.
123. Margolis v. District Court, 638 P.2d 297 (Colo. 1981). However, a rezoning decision, including approval of a conditional use, will generally be considered a legislative act for purposes of referendum. Id.; Citizens for Quality Growth Petitioners' Committee v. City of Steamboat Springs, 807 P.2d 1197 (Colo. App. 1990).
124. Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village, 757 P.2d 622 (Colo. 1988).
125. Andreatta v. Kuhlman, 600 P.2d 119 (Colo. 1979).
126. Norby v. City of Boulder, 577 P.2d 277 (Colo. 1978).
127. Condiotti v. Board of County Comm'rs of La Plata County, 983 P.2d 184 (Colo. App. 1999)(generally a master plan is merely advisory but can become legislative when adopted by a legislative action that requires landowners comply with master plan provisions in pursuing development proposals).
128. C.R.S. §43-2-301 et seq. sets forth the procedures for vacation of roadways. If the roadway has been established as a municipal street, it shall not be vacated by any method other than an ordinance.
129. Town of Superior v. Midcities Co., 933 P.2d 596, 600-01 (Colo. 1997).
130. Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687 (Colo. 2001)(setting of sewer plant investment fees).
131. Russell v. City of Central, 892 P.2d 432 (Colo. App. 1995).
132. For example, published notice must be given prior to adopting or amending a master plan or zoning regulations. C.R.S. §§31-23-208, -304. Documents vacating a roadway must be recorded with Clerk and Recorder of the County where the road is located. C.R.S. §§43-2-303(2)(f), 43-1-202.7. Notice of annexation hearings must be published at least four times. C.R.S. §31-12-108.
133. Sherman v. City of Colorado Springs, 680 P.2d 1302 (Colo. App. 1983).
134. Mahnke v. Coughenour, 458 P.2d 747 (Colo. 1969).
135. The statute states in pertinent part that "[e]very person who, under color of any statute, ordinance, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injury in action at law, suit in equity, or other proceeding for redress."
136. U.S. const. amend. XIV, §1.
137. The United States Supreme Court in 1978 ruled that municipalities could be sued under Section 1983. Monell v. Department of Social Services, 436 U.S. 158 (1978).
138. U.S. Const. amend. V. The Colorado Constitution contains a similar provision stating that "private property shall not be taken or damaged, for public or private use, without just compensation." Colo. Const. art. II, §15.

139. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
140. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Animas Valley Sand and Gravel, Inc. v. Board of County Comm'rs of La Plata County, 38 P.3d 59 (Colo. 2001).
141. First English Evangelical Lutheran Church v. County of Los Angeles, 462 U.S. 304 (1987).
142. Dolan v. City of Tigard, 512 U.S. 374 (1994)(dispute over conditions of approval requiring dedication of pedestrian and bike path, and dedication of approximately 10 percent of a lot for greenbelt).
143. Ehrlich v. City of Culver City, 12 Cal. 4th 854, 911 P.2d 429, 50 Cal. Rptr. 2d. 242 (1996).
144. 42 U.S.C. §1988.
145. U.S. Const. amend V.
146. Sundheim v. Board of County Comm'rs of Douglas County, 904 P.2d 1337, 1348 (Colo. App. 1995) aff'd 926 P.2d 545 (Colo. 1997).
147. Sundheim, supra, 904 P.2d at 1345.
148. See Colorado Manufactured Housing Ass'n v. City of Salida, 977 F. Supp. 1080 (D. Colo. 1997).
149. U.S. Const. amend. XIV §1. The due process clause of the Colorado Constitution also guarantees a right to equal protection of the laws. Colo. Const. art. II, §25.
150. Colorado Manufactured Housing Ass'n, supra (holding that the restriction of manufactured homes to certain zone districts does not violate equal protection because the restriction was rationally related to legitimate public perceptions about the incompatibility of manufactured and site-built homes, and the impact of manufactured homes on tax base and property values); City of Montrose v. Public Utilities Comm'n, 732 P.2d 1181 (Colo. 1987).
151. U.S. Const. amend I; City of Lakewood v. Colfax Unlimited Ass'n, Inc., 634 P.2d 52 (Colo. 1981)(upholding sign regulations); National Advertising Co. v. Board of Adjustment of City and County of Denver, 800 P.2d 1349 (Colo. App. 1990)(same); Z.J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683 (10th Cir. 1998)(upholding 1500-foot separation requirement and other restrictions on sexually oriented businesses).
152. U.S. Const. amend. I; Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988)(upholding exclusion of church building from an agricultural zone district).
153. U.S. Const. art. I, §8(3)(granting to Congress the power to regulate commerce among the states); Construction Industry Ass'n of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975)(finding that a growth plan allowing a fixed amount of development per year has only an incidental burden on interstate commerce and therefore does not violate the Commerce Clause).
154. 42 U.S.C.A. §2000cc.
155. Id. at §2000cc(a)(1).
156. See, e.g., Sts. Constantine and Helen Greek Orthodox Church v. City of New Berlin, 396 F.3d. 895 (7th Cir. 2005)(finding violation of RLUIPA where City denied PUD plan to operate church).
157. 42 U.S.C.A. §§3601-3631.
158. See, e.g., Hovsons, Inc. v. Township of Brick, 89 F.3d 1096 (3rd. Cir. 1996)(where alternative locations were not adequate, court found statute was violated when a township refused to grant variance to allow a nursing home in a particular zone district). A Colorado statute also prohibits municipalities from "zoning out" certain types of group homes for the aged, mentally ill, and developmentally disabled. C.R.S. §31-23-303.
159. Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §151 et seq. and elsewhere in the United States Code).
160. 47 U.S.C.A. §332(c)(7).
161. See Kenneth S. Fellman, The Right of Wireless Providers to Sue Zoning Authorities Under § 1983, 28 Colo. Lawyer No. 3, p. 77 (March 1999).
162. 15 U.S.C.A. §§1-7.
163. Local governments enjoy a "state action" immunity from antitrust liability in cases where state law evinces a clear intent to displace competition. Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985). The federal law also provides specific limits on recovery against local governments and their officials. 15 U.S.C.A. §§34-36.
164. Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1982).
165. 16 U.S.C. §§1531-1544.
166. Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 115 S.Ct. 2407 (1995).
167. C.R.C.P. 106(4)(a).
168. Though annexation is a legislative act, the authorized claim for an aggrieved landowner in the annexation area is an action for certiorari review. C.R.S. §31-12-116. See, e.g., Town of Superior v. Midcities Co., 933 P.2d 596 (Colo. 1997)(In case involving annexation dispute, landowner brought a certiorari action, as authorized by statute, and a request for a declaratory judgment that landowner had a right to withdrawal its annexation petition).
169. *Id.*
170. Bauer v. City of Wheat Ridge, 513 P.2d 203 (Colo. 1973).
171. C.R.C.P. 106(b). However, this 30-day time limit does not affect a Section 1983 or other federal claim, which can be brought outside of 30 days and irrespective of a certiorari claim. Board of County Comm'rs of Douglas County v. Sundheim, 926 P. 2d 545 (Colo. 1996). A state statute passed in 1997 attempts to further expedite actions for certiorari review of land use decisions. It requires that the defendant file the record to be reviewed within 30 days after the action is brought. C.R.S. §13-51.5-101 et seq.

172. Snyder v. City of Lakewood, 542 P.2d 371 (Colo. 1975).
173. City of Lakewood v. Colfax Unlimited Ass'n, Inc., 634 P.2d 52 (Colo. 1981)
174. Geralnes B.V. v. City of Greenwood Village, 583 F. Supp. 830 (D.Colo. 1984).
175. Colorado statutes expressly authorize development agreements and annexation agreements. C.R.S. §§24-68-104(2), 31-12-121.
176. C.R.C.P. 106(a)(2).
177. Mahnke v. Coughenour, 458 P.2d 747 (Colo. 1967); Hedgcock v. People ex. rel. Arden Realty & Inv. Co., 57 P.2d 891 (Colo. 1936)(mandamus available to obtain building permit where zoning that precluded the proposed project was unreasonable and arbitrary).
178. Reynolds v. City Council of the City of Longmont, 680 P.2d 1350 (Colo. App. 1984). This case may be of limited authority in those situations where the subdivision regulations contain criteria requiring greater — but not unfettered — exercises of discretion.
179. C.R.S. §24-68-101 et seq. This Act states a property owner may obtain a "vested property right" upon approval of a "site specific development plan." C.R.S. §§24-68-102(4),(5), -103. The right remains vested for three years, or longer if the local government agrees. Id. at §§-103(1), -104(1) & (2). During that time, the City cannot take any zoning or land use actions which would impair the right, as set forth in the plan. Id. at §-105(1). There are certain exceptions, such as actions taken with the consent of the owner, action taken upon payment of just compensation, and application of regulations "which are general in nature and are applicable to all property subject to land use regulation." Id. at §-105(2). Amendments to this act also require municipalities to designate what types of approvals will create a vested right; otherwise the types listed in the act will create a vested right upon approval. See H.B. 99-1280. The amendments also state that an application for a site specific approval is, with limited exceptions, governed by the laws and the regulations in effect at the time the application is submitted. Id.
180. See Senate Bill 99-218 (codified at C.R.S. §29-20-201 et seq.) and Senate Bill 01S2-015 (codified at C.R.S. §29-20-104.5).
181. For example, C.R.S. §29-20-108 provides for appeal to the Public Utilities Commission of certain land use decisions affecting the siting of major electrical or natural gas facilities. Certain areas of local regulation of oil and gas facilities are subject to preemption by state laws and regulations administered by state agencies. Town of Frederick v. North American Resources Co., 60 P.3d 758 (Colo. App. 2002)(finding that local regulations regarding setbacks and certain impacts of oil and gas activities were preempted).
182 C.R.S. §31-23-201(4). See also, City of Northglenn v. Ibarra, 62 P.3d 151 (Colo. 2003)(in case involving other statutes, Court found that state law preempted City ordinance attempting to limit number of adjudicated delinquent children who were registered sex offenders living in foster care homes.
183. See Chapter 3 (discussing personal liability and actions which may result in the loss of legal protections). Further discussion of personal liability can be found in Michael M. Shultz, Personal Liability of Planning and Zoning Officials, Rocky Mountain Land Use Institute Technical Service Report No. 2 (1994).
184. Cline v. City of Boulder, 450 P.2d 335, 338 (Colo. 1969); Witkin Homes, Inc. v. City and County of Denver, 504 P.2d 1121 (Colo. App. 1972). The vested property rights act provides greater protections to the landowner. See note 179 supra.
185. Kohn v. City of Boulder, 919 P.2d 822, 825 (Colo. App. 1995).
186. Id. When the representation is actually a misrepresentation, the claim will be considered a tort claim barred by the Governmental Immunity Act. See Lehman v. City of Louisville, 857 Colo. App. 455 (Colo. App. 1992).
187. A Colorado statute enacted in 1988 expressly authorizes development agreements. C.R.S. §24-68-104(2). Despite concerns that such agreements were a "bargaining away" of the government's zoning authority, court have held that these types of agreements can be proper exercises of the police power to promote the general welfare. See, e.g., Geralnes B.V. v. City of Greenwood Village, 583 F.Supp. 830, 839 (D. Colo. 1984); Ziegler, 4 Rathkopf's Law of Planning & Zoning §50A.02[3][a] (1996). On the other hand, a City cannot contract away its police power to alleviate hazardous traffic conditions, and a contract purporting to do so is void. Crossroads West Ltd. v. Town of Parker, 929 P.2d 62 (Colo. App. 1996).
188. See Patzer v. City of Loveland, 80 P.3d 908 (Colo. App. 2003)(a building permit is not a contract but a license to do what is otherwise prohibited; therefore, the issuance of a building permit does not create a contractual obligation to issue a certificate of occupancy).
189. Colo. Const. art. V, §1((9)(reserving initiative and referendum powers to registered electors of every city, town and municipality); C.R.S. §31-11-101 et seq.
190. C.R.S. §31-11-105.
191. Colo. Const. art. V, §1((9); C.R.S. §31-11-101 et seq.
192. See, e.g. Minch v. Town of Mead, 957 P.2d 1054 (Colo. App. 1998)(upholding an initiated ordinance that requires voter approval of any annexation to the Town).
193. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987). Therefore, if a project will impact a particular view corridor, a sight easement demanded by the government must serve to mitigate that impact. Id.
194. Dolan v. City of Tigard, 512 U.S. 374 (1994). The amount does not need to be determined with mathematical exactitude. However, there must be some type of individualized determination that the amount of the demand — be it in land, money, or required improvements — is roughly proportionate to the amount of the impact. Id. These takings principles are now codified in a Colorado statute. See C.R.S. §29-20-201 et seq.
195. Beaver Meadows v. Board of County Comm'rs of Larimer County, 709 P.2d 928 (Colo. 1985).
196 Both the municipal statutes and the state Code of Ethics set forth the obligations of an official who has a conflict of interest.

See C.R.S. §§ 24-18-109(3)(a); 31-4-404(2).
197. Williams v. City of Central, 907 P.2d 701 (Colo. App. 1995); Droste v. Board of County Comm'rs of Pitkin County, 141 P.3d 852 (Colo. App. 2005) aff'd, 2007 WL 1393757 (upholding County moratorium for adoption of zoning regulations).
198. For example, in Deighton v. City Council of City of Colorado Springs, 902 P.2d 426 (Colo. App. 1994), the court found the City could suspend its adult business ordinance only by enacting another ordinance. Therefore, a temporary moratorium on permits for these businesses could not be done by motion or resolution.
199. C.R.S. §31-23-227(1).
200. In Town of Frisco v. Baum, 90 P.3 845 (Colo. 2004), the Colorado Supreme Court held that a home rule jurisdiction could vest its municipal court with exclusive jurisdiction to hear appeals of certain matters of local concern, which resulted in a finding that a party must file an appeal of approval of a conditional use permit in that Town's municipal court prior to proceeding to district court. Thus, the municipal court may also provide an avenue for appeal, perhaps resolving cases that may be headed for more costly and time-consuming litigation in state or federal courts.
201. See 42 U.S.C. §§ 1983, 1985.
202. 42 U.S.C. § 1988; Farrar v. Hobby, 506 U.S. 103 (1992). The Tenth Circuit Court of Appeals, the federal appellate court that hears appeals from the United States District Court for the District of Colorado, continues to apply the attorney fee provision of 42 U.S.C. § 1988 very liberally, notwithstanding the limitations recognized by the United States Supreme Court in Farrar. See Brandau v. Kansas, 168 F.3d 1179 (10th Cir. 1999).
203. See C.R.S. § 24-10-119; but see Howlett v. Rose 496 U.S. 356 (1990); Felder v. Casey, 487 U.S. 131 (1988).
204. U.S. Const. amend. XIV; Colo. Const. art II, § 25.
205. City and County of Denver v. Eggert, 647 P.2d 216 (Colo. 1982).
206. Id. at 224.; Soon Yee Scott v. City of Englewood, 672 P.2d 225, 227 (Colo. App. 1983).
207. State Bd. of Chiropractic Exam'rs v. Stjernholm, 935 P.2d 959 (Colo. 1997).
208. Schoenberg Farms, Inc. v. People, 444 P.2d 277 (Colo. 1968).
209. Cottrell v. City and County of Denver, 636 P.2d 703,708 (Colo. 1981).
210. Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village, 757 P.2d 622 (Colo. 1988).
211. See Margolis v. District Court, 638 P.2d 297 (Colo. 1981); Snyder v. City of Lakewood, 542 P.2d 371 (Colo. 1975) overruled on other grounds. But see Jafay v. Board of County Comm'rs, 848 P.2d 892 (Colo. 1993) (characterizing a county rezoning action that affected 4,000 parcels of land encompassing 25,000 acres as "quasi-legislative," based on the prospective nature and broad impact of the rezoning).
212. Two G's, Inc. v. Kalbin, 666 P.2d 129 (Colo. 1983); Eggert, 647 P.2d 216; Price Haskel, Inc. v. Denver Dept. of Excises and Licenses, 694 P.2d 364 (Colo. App. 1984); Soon Yee Scott, 672 P.2d 225.
213. Turner v. City and County of Denver, 361 P.2d 631 (Colo. 1961); Wells v. Del Norte School Dist. C-7, 753 P.2d 770 (Colo. App. 1987). Compare Hoffman v. City of Fort Collins, 489 P.2d 355 (Colo. App. 1971).
214. Best v. La Plata Planning Comm'n, 701 P.2d 91 (Colo. App. 1984).
215. Andreatta v. Kuhlman, 600 P.2d 119 (Colo. 1979); Benes v. Jefferson County Bd. of Adjust., 537 P.2d 753 (Colo. 1975).
216. Orchard Court Develop. Co. v. City of Boulder, 513 P.2d 199 (Colo. 1973).
217. Norby v. City of Boulder, 577 P.2d 277 (Colo. 1978); C&M Sand and Gravel v. Board of County Comm'rs, 673 P.2d 1013 (Colo. App. 1983); Garland v. Board of County Comm'rs, 660 P.2d 20 (Colo. App. 1982).
218. Gold Star Sausage v. Kempf, 653 P.2d 397 (Colo. 1982).
219. Reynolds v. City of Longmont, 680 P.2d 1350 (Colo. App. 1984).
220. Stuart v. Board of Adjust., 699 P.2d 978 (Colo. App. 1985).
221. Landmark Land Co. v. City and County of Denver, 728 P.2d 1281 (Colo. 1986).
222. Keeling v. City of Grand Junction, 689 P.2d 679 (Colo. App. 1984); Denver Police Protective Ass'n v. City and County of Denver, 665 P.2d 150 (Colo. App. 1983); Reeve v. Career Service Bd., 636 P.2d 1307 (Colo. App. 1981).
223. Sutphin v. Mourning, 642 P.2d 34 (Colo. App. 1981).
224. Witcher v. Canon City, 716 P.2d 445 (Colo. 1986).
225. Prairie Dog Advocates v. City of Lakewood, 20 P.3d 1203 (Colo. App. 2000).
226. Margolis, 638 P.2d 297; Snyder, 542 P.2d 371.
227. Cherry Hills Resort, 757 P.2d 622 (emphasis supplied).
228. deKoevend v. Board of Educ., 688 P.2d 219 (Colo. 1984); Eggert, 647 P.2d 216.
229. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Glatz v. Kortz, 807 F.2d 1514 (10th Cir. 1986); Patterson v. Cronin, 650 P.2d 531 (Colo. 1982).
230. Hallmark Builders and Realty v. City of Gunnison, 650 P.2d 556 (Colo. 1982).
231. Cherry Hills Resort, 757 P.2d 622; Eggert, 647 P.2d 216; Price Haskel, 694 P.2d 364.
232. Formal rules of evidence need not be followed, but some test for admitting or denying evidence should exist, as well as a structure for ruling on objections. Colorado Dep't of Revenue v. Kirke, 743 P.2d 16 (Colo. 1987); Fueston v. City of Colorado Springs, 713 P.2d 1323 (Colo. App. 1985) (evidence should possess "probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs").
233. See McArthur v. Zabka, 494 P.2d 89 (Colo. 1972). But see Sundance Hills Homeowners Ass'n v. Board of County Comm'rs, 534 P.2d 1212 (Colo. 1975).
234. Norton v. Board of Educ., 748 P.2d 1337 (Colo. App. 1987).

235. Spencer v. Board of County Comm'rs, 39 P.3d 1272 (Colo. App. 2001).
236. Sclavenitis v. Cherry Hills Bd. of Adjust., 751 P.2d 661 (Colo. App. 1988).
237. See Hudspeth v. Board of County Comm'rs, 667 P.2d 775 (Colo. App. 1983); Einarsen v, City of Wheat Ridge, 604 P.2d 691 (Colo. App. 1979).
238. deKoevend,688 P.2d 219 (Colo. 1984).
239. See People v. Brown, 770 P.2d 1373, 1375 (Colo. App. 1989).
240. Miller v. City of Mission, 705 F.2d 368 (10th Cir. 1983); Weissman v. Board of Educ., 547 P.2d 1267 (Colo. 1976); Soon Yee Scott, 672 P.2d 225.
241. Wells, 753 P.2d 770.
242. Booth v. Town of Silver Plume, 474 P.2d 227 (Colo. App. 1970).
243. See C.R.S. § 31-4-404(2) (for statutory cities and towns); Zoline v. Telluride Lodge Ass'n, 732 P.2d 635 (Colo. 1987).
244. See Wood Bros. Homes, Inc. v. City of Fort Collins, 670 P.2d 9 (Colo. App. 1983); Johnson v. City Council, 595 P.2d 701 (Colo. App. 1979); Booth, 474 P.2d 227.
245. Williams v. Farmers Ins. Group, 720 P.2d 598 (Colo. App. 1985).
246. Best, 701 P.2d 91; Soon Ye Scott, 672 P.2d 225.
247. Hadley v. Moffat County School Dist. RE-1, 681 P.2d 938 (Colo. 1984); Wells, 753 P.2d 770.
248. See deKoevend, 688 P.2d 219 (school superintendent and principal, who testified in support of dismissal of teacher, should not have been permitted to attend otherwise closed deliberations of the school board considering dismissal); Wells, 753 P.2d 770 (during lunch break, hearing officer should not have sat at the same table as counsel and witness for one party).
249. See Wood Bros. Homes, 670 P.2d 9 (judge who is also a member of a city planning and zoning commission should disqualify himself from the commission consideration and review of a plat where that plat was in dispute in a trial heard by the judge); see also Venard v. Dept. of Corrections, 72 P.3d 446 (Colo. App. 2003) (finding abuse of discretion when a decision maker failed to withdraw despite an appearance of impropriety).
250. See Booth, 470 P.2d 227 (fact that committee of town trustees investigated application for liquor license prior to hearing on the matter and recommended against issuance of license, with other facts, denied the applicant a fair and impartial hearing).
251. See Zoline, 732 P.2d 635 (judge who owned controlling interest in bank in which a party was a substantial depositor should have disqualified himself from hearing the case.); Best, 701 P.2d 91 (impermissible business or financial relationship of county commissioner not established); see also C.R.S. § 24-18-101, et seq. (establishing a code of ethics for local government officials).
252. See Booth, 470 P.2d 227 (where every town trustee signed petitions against issuance of liquor license prior to the hearing, and committee of town trustees submitted report at hearing recommending against the license, the applicant was denied a fair and impartial hearing); Soon Yee Scott, 672 P.2d 225 (councilmember properly disqualified himself from voting on an application for a massage parlor license where he helped organize a petition drive in opposition to the proposed license, appeared at the public hearing before the council and presented on behalf of his constituents the petitions in opposition to the license, testified during the hearing, and published in a newspaper prior to the hearing an article related to the license); McClure v. Independent Sch. Dist. No. 16, 228 F.3d 1205 (10th Cir. 2000) (finding public statements by a decision maker that demonstrate actual bias deprived the plaintiff of the right to an impartial tribunal).
253. See Code of Judicial Conduct, Canon 3C(1)(d) (judicial disqualification); C.R.S. § 24-18-101, et seq. (establishing a code of ethics for local government officials).
254. See Getsch v. Hawker, 748 P.2d 1304 (Colo. App. 1987) (city personnel regulation provided for disqualification of hearing officer where employer-employee relationship existed).
255. Getsch, 748 P.2d 1304; McClellan v. State, 731 P.2d 769 (Colo. App. 1986); see Code of Judicial Conduct, Canon 3D (disclosure provision); C.R.S. § 13-1-122.
256. Leonard v. Board of Directors, 673 P.2d 1019 (Colo. App. 1983).

Appendix A:
Sample hearing procedure

Local Licensing Authority
City of Golden, Colorado
Rules of Procedure
October 2000
(As Amended)

RULE I APPLICABILITY OF RULES AND DEFINITIONS

In addition to any other rules or laws which may be applicable, including Chapter 2.35 of the Golden Municipal Code (City Administrative Hearing Procedures), the Golden Home Rule Charter (Charter) and the Colorado Beer, Liquor, Special Event Codes and Code of Regulations (Colorado Liquor Code), these Rules of Procedure (Rules) shall govern all proceedings before the Local Licensing Authority (Authority) of the City of Golden. All meetings shall also be conducted in compliance with these Rules and Robert's Rules of Order. These Rules shall govern in the event of a conflict with Robert's Rules of Order. Any provision of these Rules not governed by the Charter, the Golden Municipal Code or the Colorado Liquor Code, may be temporarily suspended at any meeting of the Authority by a majority vote of all members of the Authority. Any rule may be suspended by general consent if presented by the Chair and if there are no objections from any member.

RULE II CHAIR, VICE CHAIR AND DUTIES OF MEMBERS

A. CHAIR AND VICE CHAIR

1. Chair - The Chair shall preside at all regular and special meetings of the Authority.

2. Vice Chair - In the absence of the Chair, the Vice Chair shall preside. If the Chair and Vice Chair are both absent, the members present shall designate a person to act as Chair during their absences.

3. The Chair and Vice Chair shall be nominated by members of the Authority and approved by a majority vote of all members for a term of one year. The nomination and appointment shall take place during the Authority's annual organizational meeting. In the event that no members accept nomination for Chair or Vice Chair, the City Clerk shall inform the City Council immediately, who shall designate a Chair and Vice Chair.

B. DUTIES OF CHAIR

The Chair shall have the responsibility to ensure that all meetings are conducted in an open and fair manner and that no individual member's opinion is allowed to dominate a meeting. The Chair shall clearly document any problems or issues and work with members who deviate from acceptable procedural standards. If a member has not taken steps to comply with such standards, on the second incident, which is noted by the Chair, the Chair will notify the City Clerk to advise

the City Manager and the City Council of the matter. If the Chair is not following the standards, the City Clerk shall notify the City Manager who will forward the issue to City Council. The Chair shall attend meetings with the Mayor and report the results to the Authority. The Chair shall assist the City Clerk in training of new members. The Chair shall act as liaison with the City Council and communicate City Council goals and policies to the Authority.

C. DECORUM DURING MEETING

The Chair shall maintain decorum during a meeting. The Chair shall have the right to eject, after reasonable warning, any person disrupting a meeting. No signs or placards will be displayed by any person or party in attendance at a meeting or public hearing. Loud sounds such as cheering, applause, or booing shall be restricted by the Chair. Video or audio recording of a hearing by persons other than City employees is at the discretion of the Chair and in no event shall any recording interfere or impede a meeting or hearing.

D. DISQUALIFICATION OF MEMBER FROM PARTICIPATION

No member may participate in the debate or vote upon any question when in violation of Chapter 2.32, (Code of Ethics) of the Golden Municipal Code. A request to be excused from participation in or voting upon a question for any other reason must be made before the vote is taken.

RULE III MEETINGS - GENERALLY

A. REGULAR, SPECIAL AND ORGANIZATIONAL MEETINGS

1. All regular meetings of the Authority shall be held on the fourth Tuesday of each month, if necessary, in the City Council Chambers, however a meeting can be canceled by the City Clerk if there is not business to transact no later than 24 hours prior to the meeting. Notification of the cancellation shall be by telephone, electronically or by other communication's technology, or first-class mail. Meetings shall start at 7:00 p.m.

2. Special meetings shall be held as necessary, as scheduled by the Authority or upon call of the City Clerk who shall provide notice to each member of such meeting. Notice shall be by first-class mail, electronically, telephone, or by other technology or means of communication 24 hours prior to the meeting. Oral or written consents and waivers of notices of meetings or continuances are permitted. Cancellation procedures for special meetings shall be the same as for regular meetings.

3. The Authority shall hold an organizational meeting immediately prior to its first regularly scheduled meeting in January of each year.

B. ORDER OF BUSINESS

The following Order of Business may be used for meetings:

Call to Order
Roll Call
Approval of Agenda

Motion to Admit the License Applications and the City Clerk's Communication
Documents into Evidence
Consent Agenda
Business
Public Hearings
Other Matters/New Business
Adjournment

The Authority may change the Order of Business to assist and facilitate the conduct of its meetings.

C. PROCEDURE FOR MEETINGS

1. The City Clerk will prepare, or cause to have prepared, the meeting room and provide public hearing sign-up sheets to be placed in the lobby or Council Chamber prior to the meeting for the benefit of those persons wishing to speak on those matters on the agenda. Not later than 72 hours prior to any meeting, the City Clerk shall prepare an agenda with the order of business, copies of communications, resolutions, if applicable, with supporting documents, and other related items, and make same available for each Authority member.

2. The Chair shall call the meeting to order and describe the order of business. The Chair should request such information, evidence and testimony as is appropriate for the item being considered.

3. Except during a public hearing, persons other than members of the Authority and City officials shall not be permitted to address the Authority except upon recognition by the Chair. Any Authority member may request that the Chair recognize any person other than a City official. If permission is not granted, the decision of the Chair may be appealed. Any member may appeal a ruling of the Chair to the Authority. If the appeal is seconded, the member making the appeal may briefly state the reason for the same, and the Chair may briefly explain the reason for the ruling; but there shall be no debate on the appeal, and no other member shall participate in the discussion. The Chair shall then put the question, "Shall the decision of the Chair be sustained?" If a majority of the members present vote "Yes," the ruling of the Chair is sustained; otherwise it is overruled.

4. At the conclusion of the evidence and testimony, the Chair shall entertain a motion regarding the disposition of the item.

5. When a motion is made and seconded, the Chair shall ask for and allow discussion of the motion by the Authority.

6. Upon completion of discussion, the Chair shall request a vote by the Authority. The City Clerk will record the vote.

7. The meeting may be adjourned by motion of the Chair or any member. A recess may be called at any time either by the Chair or upon motion by a member with the consent of the majority. The Authority shall not adjourn while in recess but must reconvene prior to adjournment.

D. MINUTES OF THE MEETING

The City Clerk shall prepare and keep, or cause the preparation of and retention of, the minutes of all regular and special meetings of the Authority. The minutes shall not be a verbatim transcript of the proceedings, provided tape recordings of all proceedings are retained by the City Clerk's office in accordance with the State Archives retention schedule for reference when and if necessary. The purpose of the minutes shall be to record the Authority's transactions rather than its deliberations; therefore, debates, arguments, and discussion among the Authority shall not be included. Specific direction to the support staff, the City Clerk and City Attorney, shall be included in the minutes when such direction may affect the outcome of a decision to be made by the Authority. A court reporter may be in attendance for the purpose of recording the proceedings when the Authority, an applicant or a Party In Interest (as defined in the Colorado Liquor Code) so requests; however anyone requesting a court reporter is responsible for paying the full cost thereof.

The City Clerk should include the following in the minutes of each meeting:

1. Name - Meeting of the Local Licensing Authority of Golden, Colorado.

2. Kind of meeting (Regular, Special).

3. Place and date of meeting.

4. Officer presiding, Authority Members and Staff present.

5. The decision in each point of order arising.

6. A record of the Authority's actions, which will in most instances, be a motion reflecting the decision taken by the Authority.

7. The time and place of re-assembling unless it the regular meeting time and place.

8. A record of the applicant(s) and witnesses in attendance and the purpose of their presence.

9. Whether previous minutes were approved.

10. The signature of the City Clerk and the Chair at the time the minutes were approved.

11. All motions, seconds, the vote thereon (including abstentions), and any subject matter reports given and disposition of same.

E. ATTENDANCE AT MEETINGS

1. Attendance Required - A written report signed by the Chair shall be sent to the City Council concerning any member of the Authority who has three consecutive unexcused absences from Authority meetings for City Council determination as to whether this shall result in removal of that member from the Authority. Such report shall be sent to the City Council following such member's third unexcused absence.

2. Excusal from Meetings - No member shall be excused from attendance at an Authority meeting unless the member has informed the Chair or the City Clerk prior to the meeting. No member may be excused while in a meeting without permission from the Chair.

F. SUPPORT SERVICES

1. Legal - The City Attorney and/or such Assistant City Attorneys, as the City Attorney may designate, shall attend all regular and special meetings of the Authority as the legal and procedural advisor to the Authority. In any public hearing where evidence is to be presented in regard to a show-cause hearing in support of a suspension or revocation or any other quasi-judicial type proceeding, Special Counsel may be appointed by City Council in accordance with the Charter.

2. Secretarial; records custodian - The City Clerk, or her designee, shall serve as the secretary and records custodian for the Authority and perform the functions that a corresponding secretary and recording secretary usually perform. Additionally, the City Clerk shall be responsible for overseeing the publication concerning public hearings and other required notifications.

G. DELEGATION OF AUTHORITY TO CITY CLERK.

The City Clerk is authorized to act as the Local Licensing Authority for the following Colorado Liquor Code and Colorado Beer Code licensing functions:

1. Processing and issuance of special events permits pursuant to Article 48 of Title 12, C.R.S., provided that there are no parties filing a written objection to said permit.

2. Annual Colorado Liquor Code and Colorado Beer Code license renewals, provided that the licensee has not violated any provisions of the Colorado Liquor or Beer Codes and associated regulations during the preceding year.

3. Changes in shareholders, officers, directors or trade names of a licensee, provided that any investigation conducted by the City does not reveal information that may reasonably form the basis of a determination that the applicant is not qualified to hold the respective license.

4. The issuance of temporary permits pursuant to and in compliance with the provisions of Section 12-47-302, C.R.S., and Section 12-47-303, C.R.S. A temporary permit fee of $100.00 shall be charged in conjunction with the issuance of each temporary permit.

The City Clerk may, nevertheless, refer any licensing decision authorized under this Rule to the Local Licensing Authority if, in the Clerk's discretion, the matter should be presented to the full Local Licensing Authority. (Rule III G. added. Council Resolution No. 1178, adopted January 25, 2001.)

RULE IV PUBLIC HEARING PROCEDURES FOR NEW, TRANSFER, CHANGE OF LOCATION, CHANGE OF CORPORATE STRUCTURE, MANAGER'S REGISTRATION, AND REQUEST TO MODIFY APPLICATIONS[1]

A. The Chair or presiding member shall have full authority to control the proceedings, to admit or exclude testimony or other offers of evidence and to rule upon all motions and objections. A majority of the Authority members present may overrule the Chair on any such rulings.

Unless the member has reviewed all the evidence and a transcript of the prior proceedings, any member who has been absent during any portion of a public hearing may not vote or participate in deliberations and discussions at the public hearing.

B. The Authority shall not be bound by strict rules of evidence prevailing in courts of law or equity, however the right of cross-examination shall be preserved. Irrelevant, repetitive and cumulative testimony and evidence should be excluded when possible. Motions may be written, but, shall be read into or summarized for the record. Objections shall be stated orally for the record. All testimony shall be given under oath. In all public hearings under this Rule IV, the applicant has the burden of persuading the Authority that the application, or request, should be granted.

C. All exhibits or other documentary evidence to be admitted shall be submitted to the City Clerk and pre-marked 48 hours before the hearing. These exhibits shall be introduced as in civil cases. If the applicant desires to distribute copies of exhibits to the Authority at the hearing, the applicant shall provide a sufficient number of copies. Neighborhood petitions signed by inhabitants and submitted to the Authority in accordance with these Rules shall be considered by the Authority when determining the "requirements" and "desires" of the neighborhood.

D. The following order for the presentation of evidence shall apply:

1. Call the public hearing to order.

2. Opening remarks by Chair.

3. Opening statement by the applicant or the applicant's attorney.

4. Opening statement by the City Attorney or Special Counsel.

5. Presentation of applicant's evidence and witnesses. Prior to excusing applicant's witnesses, cross-examination shall be permitted in the following order:

   a. City Attorney or Special Counsel.
   b. Authority members.

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[1] In the event of a conflict between these procedures and the provisions/procedures of the Charter, City Administrative Hearing Procedures and the Colorado Liquor Code, the aforementioned laws, rules and regulations shall apply, as applicable, over these procedures.

c. Any person who is a Party In Interest (if applicable).

6. Presentation of City's evidence and witnesses. Prior to excusing any of the City's witnesses, cross-examination shall be permitted in the following order:

   a. Applicant's attorney.
   b. Authority members.
   c. Any Party In Interest.

7. Presentation of witnesses and evidence by any Party In Interest. Prior to excusing witnesses, cross-examination of interested parties and their witnesses shall be permitted by applicants, City and Authority members.

8. Applicant's rebuttal evidence.

9. City's rebuttal evidence.

10. Applicant's closing statement.

11. City's closing statement.

12. Applicant's reply closing statement.

13. Close the public hearing.

14. Deliberation and call for motion.

15. Applicable motion to grant or deny application, discussion and vote.

E. Reopening of a Public Hearing - Whenever a public hearing has been opened and continued to another date or if it has been closed and the Authority determines to take additional evidence prior to a vote or a reconsideration of a vote, the Chair may reopen the public hearing for purposes of taking such additional evidence. The Chair may limit the scope of such evidence to be taken. If a public hearing is reopened and additional evidence is taken, all such additional evidence shall be incorporated into the original public hearing.

F. Evidence for Public Hearings - New licenses, transfer of ownership, change of location, change of corporate structure, manager's registration, and request to modify.

1. Evidence concerning whether the Applicant (individual, corporation, or other entity) is qualified to hold the type of license applied for (not applicable for request to modify or change of location), which evidence may include:

   a. other facilities operated by applicant.
   b. training and experience of applicant.
   c. familiarity with state and local laws.
   d. procedures and policies regarding enforcement of liquor laws.
   e. reputation and particular history of applicant regarding liquor laws.

2. Evidence concerning the reasonable requirements of the neighborhood and whether existing outlets are adequate (not applicable for transfer, change of corporate structure, or manager's registration), which evidence may include:

   a. number of existing outlets and proximity.
   b. testimony from adults residing in the relevant neighborhood.
   c. testimony from applicant or applicant's officers.
   d. testimony from petitioner or entity submitting petitions.

3. Evidence concerning the desires of adult residents for existing outlets (not applicable for transfer, change of corporate structure, or manager's registration), which evidence may include:

   a. testimony from adults residing in the relevant neighborhood.
   b. testimony from a manager or business owner in the relevant neighborhood.
   c. petitions submitted by the applicant or petition entity.
   d. testimony from applicants.

4. May receive other evidence concerning:

   a. nature of establishment and location.
   b. discussion concerning meeting all applicable City codes or ordinances.
   c. discussion concerning financial interest in establishment.

G. Any Party In Interest desiring to participate in the hearing must so inform the Authority at the onset of the hearing. That party may cross-examine witnesses and introduce evidence with regard to the following matters:

1. Reasonable requirements of the neighborhood and the number and type of relevant existing outlets.

2. Any other pertinent matters affecting the qualifications of the applicant, including but not limited to the applicant's character, record or reputation.

3. Any other evidence, which would indicate that the building or location proposed for the operation of the license, is not suitable for the intended purposes.

4. Desires of the inhabitants in opposition to the issuance of the license expressed by witnesses and/or through petitions.

H. The City Clerk may grant an applicant's request or the City's request to continue a matter set for hearing to a following regular or special meeting, if such request is made prior to the time that publication and posting of notice of hearing on the matter is to be made. Once a matter has been scheduled for public hearing and public notice thereof has been given, the matter may be continued only by the Authority upon a showing of good cause. The Authority may, in its discretion, grant or deny an applicant's request for a continuance, or it may grant the continuance subject to the payment of costs or other expenses reasonably caused by applicant's request.

I. Unless excused by the Authority, the following persons shall be in attendance at the public hearing on the application:

1. If the applicant is an individual, that individual; or

2. If the applicant is a partnership, any managing or general partner or his/her authorized designee; or

3. If the applicant is a corporation, the president of the corporation, an officer or director or such other corporate representative as the president may designate in writing; or

4. If the applicant is a limited liability company, a managing officer, or his/her authorized designee.

J. The Authority may deliberate in open session or may, in compliance with the Golden Municipal Code, recess into executive session to deliberate upon the evidence presented. The executive session shall not be utilized for the purpose of receiving any evidence nor shall a final determination be made during such executive session. Final decisions shall only be made in public meetings.

K. It is within the discretion of the Authority whether to make an immediate decision upon the conclusion of the public hearing or require the City Attorney's office to prepare written findings within a reasonable time after the hearing, not to exceed 30 days.

L. Any findings, either written or oral, (which shall mean findings of fact, conclusions of law and order), may be prepared by the City Attorney's office and may be available for adoption by the Authority at the public hearing or at a subsequent regular or special meeting. Written findings of fact shall be mailed by certified mail to the applicant within 30 days after the determination is made.

M. All decisions of the Authority are final, subject only to appeals (litigation) to a court of competent jurisdiction.

RULE V PUBLIC HEARING PROCEDURES FOR RENEWALS, SUSPENSIONS, FINES, AND REVOCATIONS [2]

A. Following investigation and public hearing, at which the licensee shall be afforded an opportunity to be heard, the Authority is authorized to suspend, deny renewal of or revoke any license issued by the Authority for violations by the licensee, or by any of the agents, servants, or employees of such licensee of the provisions of the Colorado Liquor Code, or any of the rules, ordinances and regulations authorized pursuant to such Code or of any of the terms, conditions or provisions of the license issued by the Authority.

B. Suspension and revocation proceedings shall be commenced by the Authority by issuing and causing to be served upon the liquor licensee by first-class mail to the licensee at the address contained in the license, an Order to Show Cause and Notice of Hearing (Notice). The Notice shall command the licensee to appear and show cause why its license should not be suspended or revoked as it appeared to the Authority that there was probable cause to believe that the licensee or any of

[2] See Footnote 1.

the agents, servants or employees violated laws, rules or regulations of the Colorado Liquor Code or any of the terms, conditions or provisions of the license issued by the Authority. The Notice shall notify or inform the licensee of the charges or alleged grounds for suspension or revocation and shall be prepared for the Authority by the City Attorney.

C. All proposed settlements and dispositions of matters scheduled for a public hearing shall be in the form of joint stipulations and shall be submitted in writing to the offices of the City Clerk and the City Attorney at least 10 days prior to the scheduled public hearing date. The Authority has the discretion to consider a proposed disposition prior to the hearing.

1. The scheduled public hearing shall be automatically vacated if:

a. The proposed settlement or disposition is properly and timely made in writing in accordance with Section C above; and

b. The proposed settlement is approved as to legal form by the City Attorney; and

c. No prior proposed settlements or dispositions on the same matter have been previously submitted to the Authority for consideration; and

d. The licensee has not, within the preceding two years, had its license suspended and/or paid a fine in lieu thereof (Fine).

2. The City Clerk shall provide the Authority members with a copy of the written notice of proposed settlement or disposition in their packets, or shall provide the Authority members with personal, telephonic, electronic, other communication method, or first-class mail notice of the matter.

3. Consideration of proposed disposition by the Authority; continuance of hearing upon rejection.

a. Upon timely filing of the notice of the proposed disposition as provided in Section C above, the Authority shall, at the time of the scheduled hearing, consider the proposed stipulations and recommendations. However, the Authority may, upon good cause shown, consider dispositions presented either orally or in writing without regard to the provisions of Section C. Upon a finding that the public interest is not served by the proffered disposition, or if the Authority significantly changes the proposed settlement order and during the Authority's consideration of such, either party has an objection to such changes, the hearing on the merits shall be continued and rescheduled to the next regular or special meeting of the Authority. The continued hearing shall be at least 10 days after the original scheduled hearing date, unless both parties are prepared and agree to proceed immediately after rejection of the proposed disposition.

b. In the event of rejection of the proposed disposition, the Authority shall identify the reasons for such rejection, which may include, without limitation, seriousness of the violation, aggravating or mitigating circumstances, the history of the subject establishment,

corrective actions taken, likelihood of reoccurrence, and any other relevant matters impacting the public health, safety and welfare.

4. Subsequent proposed dispositions.

In the event that the Authority, in the exercise of its discretion, may reject the proposed disposition of a matter, and the issues are rescheduled for hearing on the merits as set forth in Section 3(a) above, and the parties submit an amended notice of proposed disposition, the parties must nevertheless be prepared to proceed on the merits of the case at the rescheduled hearing in the event the amended proposal for disposition is also rejected by the Authority as herein contemplated.

5. Effect of rejection of proposed disposition--no prejudice.

In the event that the Authority may reject any proposed disposition pursuant to the provisions of these Rules, neither the City nor the licensee shall suffer any prejudice or detriment as a result of such rejection. The legal standards and burden of proof applicable to the proceedings shall be as if the proposal had not been presented, and a licensee shall suffer no detrimental presumption or inference as a result of such rejection upon a hearing on the merits.

6. Factual stipulations.

Nothing in these Rules shall be deemed or construed to preclude or limit either party before or during a hearing from offering to stipulate as to the existence of any fact.

7. Notice to licensees.

Along with the Notice sent to any licensee or Notice of Non-Renewal to be considered at a public hearing, the City Clerk shall include a copy of Rule V of these Rules.

D. All requests for continuance of a scheduled public hearing by which the Authority will be considering whether a license may be suspended or revoked shall be submitted in writing to the offices of the City Clerk and the City Attorney, or if the City is requesting the continuance, to the City Clerk and the business address of the applicant/licensee or its legal counsel at least 10 days prior to the scheduled public hearing date.

1. A continuance of the public hearing shall be granted by the City Clerk to the next available meeting of the Authority if:

a. The written request is properly and timely submitted to the City Clerk's office in accordance with this Section D; and

b. Both parties or their representatives agree to the continuance; and

c. Neither party has been previously granted a continuance in the matter under consideration; and

d. The City Clerk's office has not incurred any costs for publication of the public hearing date.

2. In the case of a renewal scheduled for a public hearing, a continuance of the public hearing shall be granted by the City Clerk to the next available meeting of the Authority if such request is made prior to the time that notice of hearing on the matter is to be made.

3. Uncontested requests for continuances of scheduled hearings submitted within 10 days of the hearing date may be granted by the Chair of the Authority if the Chair, in its discretion, determines good cause for such a continuance exists. In such event, the hearing shall be set for a new date during the meeting at which the hearing was originally scheduled.(New Rule V D. 3. Council Resolution No. 1478, adopted March 11, 2004.)

4. If the request for continuance is not made and granted in accordance with Subsection D (1) or D 3. above, both parties or their representative shall appear before the Authority at the scheduled public hearing prepared to proceed with their case. (Rule V. D. 4, renumbered from Rule V. D. 3 and amended, Council Resolution No. 1478, adopted March 11, 2004.)

5. Upon a showing of substantial hardship or other good cause by the requesting party, as determined solely by the Authority, the Authority may grant continuances upon such terms and conditions as it deems just and proper.

E. A hearing on the suspension, revocation, or non-renewal shall be held at a place, day and time designated by the Authority as stated in the Notice. Evidence in support of the charges shall be given first, followed by cross-examination of those testifying thereto. The licensee, in person or by counsel, shall then be permitted to give evidence in defense and in explanation of the charges, followed by the cross-examination of those testifying thereto.

F. In the event the licensee is found not to have violated any law, rule or regulation, the charges against the licensee will be dismissed. If the licensee is found to have violated a law, rule or regulation, the license shall be suspended, revoked or not renewed in accordance with the procedures set forth in Subsection L below.

G. The City Clerk shall mail the licensee the Authority's decision by first-class mail for a liquor licensee to the address contained in such license within 30 days following the hearing.

H. In the event of revocation, or suspension, no portion of the license fee shall be refunded.

I. Orders of suspension shall indicate the effective date of suspension. For suspensions of 14 days or less, the effective date shall be at least 10 business days after announcement of the suspension unless the Authority makes findings which indicate the need for an earlier effective date.

J. If the Authority has probable cause to believe a licensee is guilty of a deliberate and willful violation of any applicable law or regulation or that the public health, safety, or welfare imperatively requires emergency action, the Authority may temporarily or summarily suspend the license for a period not to exceed 15 days pending a hearing on the suspension or revocation, which hearing shall be

promptly instituted and determined. Any finding by the Authority that a temporary, summary, suspension is appropriate under this section must be by a vote of four members of the Authority, and specific findings of a willful violation or immediate threat to the public health, safety or welfare must be made and entered in the record and incorporated into any suspension or revocation order.

K. A licensee wishing to petition the Authority to pay a Fine in lieu of a suspension of 14 days or less, must submit a written petition to the City Clerk's office at least three working days prior to the effective date of the suspension and follow the procedures in The Colorado Liquor Code.

1. The petition for payment of a Fine shall include all information and documentation that the licensee would like the Authority to consider when acting on the petition. The petition shall include, among other things, such information which indicates the licensee is eligible for the payment of a Fine pursuant to The Colorado Liquor Code and a calculation of the proposed fine with sufficient financial documentation so as to permit the Authority to substantiate the amount of the proposed fine.

2. The City Clerk shall not accept for filing a petition for payment of a Fine unless the petition is timely filed.

3. Except as provided in this Section K, upon the acceptance of filing of a petition for payment of a Fine, the suspension of the license shall be temporarily stayed until such time as the Authority acts upon the petition for payment of a Fine. The petition shall be presented to the Authority at the next available regular meeting of the Authority following the filing of the petition.

4. If the Authority denies the petition for payment of a Fine, the suspension shall be reinstated and the Authority shall indicate the effective date of the suspension.

5. If the petition for payment of a Fine is granted, the granting of the petition shall be deemed to be conditioned upon the payment of the Fine within 10 working days of the action of the Authority. A new suspension period will be set out in any order granting a petition for payment of Fine, which period of suspension automatically becoming effective in the event that the licensee fails to pay the fine.

L. The public hearing for a revocation, suspension or non-renewal shall be conducted following the same applicable procedures as outlined in Rule IV above, however, the City will have the burden of persuading the Authority that a violation occurred or the license should not be renewed, as follows:

1. The following order for the presentation of evidence shall apply:

a. Opening statement by the City’s Special Counsel.
b. Opening statement by the Licensee.
c. Presentation of City's evidence and witnesses. Prior to excusing any of the City's witnesses, cross-examination shall be permitted in the following order:
1. Licensee's attorney.
2. Authority members.

d. Presentation of Licensee's evidence and witnesses. Prior to excusing applicant's witnesses, cross-examination shall be permitted in the following order:
   1. City's Special Counsel.
   2. Authority members.

e. City's rebuttal evidence.
f. Licensee's rebuttal evidence.
g. City's closing statement.
h. Licensee's closing statement.
i. City's reply closing statement.
j. Close the public hearing.
k. Deliberation and call for motion.
l. Applicable motion to suspend, revoke, or not renew license, discussion and vote.

2. Evidence for Public Hearing - Suspension, Non-Renewal

   City presents evidence concerning whether the licensee committed the violations listed in the Verified Complaint, which evidence may include:

   a. Evidence from individual witnesses, either employees or contractors who were present when events occurred.
   b. Evidence from experts, including health or other County or State officials, concerning events surrounding the incident.
   c. Evidence from City officials, including code enforcement officers, finance officers, and building code officials.
   d. Evidence from the police department.

3. In the event the Authority finds that a violation occurred, the Sentencing Guidelines should be applied to assist the Authority in determining a penalty.

4. In the event that the Authority finds that a violation occurred, then the licensee may also present evidence in mitigation or explanation and the City may present evidence in aggravation prior to the Authority issuing its Order relating to the penalty, conditions or sanctions to be imposed.

5. The Authority may deliberate in open session or may, in compliance with the Golden Municipal Code, recess into executive session to deliberate upon the evidence presented. The executive session will not be for the purpose of receiving any evidence nor shall a final determination be made during such executive session. Decisions of the Authority shall be made in public meetings.

6. It is within the discretion of the Authority whether to make an immediate decision at the conclusion of the public hearing or require the City Attorney's office to prepare written findings within a reasonable time after the hearing, not to exceed 30 days.

7. Any findings, either written or oral, (which shall mean findings of fact, conclusions of law and order), shall be prepared by the City Attorney's office and shall be available for adoption by the Authority at the public hearing or at a subsequent regular or special meeting. Written findings of fact shall be sent by first class mail to the licensee within 30 days after the determination is made.

8. All decisions of the Authority are final subject to appeals (litigation) to a court of competent jurisdiction.

RULE VI PETITIONS

A. Petitions circulated by the applicant and any protestants or their agents shall be submitted to the City Clerk not later than seven business days prior to the public hearing. The Authority may continue any hearing where the City Clerk has not had sufficient time to verify the accuracy of the petitions. The Authority may waive the seven-day requirement upon a majority vote.

B. Petitions shall be circulated within the designated relevant neighborhood and signed by residents, business owners, or managers within the designated area. Petitions must be signed with the full given name. No signatures will be accepted if a wife or husband has signed for both unless accompanied by a proper and sufficient power of attorney for the non-signing spouse.

C. All signatures shall be identifiable with a residence or business address listed on the petition, together with the age of the person signing the petition and the date signed. Each individual signing a petition shall indicate his/her relationship to the relevant neighborhood (e.g. resident, business owner, employee, business manager). Signatures will not be accepted if it is not clear whether the signatory is a business owner or manager or a resident of the designated area.

D. Each petition shall contain an affidavit signed by the circulator of the petition that the circulator personally witnessed each signature appearing on the petition, that each signature thereon is the signature of the person whose name it purports to be, that the address given opposite that person's name is the true business or residence address of the person signing the petition and that the requirements of this Rule have been complied with.

E. All petitions shall be in substantial conformity to the format approved by the City Clerk. Petitions will not be accepted unless a signed Affidavit is submitted for each circulator and the applicant is clearly identified on the face of each petition.

F. All signatories of petitions for or against the issuance of a fermented malt beverage or malt, vinous or spirituous liquor license must be 21 years of age or older.

Appendix B:
Sample employee defense policy

Legal representation for employees who are defendants in certain civil actions

1.0 Purpose

1.1 The purpose of this Policy is to establish procedures implementing the provisions of the Colorado Governmental Immunity Act ("Act") which pertain to legal representation for City/Town employees and to extend such representation to certain federal actions.

2.0 Scope and Definitions

2.1 The Act provides that the City/Town, under certain circumstances, must assume the cost of defending its employees and paying judgments and settlements against its employees. This Policy implements the provisions of the Act and applies to the same extent as the Act. This Policy also applies to claims brought under federal law which lie in tort, but only to the extent the City/Town has available insurance coverage therefor.

2.2 As used in this Policy, "claim" means a civil action, brought in state or federal court, which is subject to the Act or which is based on a federal law and lies in tort.

2.3 As used in this Policy, "employee" shall have the same meaning as provided in Section 24-10-102(4), and shall include a former employee of the City/Town.

3.0 Policy

3.1 Costs of Defense: The City/Town shall be liable for the reasonable costs, including reasonable attorney fees, of the defense of an employee against a claim if:

3.1.1 The City/Town Attorney determines that the claim arose out of injuries sustained from an act or omission of the employee occurring or alleged in the complaint to have occurred during the performance of the employee's duties and within the scope of the employee's employment with the City/Town; and

3.1.2 The City/Town Attorney determines that the employee's act or omission was not willful or wanton; and

3.1.3 The employee does not compromise or settle the claim without the written consent of the City/Town; and

3.1.4 The employee provided written notice to the City/Town Attorney of the incident or occurrence which led to the claim, within a reasonable time after the incident or occurrence, if the incident or

occurrence could reasonably have been expected to lead to a claim; and

3.1.5 In the case of an action to which the City/Town is not a party defendant, the employee provided written notice to the City/Town Attorney of existence of the action against the employee within fifteen (15) days after the commencement of the action.

3.2 Legal Representation for Employee

3.2.1 The City/Town shall have met any responsibility it may have under 3.1 through the services of the attorney assigned by the insurance entity which provides a defense for the claim, or through the services of the City/Town Attorney or a different attorney selected by the City/Town. Nothing herein shall prohibit an employee from retaining the services of his or her own attorney, but, except as otherwise provided in Section 3.7, the fees and costs of those services shall be borne solely by the employee.

3.3 Payment of Judgments and Settlements of Claims Against City/Town Employees

3.3.1 The City/Town shall be liable for the payment of all judgments and settlements of claims against a City/Town employee under the circumstances specified in 3.1.1 through 3.1.5 above but only if sovereign immunity would not bar the action against the City/Town. However, even if such immunity would otherwise bar the action against the City/Town, the City/Town shall still remain responsible, pursuant to this paragraph, to pay any judgment or settlement of a claim against an employee where the action arose out of the employee's operation of an emergency vehicle and the employee was operating the vehicle within the provisions of section 42-4-106(2) and (3), C.R.S.

3.4 Employee Responsibilities

3.4.1 Any employee involved in an incident or occurrence in which any person may have been injured or any physical damage to property may have occurred as a result of an act or omission of the employee occurring during the performance of the employee's duties, shall, as soon as practicable but in any event within seventy-two (72) hours following the incidence or occurrence, notify or have a supervisor notify the City/Town Attorney's Office of the incident or occurrence.

3.4.2 If a civil action is filed against a City/Town employee and the action contains any claim of injury to a person or to property from an act or omission of the employee occurring during the performance of the employee's duties or within the scope of the employee's employment with the City/Town, the employee or the employee's supervisor shall provide written notice to the City/Town Attorney of the existence of the civil action within fifteen (15) days after the commencement of the action. The employee or the employee's supervisor shall promptly transmit to

the City/Town Attorney a copy of the complaint served on the employee.

3.4.3 The employee shall not compromise or settle any claim unless the City/Town Attorney has notified the employee in writing that the City/Town will not bear the cost of the legal defense of a civil action against the employee. If an employee violates this provision, the City/Town will not be responsible for payment of the employee's costs, attorney fees, judgments or settled claims.

3.5 Notification to Employee

3.5.1 Within fifteen (15) days after receipt by the City/Town Attorney of any written notice provided pursuant to 3.4.2, the City/Town Attorney shall notify the employee in writing whether the City/Town will assume the defense of the employee.

3.5.2 If the City/Town is made a co-defendant with an employee in a civil action, the City/Town Attorney shall notify the employee in writing within fifteen (15) days after the commencement of the action whether the City/Town will assume the defense of the employee.

3.6 Reimbursement of Expenses

3.6.1 If a defense is provided pursuant to this Policy in an action filed against an employee and the trial court determines that the injuries did not arise out of an act or omission of the employee occurring during the performance of the employee's duties and within the scope of the employee's employment, or that the act or omission of the employee was willful and wanton, the employee shall reimburse the City/Town for reasonable costs and reasonable attorney's fees incurred in the defense of the employee.

3.7 Conflicts of Interest

3.7.1 In the event that an attorney who represents both the City/Town and the employee pursuant to 3.2.1 determines that representation of both would create a conflict of interest, separate counsel shall be appointed pursuant to 3.2.1 for each party.

3.8 Reimbursement of Punitive Damages

3.8.1 The City/Town is not liable for punitive damages which are awarded against an employee nor is the City/Town required to defend an employee against a claim for punitive damages, unless the City/Town Council, in its sole discretion, determines otherwise pursuant to the procedure set forth in §24-10-118(5), C.R.S.

Ethics, Liability & Best Practices Handbook for Elected Officials

Tami A. Tanoue
CIRSA General Counsel/Claims Manager

Robert Widner
Widner Michow & Cox LLP

CIRSA

CML
COLORADO MUNICIPAL LEAGUE

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About the Authors

Tami Tanoue

Tami Tanoue has been the in-house General Counsel/Claims Manager for CIRSA since July, 2002. She was previously in private practice with the firm of Griffiths, Tanoue, Light, Harrington & Dawes, where she served CIRSA as its contract General Counsel for 12 years, and was City or Town Attorney for several Colorado municipalities. Prior to that, she was Staff Attorney for the Colorado Municipal League, where she represented the collective interests of Colorado municipalities. Tami is a regular speaker on local government liability topics, and has written several publications on liability issues.

Robert Widner

Robert (Bob) Widner is a founding partner with the law firm of Widner Michow & Cox LLP. Bob's legal practice has consistently focused on representation of local governments with a special emphasis in land use planning law. Bob currently serves as the City Attorney for the City of Centennial. Prior to founding Widner Michow & Cox, Bob was a partner with the Denver law firm of Gorsuch Kirgis LLP where Bob served as the Park County Attorney, the City Attorney for Cherry Hills Village, and Town Attorney for Lyons.

Foreword

If you've stepped up to the challenges of serving as an elected official in your community, congratulations! You're dedicating your energy, wisdom, and experience towards making your city or town the best it can be. But the job of an elected official is not an easy one and, if done improperly, can result in liability for your entity, yourself, or both.

In this publication, Tami Tanoue, CIRSA's General Counsel/Claims Manager and former CML Staff Attorney, discusses many of the issues of greatest concern to elected officials from the standpoint of maximizing excellence and effectiveness, while minimizing the risk of liability. Her perspective is informed by decades of service to municipalities, individually and collectively. We think you'll find her writing to be engaging, on-point, and light on the legalese.

Noted municipal attorney Robert Widner of the firm of Widner, Michow & Cox, LLP contributes a chapter on ethics in local government. He provides practical suggestions for dealing with the difficult ethical issues that elected officials must face. We appreciate his contribution to this publication.

This *Ethics, Liability & Best Practices Handbook for Elected Officials* is intended to provide an overview of some of the common liability issues facing elected officials, as well as some "best practices" suggestions for maximizing effectiveness and avoiding or reducing liability.

We hope you will find this publication to be of value to you as you undertake the challenging and rewarding work of governing your community.

Chris Krall
CIRSA Executive Director

Sam Mamet
CML Executive Director

Chapter 1

The Oath of Office: Ethics, Liability & Best Practices

By: Tami A. Tanoue, CIRSA General Counsel/Claims Manager

Chapter 1
The Oath of Office: Ethics, Liability and Best Practices

A typical oath of office might go as follows:

"I solemnly swear or affirm that I will support the Constitution and laws of the United States of America and the State of Colorado, [this Charter,] and the ordinances and other laws of the City/Town, and that I will faithfully perform the duties of the office upon which I am about to enter."

With the passage of time since you were elected, does your oath have continuing meaning as an ethical commitment? This chapter examines the oath as a commitment to best practices in carrying out your responsibilities, and as a path to avoiding liability. We'll focus on four key areas: allocation of responsibilities, transparency in meetings, quasi-judicial rules of engagement, and personal conduct.

Honoring the Allocation of Responsibilities

As in other levels of government, municipal powers and responsibilities are typically allocated among the governing body, judge, staff, and possibly others, according to charter or statutory requirements. Thus, for instance, the governing body is responsible for all legislation, the municipal judge is responsible for determining ordinance violations, and the staff is responsible for administrative matters.

To the extent that charter or statutory provisions set forth a clear allocation of responsibilities, respecting that allocation is part of an elected official's oath. Inappropriate involvement in administrative matters, then, could be a violation of your oath.

Personnel matters are among those in which inappropriate involvement tends to occur. As an individual elected official, if you are asked by an employee who's not one of your direct reports to become involved in an employment issue, or if you take the initiative to become involved, that could raise a red flag in terms of your oath to respect the allocation of responsibilities.

From a best practices standpoint, inappropriate involvement in personnel matters can effectively destroy the chain of command. While most municipal offices are not operated according to a military-style chain of command, some version of a chain of command is critical for effective functioning no matter how large, small, formal, or informal your operations are. Once you allow inappropriate involvement to occur, you have effectively disempowered your supervisors and managers throughout the organization, and sent the message that employees are free to disregard the chain of command.

Personnel matters are also a high-risk liability area. The more you're personally involved, the more likely it is that your name may some day appear on the wrong end of a lawsuit! So you can see that honoring the allocation of responsibilities by staying out of most personnel matters is a means of avoiding or reducing liability.

Honoring Transparency in Meetings

In local government, transparency of the governing body in its discussions and decisions is a basic expectation of the citizenry. Citizens take great interest in the goings-on of the governing body, and are quick to notice when their transparency expectations are not met. A perception that governing body members are conducting discussions secretly, that executive sessions are being held for improper purposes, or that decisions are being made in "smoke-filled back rooms," can quickly erode trust and confidence in government. (Executive sessions are discussed in more detail in chapter 8.)

Transparency in meetings means that governing body meetings are open to the public and held only after proper public notice, that executive sessions are strictly limited to the purposes authorized by law, and that discussions of public issues take place in a meeting setting rather than by email or in hidden locations. Is this part of your oath? Most certainly! The Colorado statewide open meetings law applies to all local public bodies, including city councils and boards of trustees. If you're a home rule municipality, there may be charter provisions concerning transparency as well.

Is honoring transparency in governing body meetings a best practice? It is, if you want to maintain the public's confidence and trust! Making a commitment to transparency can also help ensure that your municipality doesn't become Exhibit A in an effort to make draconian changes to the open meetings law. You surely don't want to be held up as a bad example in the legislature. It's happened.

Is honoring transparency a liability-reducing suggestion? At CIRSA, we've seen our members become involved in litigation over their meeting practices. Based on experience, the answer to that question is yes. There are watchdogs out there scrutinizing you, and they will pounce on you with a lawsuit if your meeting practices don't pass muster under the law. CIRSA has open meetings/executive session defense cost coverage for member governing bodies, but by honoring the letter and spirit of the open meetings laws, you can avoid costly and potentially embarrassing litigation.

There are watchdogs out there scrutinizing you, and they will pounce on you with a lawsuit if your meeting practices don't pass muster under the law.

Honoring the Quasi-Judicial Rules of Engagement

Governing body activities can be pigeonholed broadly into two areas: legislation and quasi-judicial decision-making. The rules of engagement differ depending on which pigeonhole fits. For legislative matters, the rules of engagement are free-wheeling. Think of the legislature when it's in session, and the lobbying that goes on there. But for quasi-judicial matters, the rules of engagement have a basis in constitutional due process requirements: the right to a fair hearing before a neutral decision maker when individual property rights are at stake.

No doubt your municipal attorney has discussed the quasi-judicial rules of engagement with you. The attorney is trying to protect the integrity of the hearing process, the defensibility of the outcome, and your prerogative to participate as a decision-maker. These rules of engagement include:

- You will follow the applicable legal criteria, and apply those criteria to the evidence you hear at the hearing, to arrive at your decision.
- You will refrain from "ex parte" or "outside the hearing" contacts regarding a pending quasi-judicial matter.
- You will not participate in decision-making in a quasi-judicial matter in which you have a conflict of interest.

These rules flow from constitutional due process requirements, so they are most certainly a part of your oath. Following these rules is also a way to avoid or reduce liability. In quasi-judicial matters, the process by which you arrive at a decision is at least as important as the substance of the decision itself. If you've ensured that the process is letter-perfect, then you have eliminated a huge portion of the possible quarrels that could turn into a claim. And it's a best practice, because following the rules of engagement will enhance the reality and the perception that all who come before you with quasi-judicial matters will be treated fairly.

Honoring Standards of Personal Conduct

The way you conduct yourself in relation to other members of the body, staff, and the community, greatly impacts your effectiveness as an elected official. No matter where you are on the political spectrum, you can probably agree that politics today are infected with divisiveness and incivility. Municipal government being non-partisan, its elected officials should, at least in theory, be able to rise above the rancor of partisan politics!

With respect to the governing body, do all members understand that governance is a team activity? An individual elected official does not have the power to accomplish anything on his or her own. Only through collaboration and consensus-building can an individual's priority become the priority of the body.

Has the governing body been able to "gel" as a team, or are members viewing

one another with a sense of distrust? Are there "outliers" on the council or board who are creating turmoil and dissension? (See Chapter 2 on identifying and dealing with "outliers.") Are you lining up along the same divisions on every issue? Are you unable to disagree without being disagreeable? Perhaps some team building is in order if these things are happening.

With respect to staff, is an incoming council or board viewing staff as the "enemy"? A staff exists to carry out the goals set by the governing body. Sometimes, with the changing of the guard at the governing body level, there's an assumption that there needs to be a changing of the guard at the staff level, too. But if this staff faithfully carried out the goals of the prior governing body, why wouldn't you expect that they will be equally able and willing to carry out the goals of the new body?

With respect to the community, are public comment periods turning into "public inquisition" or "public argument" periods? Is "staff bashing" or "elected official bashing" happening at meetings? Perhaps another look at your rules of order, and your approach to meetings, would be appropriate. Certainly the public has every right to appear at meetings and make complaints. It's a sign of faith in local government that people care enough to complain! But the manner in which those complaints are made, and the manner in which you respond, can mean the difference between a constructive, productive exchange or a nasty, embarrassing, unproductive, or morale-crushing attack.

Is the observance of personal conduct standards part of your oath? At least arguably, yes. After all, when lawyers take their oath of office, they commit to respectful conduct towards one another and to the judiciary. It doesn't seem a far stretch to impute a similar commitment to your oath.

Is it a best practice to observe personal conduct standards? It certainly seems so. Maintaining harmonious and productive working relationships with your fellow elected officials, staff, and the public can only increase your effectiveness. And keep in mind that harmony doesn't mean you all have to agree all the time. Indeed, healthy discussion, debate, and disagreement are the engine for understanding issues and solving problems. But the idea of disagreeing without being disagreeable is important to keep in mind.

Does the observance of personal conduct standards help with liability reduction? We think so. In CIRSA's experience, turmoil at the top levels of the municipality means turmoil throughout the organization. After all, you-know-what rolls downhill. Over and over, we've seen that disharmony and dysfunction at the top means claims throughout the organization.

Conclusion

Honoring your oath of office isn't just something you do when your raise your right hand at the beginning of your term. You can look at just about any arena in which you operate as an elected official, and ask yourself, "What did I commit to do when I took my oath?" By asking and answering this question, you can stay on the path of best practices, and avoid or reduce personal liability.

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Chapter 2

Governing Bodies and The Outlier Syndrome

By: Tami A. Tanoue, CIRSA General Counsel/Claims Manager

Chapter 2
Governing Bodies and The Outlier Syndrome

Those who have been working with municipalities for an extended period have observed a phenomenon that occurs at the governing body level. Let's call this phenomenon **the Outlier Syndrome.**

The Outlier is the "lone wolf" who sits on a city council or board of trustees and steadfastly refuses to act like a member of the team. Even while isolating himself or herself as the only person on the losing side of just about every vote, the Outlier manages to create havoc with the rest of the body. The Outlier may be obstreperous and obstructionist. The Outlier may refuse to recognize and respect the norms that guide the rest of the body's conduct. The Outlier may position himself or herself as the only "ethical" or "transparent" member of the body. The Outlier's every statement and action seems to be aimed at preserving that self-assumed distinction rather than making any concrete achievements. Sometimes, a governing body is unfortunate enough to have more than one Outlier.

Have you ever experienced the Outlier Syndrome in action? It could be called a syndrome because of the recognizable features or symptoms that seem to fester whenever an Outlier sits on a governing body. Do you have an Outlier on your governing body? Could you possibly be an Outlier? Should the Outlier Syndrome be viewed as an affliction or malady? And if so, what can be done? We'll explore these questions in more detail below.

Power, Goals, and the Outlier

To understand the Outlier's impact on a governing body, let's start with the idea that elected officials can only act as part of a body – a collaborative decision-making body. You can search throughout the laws governing statutory municipalities, or just about any home rule charter, and you'll likely find no powers or duties that are to be exercised by a singular elected official (other than the mayor, who may have certain defined responsibilities). This means that, as elected officials, the only way you can get anything accomplished is to have a majority of the governing body on your side.

It's likely that each elected official has an individual list of goals, goals that those who voted for you want you to accomplish. But your goals can be accomplished only if they're part of the goals of the body as a whole. That means your success depends on creating a consensus of the majority! And where does the Outlier fit in on a collaborative decision-making body? Why, nowhere! Perpetually being on the losing side of a vote means that the Outlier gets nowhere on his or her goals… unless, of course, he or she feels that being an Outlier is its own reward.

The Outlier is the "lone wolf" who sits on a city council or board of trustees and steadfastly refuses to act like a member of the team.

Are you an Outlier?

Perhaps you have met your share of Outliers, who tend to share one or more of these characteristics:

- There is an element of the lone crusader in them. They feel they were elected to shake up the status quo in some way. Maybe they think their predecessors were too cozy with developers, not friendly enough with the business community, too close to the municipality's staff, not close enough to the municipality's staff, etc.
- They view themselves as independent thinkers. They are often highly intelligent, but not "people persons." In kindergarten, their report cards might have reflected a poor score on "plays well with others."
- They take a perverse glee in being the "outsider," relish arguments for argument's sake, and place little value on matters like courtesy and regard for the feelings of others.
- They hate having to endure "soft" discussions such as a council or board retreat, the establishment of a mission or vision statement, the development of consensus around rules of procedure or rules of conduct, a session to discuss goals and priorities, or a CIRSA liability training session.
- They feel they are always right, and everyone else is always wrong. They feel they are always ethical, and everyone else is not. They feel they are looking out for the citizens, and everyone else is not.
- Initially, they may just have been unfamiliar with the ways of local government, and needed to build the skills to work effectively in a new environment. One or more gaffes may have caused them to be pegged as Outliers and treated accordingly, initiating an unhealthy Outlier dynamic.
- There may have been some explosive moments in private or public with the Outlier's colleagues, or indeed, the colleagues may have made some attempt at an "intervention."

These observations may or may not be totally on the mark. But one characteristic of the Outlier cannot be denied: he or she is seldom on the prevailing side of a vote, and is often at loggerheads with the rest of the body.

Do you think you may be an Outlier? If so, you might examine what your goals as an elected official really are. Do you want to have a list of concrete accomplishments at the end of your term? Or will it be accomplishment enough to have been the "loyal opposition"? If the former, then your behavior may be working at cross-purposes with your goals. If the latter, really? Will the people who voted for you be satisfied with that accomplishment? Will you?

Is the Outlier a Problem for the Rest of the Body? For the Municipality?

Most people who've had to deal with an Outlier would say that yes, the Outlier is a problem! How? Well, here are some ways:

- Anger and frustration build when a council or board has to deal with an Outlier, siphoning away energy that could be spent on more positive endeavors. This is a particular problem if tensions have built to the point that confrontations have begun to occur. No reasonable person wants to attend or view a council meeting and have a hockey game break out! It may be entertaining, but mostly, it's embarrassing to the governing body and to the community.

- Healthy teams seek to build a sense of camaraderie and cohesiveness. That's not entirely possible when there's an Outlier. It's not healthy to build a team around a shared hatred of one of its own members, and most reasonable people would prefer not to have that happen.

- The Outlier's perspective tends to be oppositional. From a liability standpoint, such a perspective is risky. If you're taking positions on an oppositional basis, are you really meeting your fiduciary duty to look out for the best interests of the entity?

- A disharmonious governing body is a dysfunctional governing body. It's been CIRSA's experience that liability claims thrive in an environment of disharmony and dysfunction.

- Your staff members are affected by the Outlier Syndrome, too. From the staff's perspective, seeing dysfunction on the governing body is a little like watching discord between one's own parents. It's unsettling, distressing, and morale-crushing.

- Most importantly, it's a shame for the governing body to lose a potentially valuable contributing member. In a worst case scenario, the Outlier becomes completely disempowered as he or she is ignored and marginalized. But this means that the body isn't running on all cylinders, and is deprived of the valuable perspectives that the Outlier might otherwise bring. Ultimately, the voters, and the community, are the losers.

Dealing with the Outlier Syndrome

You can't cure an affliction until you recognize it. And you can't recognize what you haven't named and defined. If your municipality is afflicted with Outlier Syndrome, you've taken the first steps towards a cure by naming, defining, and recognizing it! Here are some other steps you might consider.

- Confront the issue forthrightly and compassionately in a neutral environment. A council or board meeting is likely not a neutral

environment! Perhaps the matter could be discussed as one item on a retreat agenda. Be prepared with specific examples of how the Outlier has negatively impacted the body.

- Consider addressing the issue in the context of a larger discussion about governing body rules of procedure or rules of conduct. The "norms" that guide members' interactions with one another may be obvious to some but not all, especially to newer members. Those norms could be part of the discussion, and the process of articulating them can facilitate a consensus to honor them.

- Consider bringing in an outside facilitator to assist you. A governing body is a bit like a marriage that's been arranged for you by the citizens! There's nothing wrong with getting some outside help for perspective and to find solutions.

If you think you might have the Outlier label pinned on you, consider these suggestions:

- First, get a reality check. Find out how you're being perceived by your peers. It may be very different from your own perception of yourself. Ask each of your colleagues to give you a frank assessment.

- Check your motivations. If you have concrete goals you want to accomplish as an elected official, you must accept that success in your position can't happen without collaboration and consensus building. There is nothing that you can accomplish alone. So set a goal to be on the "prevailing" side…indeed to bring others over to establish a "prevailing" side.

- If you've already burned some bridges, understand that consensus-building can't happen without mutual trust, respect, and a sense of cohesion. These will take time to build. Look for a retreat or other opportunities to clear the air and start fresh.

- Use staff as a resource! Your manager or administrator wants nothing more than to assist newly elected officials in learning the ropes, and understanding the best time, place, and approach to raising issues. Don't get off on the wrong foot with blunders that might peg you as an Outlier.

What if all efforts to deal with the Outlier Syndrome fail? Well, it might be time for the rest of the governing body to cut its losses and move on. Don't continue to agonize over the Outlier and his or her impact on the body's functioning. Continue to accord the Outlier the same opportunities to participate in discussion and decision-making as any other member, but don't allow the Outlier to keep pushing your buttons. Remember, arguments and confrontations require more than one participant. You may need to simply say "thank you" or move on to the next point of discussion. Ultimately, the responsibility for putting an Outlier into office rests with the citizens, so there's only so much you can do. Try to go about your business

without having the Outlier become the dysfunctional center around which the rest of you swirl.

Conclusion

Governing body members don't all have to be in lockstep, or think and behave in the same way. On the contrary, diversity of thinking, styles, opinions, experiences, and approaches are healthy and necessary for a collaborative decision-making body. There is truly a collective wisdom that comes forth when many diverse minds work together on common goals. But the Outlier Syndrome is detrimental to a high-functioning governing body, and therefore, to the community. If your governing body is afflicted with the Outlier Syndrome, it's time to do something about it!

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Chapter 3

Nine Practices of Highly Ineffective Councils and Boards

By: Tami A. Tanoue, CIRSA General Counsel/Claims Manager

Chapter 3
Nine Practices of Highly Ineffective Councils and Boards

Some readers may be acquainted with John Carver's Policy Governance® model (Model) for boards of public and nonprofit bodies. In this chapter, we discuss the tough job of governing body members, and some of the ways in which a council or board can allow its effectiveness to be diminished or compromised. To understand the Model, how it works, and how it is implemented, Carver's book, *Boards That Make a Difference: A New Design for Leadership in Nonprofit and Public Organizations* (3rd ed. 2006), is highly recommended reading.

For those who've labored in local government for any length of time, *Boards That Make a Difference* will provide some laugh-out-loud moments of self-recognition. It describes a number of common practices that are a drain on the effectiveness of the governing body and a source of frustration for both the body's members and the staff who serve it.

Do Any of These Practices Ring a Bell?

Spending time on the trivial. As the author describes it, "Major program issues go unresolved while boards conscientiously grapple with some small detail." How many times have you gotten mired in the tiniest detail of a purchasing decision, or the proposed budget?

Foreshortened time horizons. The board's decision-making time horizons should be the most distant of anyone in the organization. Yet, as Carver says, "we find boards dealing mainly with the near term and, even more bizarre, with the past." How many times have the pennies spent in the prior months, as reflected in the "bills for approval" portion of the agenda, received undue attention at your meeting?

Reactive rather than proactive stance. Is the idea that the board should make proactive decisions, rather than merely react to staff initiatives, completely foreign? Would, as the author says, your board "cease to function" if it were asked to create its own agenda?

Going over what the staff has already done. "Reviewing, rehashing, redoing," is what the author calls it. Some boards spend a great deal of their time going over what the staff has already done. But as the author says, "reviewing, rehashing, and redoing staff work – no matter how well – do not constitute leadership"!

Problem-based prescriptions. If you prescribe a specific solution based on the details of a specific problem that has occurred in the past, you may wind up with a "pendulum swing" that creates unintended consequences in the future. As Carver says, "Correcting insufficiencies by looking backward at what they have been simply invites the next, perhaps opposite error. It is like trying to drive down the highway with a firm grip on the rearview mirror."

Accountability being allowed to leak. Have you established a City/Town Manager or Administrator position? If so, great! But are you still continuing to encourage or allow council/board member interactions with subordinate staff, or subordinate staff members to bypass their supervisors and directly go to council/board members with

their issues or complaints? If so, you may be keeping the Manager/Administrator from being able to do his or her job, or you may be interfering in such a manner that you can no longer credibly hold him or her accountable for performance.

Diffuse authority. When the governing body's and staff's respective areas of responsibility are not clearly delineated, the staff's knee-jerk response for every issue in a gray area may be, "Let's take it to the council." If you allow this, you'll continually increase your own workload without ever clarifying the appropriate boundaries between council/board governance and staff decisions.

The "Approval Syndrome." Does your agenda call for the governing body's approval of documents containing a multitude of paralyzing details (line item budgets, detailed personnel and administrative policies, job descriptions, etc.)? How does this make you feel? The document has already been created, and you're just reacting to it. Then, to avoid feeling like "rubber stamps," board members may start nitpicking. But as the author says, "no matter how much intelligence goes into playing this reactive role, it is clearly not leadership." Moreover, by its approval, the board has been co-opted into assuming ownership of the document, and staff is let off the hook in terms of accountability for the results expected from the document!

The "seductive intrigue of organizational activity." You know how, when you're faced with a huge project, sometimes the easiest way to procrastinate is to divert your attention to desk-cleaning or some other trivial task? That's the "seductive intrigue" that can pull you into involvement in the organization's internal minutiae. It can be a heck of a lot easier to divert your attention to those details than to grapple with the big issues involved in governing your entity. But governance shouldn't be about bringing the council/board more knowledgeably into the process of administration. A governing body need not and should not tag along behind management, or try to become "superstaff" in a "conscientious attempt to tag along more professionally." You've got grander things to do as the governing body!

So What's the Answer?

Well, no doubt John Carver would say, "Adopt and implement my Model!" Of course, that will require time and effort, an unswerving commitment, and probably the help of a Policy Governance® consultant. In the meantime, here are a few suggestions from *Boards That Make a Difference* to ponder.

- **View yourselves as an extension downward from ownership, rather than an extension upward from management.** As mentioned, your job is not to be "superstaff," much less "supermanagement." As the representative body for the citizens – the true "owners" of the community – your job is to exercise ethical and trusteeship responsibilities on behalf of the ownership. Viewed in that light, it becomes apparent that neither the championing of management decisions, nor substituting your judgment for that of staff, are part of those responsibilities. To be true leaders, you need to "develop a taste for the grand expanse of the larger context," as Carver says.

- **You determine the "ends." Leave the "means" to the staff.** It's important to read *Boards That Make a Difference* in order to understand fully what Carver means by "ends." Briefly, "ends" are the results or outcome to be obtained or the impact to be made, for whom, and at what cost or relative worth. You could call the "ends" the "what and the why." Everything else falls into "means," or the "how." Once you determine the "ends," give staff the latitude to determine the "means." After all, they were hired for their skill and expertise in means, weren't they? Aren't they in the best position to determine the means? If the governing body becomes involved in means, you may be simultaneously impairing your staff's ability to exercise their best judgment, and crippling your ability to hold them accountable for the achievement of the ends. Who's to blame if you dictated the "how" and the result was a shortfall in achieving the "what"?

- **Set appropriate boundaries on the "means."** Leaving the means to staff doesn't mean unbridled discretion. We all know that there's a limit to the idea that "the ends justify the means." Carver maintains that the governing body's legitimate involvement in means is to prohibit any means that are imprudent or unethical. But the way to do that is not with a set of *prescriptions* – what must be done. Rather, the right way to do that is with *proscriptions* – what must not be done. Why? Well, there aren't enough hours in the day or enough specialized knowledge on the board to define all the things that must be done. But the board certainly has a legal, moral, and ethical compass. That's why defining what's prohibited as imprudent or unethical is a more effective and efficient means of putting a boundary past which means cannot go.

- **Govern yourself before governing others.** Carver recommends that the governing body take the time to design and codify its own processes, including a board member code of conduct. One of the many helpful examples in *Boards That Make a Difference* is a sample code of conduct. Anyone who's experienced dysfunctional behavior within a governing body knows that negative interpersonal dynamics can destroy the governing body's effectiveness as well as its credibility with its constituents. But how can a board deal with inappropriate behavior among its own if it hasn't first determined what constitutes appropriate behavior? With a sound and mutually agreed process, personality need not become the dominant force in shaping issues and dealing with disagreements and confrontations.

What's This Have to do With Liability Anyway?

The problems identified by Carver as obstacles to good governance are also problems that can lead to increased liability for elected officials. For instance, if your role in relation to staff's is unclear, how are you or staff going to know what is within the scope of your authority and what is within the scope of theirs? Falling outside the scope of your lawful authority is one of the sure ways to lose your liability protections. And it follows that Carver's approach to good governance also provides

excellent risk management suggestions. Both board and staff can flourish within their respective spheres of authority without stepping on one another, maintain appropriate accountability, and ensure that the work of the public entity will be carried out within the boundaries of prudence and ethics.

Conclusion

This chapter has pulled out bits, albeit helpful bits, of *Boards That Make a Difference* for you to consider. Reading the book is highly recommended, because the Model really makes the most sense when viewed in its entirety.

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Chapter 4

Removal of Elected Officials in Statutory Towns: Pitfalls to Avoid

By: Tami A. Tanoue, CIRSA General Counsel/Claims Manager

Chapter 4

Removal of Elected Officials in Statutory Towns: Pitfalls to Avoid

The purpose of this chapter is to identify some of the key requirements pertaining to the removal of an elected official in a statutory town pursuant to a proceeding under C.R.S. Section 31-4-307. Many of these requirements are not present in the statute itself; rather, they are found in some old judicial decisions concerning the statute. Removal of an elected official by the governing body essentially overrides the will of the people who elected the official. For this reason, it is critical that any removal proceedings take place in accordance with the guidance provided by these decisions. The advice of counsel is also critical given the potential for missteps.

A recent case involving a CIRSA member municipality highlights the importance of these judicial decisions. While these decisions are more than a century old, they came into play in the recommendation of a United States Magistrate Judge in *Russell v. Buena Vista,* 2011 WL 288453 (D. Colo. 2011). This recommendation is unpublished and does not serve as precedent; however, it was recently cited with approval by the Colorado Supreme Court in *Churchill v. University of Colorado,* 2012 WL 3900750 (Colo. 2012). Thus, the recommendation may offer some good guidance to a statutory town contemplating a removal proceeding.

Given this recent resurrection of old case law, the way in which a town may have applied Section 31-4-307 in past proceedings may not serve as a sound guide to the conduct of such proceedings today. Thus, past practice should not be used as a basis to avoid compliance with the following requirements gleaned from old case law:

- **The basis for removal (unless the elected official has moved out of town) must be "misconduct or malfeasance in office," as those terms are used in Article XIII, Section 3 of the Colorado Constitution.** These constitutional provisions contemplate official misconduct of such a magnitude that it affects the performance of the officer's duties, and offenses against the municipality "of a character directly affecting its rights and interests." *Board of Trustees v. People ex rel. Keith,* 59 P. 72, 74 (Colo. 1899). Political or personal disagreements, or a stalemate resulting from failure to obtain a requisite number of votes on matters coming before the governing body, may not be sufficient grounds to effect a removal.

- **The removal proceeding is quasi-judicial in nature, subject to the safeguards commonly found in judicial proceedings.** This means:

    - There must be a charge or charges against the official sought to be removed. The charges must be specific and stated with substantial certainty. *Board of Alderman v. Darrow,* 22.P. 784, 787 (Colo. 1889). Vague or general charges likely will not meet this requirement.

    - There must be a hearing in support of the charges, and an opportunity to make a defense. *Darrow,* 22 P. at 787.

The charges must in the first instance be proven by testimony and evidence, with the opportunity given to the officer sought to be recalled to rebut such testimony and evidence, and offer his or her own.

This highlights one of the most difficult procedural aspects of a removal proceeding: who will present the evidence and testimony? The governing body serves as the decision-maker. It would likely be problematic, from a fairness standpoint, if the decision-makers also served as witnesses.

- The hearing must be held under the same limitations, precautions, and sanctions as in other judicial proceedings, and subject to judicial review. *Keith,* 59 P. at 75.

Questions to consider in holding the proposed hearing include:

- Have provisions been made for the issuance of subpoenas to compel the attendance of witnesses, the administration of oaths, the right of discovery, cross-examination of witnesses?
- Are rules of procedure in place, has a standard of proof been established, and will rules of evidence be followed?
- Who will be the witnesses presenting the evidence and testimony?
- Do the officers sought to be removed have the right to be represented by counsel? Is the governing body working with the advice of counsel?
- Have adequate time and opportunity been given to the officers sought to be removed to prepare their cases in answer to the charges?
- Have provisions been made for the granting of reasonable continuances?
- Has some means of recording the hearing been arranged, preferably by a stenographer who can prepare a verbatim transcript?
- Who will prepare written findings of facts, conclusions of law, and a final decision and order?
- **A basic requirement of judicial proceedings is that decision-makers must be neutral and impartial.** This is why in most judicial proceedings, investigative, prosecutorial, and adjudicatory functions are separated. In removal proceedings, the adjudicatory body (the governing body) may also have carried out an investigative function by establishing the charges that are the basis for the proceeding. Involvement in presenting testimony and evidence, as noted above, would further diminish the separation of these functions. The lack of separation may compromise the appearance or reality of a neutral and impartial decision-maker. The governing body

must be cognizant that this lack of separation, while difficult to avoid in some removal proceedings, may increase the liability of the decision-makers.

- **The decision will be subject to judicial review under Rule 106(a)(4) of the Colorado Rules of Civil Procedure.** A transcript of the proceedings, as well as the evidentiary record, will be produced to the district court for review. The standard of review will be whether the governing body's decision was "arbitrary or capricious." Constitutional due process violations may be raised, and considerations of bias may be raised to set aside a decision as well.

Conclusion

The types of internal conflicts often experienced by governing bodies may be an adequate basis for the exercise of recall powers by the people. However, removal is different from recall. When removal powers are exercised pursuant to Section 31-4-307, the governing body is essentially overriding the will of the people. For this reason, the removal power should only be exercised in situations where serious misconduct or malfeasance in office can be proven, only if the procedural safeguards summarized above are in place, and only with the assistance of legal counsel. Otherwise, the governing body may be taking on an unacceptable risk of liability.

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Chapter 5

Liability Protections and You

By: Tami A. Tanoue, CIRSA General Counsel/Claims Manager

Chapter 5
Liability Protections and You

Are you aquainted with the protections you have through your entity's membership in the CIRSA property/casualty pool? In this chapter, we provide a brief introduction to the two key coverage parts of the liability policy that apply to you as elected officials of CIRSA member entities.[1]

What Liability Coverages do We Have?

General Liability and Auto Liability Coverage applies to claims for bodily injury, property damage, and auto liability, among others. This is the coverage part that pertains to most allegations of "hard" injuries, such as an allegation of physical injury to a person or to tangible property. Thus, for instance, this coverage part would respond for an auto accident while you're driving your entity's vehicle on public entity business. This coverage part also includes law enforcement liability coverage.

Public Officials Liability Coverage applies to "wrongful acts" you are alleged to have committed. This coverage part applies to allegations of civil rights violations, improper activities concerning employment practices, and violations of federal and state law. Thus, for instance, this coverage part would respond when someone claims that he or she has suffered employment-related discrimination or harassment, or a violation of constitutional rights.

Who's Covered?

"Covered Parties" under the policy include, of course, your entity as a member of CIRSA. Any elected or appointed official, trustee, director, officer, employee, volunteer, or judge of a CIRSA member is also considered a Covered Party. So is each governing body, board, commission, authority, or similar unit operated "by or under the jurisdiction of" a member entity. Thus, elected officials, board and commission members, appointed officials, employees, and even authorized volunteers of your entity are all considered Covered Parties.

What Limits of Coverage do We Have?[2]

As of this writing, coverage limits are as follows:

- For general liability and law enforcement liability, the coverage limit is $5,000,000 per claim/occurrence.
- For auto liability, the coverage limit is $1.5 million per claim/occurrence.
- For public officials' liability, the coverage limit is $5,000,000 per claim/occurrence, subject to an annual per-member aggregate of $10,000,000.

Defense costs are included in these limits. There is also a member-selected deductible that applies to each claim/occurrence. Members have chosen

deductibles that vary from $500 to as much as $250,000 per claim/occurrence, so you should check with your own CIRSA contact to find out what your entity's deductibles are.

What Key Exclusions do We Need to be Concerned About?

There are several exclusions of concern, and a few are highlighted here. These exclusions are universal in most liability policies.

The "willful and wanton" exclusion is probably the exclusion of greatest concern to elected and other public officials. This exclusion applies to both coverage parts of the liability policy, and states that coverage does not apply to any loss arising out of the actions of any elected or appointed official, trustee, director, officer, employee, volunteer or judge of a member entity when such acts or omissions are deemed to be willful and wanton. And remember, you are a "Covered Party" only while in the performance of your duties for the member entity, and acting within the scope of your authorized duties for the member entity.

As you probably know, the Colorado Governmental Immunity Act's protections are lost when you are determined to have been acting outside the "scope of employment," that is, outside the course and scope of your authorized duties as an elected official. But such conduct has a double consequence: the potential loss of your liability coverages through CIRSA. This is the reason that our public officials' liability training places a heavy emphasis on the need to understand your "job description" as an elected official, and the need to stay within the parameters of that "job description."

> The "willful and wanton" exclusion is probably the exclusion of greatest concern to elected and other public officials.

The sexual harassment exclusion is another exclusion that has impacts on claims based on an individual official's conduct. This exclusion to the Public Officials Liability coverage part applies to sexual harassment claims. Let's say that a sexual harassment claim is made both against the entity, for failure to deal effectively with sexual harassment in the workplace, and against the harassing official, employee, or volunteer. Under this exclusion, the entity will likely be covered. However, with respect to the individual employee or volunteer, the entity will have the option to direct CIRSA to defend or not defend the individual. Thus, if the entity so directs, the individual will be left out in the cold as to any defense of a sexual harassment claim against him or her! And in any event, even if the entity directs CIRSA to provide a defense, any liability imposed on the individual based upon a finding that harassment occurred would not be covered through CIRSA. **The sexual abuse exclusion** operates in a similar fashion.

The punitive or exemplary damages exclusion is also pertinent in the context of an individual official's conduct. Punitive or exemplary damages can be awarded in circumstances where an individual's conduct is willful and wanton in the disregard of someone's rights, or callously indifferent or motivated by evil intent. The purpose of punitive damages is, as the term suggests, to punish a wrongdoer for such egregious conduct. Because the punitive effect would be considerably blunted if an insurer were available to cover a punitive damages award, punitive damages are deemed uninsurable by the appellate courts of many jurisdictions, including Colorado. Consistent with this judicial position, the CIRSA liability policy contains an express exclusion for punitive or exemplary damages.

The breach of contract exclusion can be pertinent to the activities of governing bodies. Governing bodies approve a wide variety of contracts, and sometimes are alleged to have dishonored them. It is not the intent of a liability policy to cover the kinds of liability that can arise when someone alleges a breach of contract, so there is an exclusion for the breach of an express or implied contract. This exclusion does not apply when a claim is based upon an allegation by an official or employee of wrongful termination of employment.

The condemnation/inverse condemnation exclusion can be relevant to a land use action taken by a governing body. A landowner may claim that all or a portion of his or her property was "taken" by governmental action, or that vested property rights were impaired by governmental action. These types of claims, involving the value of private property, are not covered. As you can imagine, liability policies aren't suited to cover these types of claims, because they would require insurers to try to underwrite the risk of having to pay for the property values of privately owned real estate throughout the state!

The bonds or taxes exclusion applies to any liability based upon or arising out of the issuance of bonds, securities, or other financial obligations, or taxes, fees, or assessments, or the collection, retention, or expenditure of funds. Thus, when a claim is made of an improperly levied tax, or retention of funds in violation of the Taxpayer's Bill of Rights, or impropriety in the issuance of bonds or other financial obligations, this exclusion would apply.

What Else Should You Know About Coverage Issues?

A lawsuit against you may elicit one of several responses from CIRSA. It may be determined, based on the allegations, that you are owed an unconditional duty of defense (i.e., the assignment of a defense attorney) and indemnity (i.e., covering any judgment or settlement). Or it may be determined that none of the allegations invoke any duty of defense or indemnity, and you will receive a denial letter. Sometimes, though, a suit will contain a mixture of covered claims and uncovered/potentially uncovered claims and, in this case, we will defend you under a "reservation of rights." A "reservation of rights" letter will be sent telling you of the areas where there may be no coverage, and reserving our right not to indemnify you, and our right to terminate your defense (and potentially seek reimbursement of legal fees paid on your behalf) should circumstances warrant.

One or more CIRSA defense counsel will be assigned in circumstances in which there is a duty to defend. In some cases, a single attorney can represent multiple defendants; however, in cases where defenses may be inconsistent between or among the covered parties, or other circumstances for a conflict of interest may exist in representation, CIRSA will assign multiple counsel. CIRSA-assigned defense attorneys, although paid by CIRSA, owe their duty of loyalty to you, their client.

Footnotes:

[1] This is only a summary of certain provisions of the CIRSA liability coverage documents. The language of the applicable coverage document must be reviewed for a complete and accurate understanding of the applicable coverages, and the application of the coverage document to any specific situation will require the advice of your entity's attorney.

[2] Please refer to the Declarations pages of the Liability Coverage form for more specific information on the limits and sublimits for all coverages.

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Chapter 6

Ethical Conduct in Local Government

By: Robert Widner, Widner Michow & Cox LLP

Chapter 6
Ethical Conduct in Local Government

Introduction

Citizens have a right to expect ethical behavior from local government officials. In the municipal context, "ethical behavior" generally means the conduct of public business in a manner that will preserve or restore the public's trust in government. In many instances, local government officials are unaware of the rules and guidelines governing their official behavior. This chapter outlines a basic regulatory framework for ethical behavior for local government officials and advocates on the premise that limited but enforceable local regulation is necessary to protect the public trust. The first part of this chapter focuses upon *"what"* ethical activity should be regulated at the local level. The second part focuses upon *"how"* local ethical standards should be enforced.

Although the vast majority of public officials ably conduct official business without ethical missteps, a single publicized violation can cast a cloud upon the entire government organization and raise suspicion that other public officials are engaged in similar misconduct.

Why Regulate Local Ethics?

Both media stories and national studies of local government decision-making highlight the need for regulation of ethical behavior by local government officials. Unfortunately, ethical violations do occur at all levels of government and may range from the use of a public office to help a friend secure special treatment from the government to corruption, self-dealing, or just plain poor decision-making. Although the vast majority of public officials ably conduct official business without ethical missteps, a single publicized violation can cast a cloud upon the entire government organization and raise suspicion that other public officials are engaged in similar misconduct. Simply put, ethical violations erode public trust.

Colorado state law attempts to describe appropriate "standards of conduct" for local government officials in Title 18, Article 24 of the Colorado Revised Statutes. Unfortunately, the state law fails in many respects to articulate clearly the standards for ethical behavior or to define key statutory phrases, such as what constitutes "personal or private interest." State law further fails to serve the needs of local government by delegating the enforcement of alleged local ethical violations to the local district attorney's office. This delegation often proves ineffective as it requires district attorneys to divert their limited resources from the enforcement of criminal conduct to the investigation and enforcement of state misdemeanor ethical misconduct. Moreover, enforcement of statutory standards of conduct against elected public officials by elected district attorneys can – fairly or unfairly – lead observers to assume that politics, rather than justice, will dictate the outcome.

Municipalities may overcome these state statutory shortcomings through local regulation and enforcement of ethical behavior. Effective local regulation of public officials' ethics necessarily involves two distinct elements. The first is a set of clearly written directives identifying what constitutes unacceptable or unethical behavior. The second is a process for enforcing the written directives in a reasonable, fair, and efficient manner.

What Should be Regulated?

The most common problems with local rules of ethical conduct are vagueness and overbreadth. Sweeping general statements such as "city officials should comport themselves at all times in a professional manner" are too vague to help either the officials or their constituents understand what is and is not acceptable. Likewise, regulations that attempt to set standards for the officials' personal life may seem admirable, but are really beyond the scope of good ethical regulation. Consequently, any set of ethical regulations should focus on the conduct of public officials while performing their public duties and should be specific enough to clearly define what constitutes an ethical violation.

Engaging in criminal conduct while in the course of one's public responsibilities should always be an ethical violation. However, criminal acts committed by public officials outside of their official role and in their private capacity are best left to local law enforcement or, as discussed below, the public's right of recall. It may be true that a public official's criminal activity unrelated to public office can still undermine public trust, but if your ethical code provides that "any felony or misdemeanor criminal activity" committed by a public official constitutes an ethical violation, are you prepared to sanction a board or council member who receives a jaywalking ticket?

A criminal act committed by a public official in his or her private life will typically only call into question the qualifications of that particular public official to serve the public. To that end, state law provides a remedy in the right of recall, a process by which the voters can decide whether that individual should continue to serve. Local ethical regulations, however, should avoid putting members of the municipal governing body in the role of overseeing and enforcing the private activities of one of their own.

It is also customary, and a good idea, for local ethics regulations to incorporate as an ethical violation any failure of the public official to adhere to important provisions of the municipal charter or ordinances, such as provisions that prohibit elected officials' interference with the city manager's supervisory role over city employees. In addition, ethics regulations should prohibit:

- the intentional disclosure of confidential governmental information;
- the acceptance of gifts of substantial value;
- the misuse of public resources or public equipment; and
- engaging in contractual relationships for the personal benefit of the public official and/or the official's relatives.

In summary, local ethical regulations should prohibit the conduct that will most directly impair the public's trust in the local government organization as a whole. If drafted with appropriate attention to specificity, effective local regulation will put public officials on notice of precisely what constitutes inappropriate behavior related to their public service, and will clearly inform constituents of what is expected of their local representatives. Accompanying the regulations should be well-defined terms and phrases designed to avoid vagueness and ambiguity.

How Should Ethics Codes be Enforced?

Ethics regulations effectively inform officials what conduct is permitted and prohibited in public service. However, without a means to enforce the ethical requirements, the regulations become largely meaningless.

Creating a process to enforce ethical regulations requires careful thought. Ensuring that the regulations are enforced fairly is a paramount concern. Fair enforcement is fostered when regulations clearly articulate the requirements and expectations of every step of the enforcement action. Where a step is optional, such as whether an investigation of the ethics complaint will be performed, the criteria and procedures for determining whether or not the step will be employed should be clearly identified and followed. The regulations should contemplate the need for issuing subpoenas for documents and compelling witness testimony and attendance.

The typical process will include a complaint, the identification of the hearing body or hearing officer, an initial review, investigation, a hearing, a decision and, if appropriate, a penalty.

Complaint

The initiation of the process to enforce an ethical standard should require a written complaint or allegation of unethical conduct. The form of the written complaint is important. The person charged with unethical conduct has a right to know what conduct is alleged to have violated the ethical rules.

At a minimum, the complaint should include a detailed description of the action alleged to have violated the rules and citation to the ethical rules alleged to be violated by such conduct. Requiring the complaining party to verify or certify under penalty of perjury or other sanction that the allegations are truthful may aid in preventing complaints that are merely intended to harass or which might be politically motivated. Once received, the complaint must be formally delivered or served upon the person alleged to have violated the rules.

Hearing Body or Officer

A critical decision for any ethical enforcement action is the selection of the appropriate hearing body or officer to hear the allegations, render a decision, and impose a penalty, if appropriate. The enforcement regulations should identify the process for selection, composition, and qualifications of the hearing body or hearing officer. The options are numerous. The hearing body might, for example, be composed of the entire governing body of the local government, a governing body

subcommittee, a citizen ethics board, or an independent hearing officer. Moreover, the decision of the hearing body or officer can be considered advisory and made subject to final review and ratification by the governing body.

Each option presents advantages and disadvantages. The elected governing body is a logical selection when judging the conduct of its fellow members or public servants due to its role as representing the citizens who demand ethical action by government. However, selecting the governing body or individual members of the governing body risks injecting elements of political favoritism into the ethics process. Similarly, while citizen members have a direct interest in ethical governmental action, citizens can oftentimes be politically aligned with elected officials or lack the experience to understand the allegations in the context of public service. Individual hearing officers, while perhaps free of any political motivations, may lack accountability to the citizens.

Initial Review

A preliminary or initial review of the complaint may be a beneficial step. A complaint may fail to assert any actions by the public servant that constitute an ethical misstep or may assert actions that are unrelated to the servant's public duties. In addition, a complaint may, on its face, be submitted for the sole purpose of harassing the public servant. At a preliminary review, the hearing body or officer can elect to dismiss the complaint, thereby saving the local government time and money in processing spurious or specious allegations. Any decision to dismiss the complaint should be made in writing and provided to the complaining party and the person against whom the allegations were raised.

Investigation

For some but not all complaints, an investigation might be warranted. If warranted and approved by the hearing body or officer, the investigation should be undertaken by an independent and neutral party. This investigation might involve the interview of witnesses and review of the evidence, and may culminate in a written summary of disputed and undisputed facts relevant to the issues to be decided by the hearing body or officer.

Hearing

For complaints that warrant prosecution, a hearing should be held to consider the complaint. In some circumstances, the hearing may include a preliminary stage whereby the hearing body or officer reviews the investigative report and, if appropriate, may elect to dismiss the allegations if the investigation established that the evidence does not support a finding of wrongdoing. Conducted in a manner similar to a judicial proceeding, the hearing should permit the presentation of evidence to support the allegations of unethical conduct and an opportunity to provide a defense against the allegations. The local government may employ a prosecutor to present the allegations and evidence. Any decision by the hearing body or officer should be made in writing to ensure an adequate record and formally conclude the proceeding.

Decision and Penalty

In the event that the hearing body or officer finds a violation of the ethical standards, a penalty may be in order. Obviously, the severity of the penalty can vary depending upon the seriousness of the violation. Penalties may range from a simple letter of admonition or censure, to removal of the public servant from certain duties or responsibilities, to more drastic action including removal from elective office. It is exceedingly rare for ethical violations to result in a monetary fine. A monetary fine is most appropriate where the ethical violation caused probable financial harm to the community. These types of violations are best prosecuted by the district attorney under the public trust provisions of state law.

Importantly, removal from office is a power best reserved for the governing body which holds the power of removal pursuant to state law. Moreover, it is important to acknowledge that elected officials remain accountable to the citizens and are subject to recall from office should their constituents feel the ethical standards of their official are lacking. For that reason, removal from office should be considered only in the most egregious cases.[1]

Footnotes:

[1] Please see Chapter 4 for a discussion of the removal power in a statutory town.

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Chapter 7

Elected Officials' Involvement in Personnel Matters

By Tami A. Tanoue, CIRSA General Counsel/Claims Manager

Chapter 7
Elected Officials' Involvement in Personnel Matters

CIRSA doesn't take many member cases all the way through trial. But when we do, it's usually because we expect a jury verdict in our member's favor. But one area where we've sometimes been disappointed by a jury has been in the area of employment liability.

CIRSA members' experience with employment claims in the judicial system reflects certain realities. Every juror has probably had to deal with a "bad boss" at some time in his or her working life. It's much harder to find a juror who's had to deal with "bad employees" as a manager or supervisor. So juries are naturally tilted in the employee's favor rather than the employer's.

Every juror has probably had to deal with a "bad boss" at some time in his or her working life. It's much harder to find a juror who's had to deal with "bad employees" as a manager or supervisor.

Another reality is that employment litigation is extremely stressful. Careers and reputations are at stake. The supervisor's and manager's (and sometimes elected official's) every move is subjected to scrutiny, and the documents they've generated are nit-picked by attorneys and blown up into super-sized exhibits. One's fate is entrusted to the decision of a group of complete strangers. Sometimes, that fate is a dire one, indeed. One mayor in New Mexico (which is in the same federal circuit that encompasses Colorado) was handed a verdict in which a jury determined that his retaliatory and discriminatory conduct in an employment matter warranted a punitive damages award of $2,250,000 against him (later reduced to $1,500,000 but affirmed by the 10th Circuit Court of Appeals). *Hardeman v. City of Albuquerque,* 377 F.3d 1106 (10th Cir. 2004).

Even when the stakes aren't that high, no one who's ever been through employment litigation relishes the thought of ever going through it again. The suggestions in this chapter are intended to help elected officials minimize the chances that they'll be caught up in employment-related litigation and, if they are, to maximize the chances of a better outcome than that faced by the New Mexico mayor.

Establish a structure that allows delegation of personnel functions. In a word, the single most important suggestion is: delegate! The chances that you'll be pulled into an employment claim, much less sued successfully, go way down if you've appropriately delegated the responsibility to hire, train, evaluate, supervise, manage, and discipline all but your key employee or employees. To do this, you need to have an administrative structure in place that will permit delegation, such as a manager or administrator form of government.

If your entity is fortunate enough to have a manager/administrator, the governing body should take full advantage of the organizational structure this position allows. The manager/administrator should be the ***only*** position (with the exception of city/town attorney, municipal judge, and similar professional positions) that reports directly to the governing body. All other personnel should be accountable to the organization solely through the manager. Every organization that has more than a few employees should strive to put such a structure into place.

Honor the structure. Once you've achieved a manager/administrator form of government, you must honor it. These types of actions, if allowed, would violate your commitment to that form, waste the resources that you've allocated to it, and encourage dysfunction and disorder:

- Elected officials reaching down below the level of the manager/administrator to influence what goes on with personnel administration below that level.
- Elected officials permitting an employee below the level of manager/administrator to bypass his/her own supervisor and take personnel issues directly to them.

Thus, for instance, if your entity has committed to a manager/administrator form, there's no call for elected officials, individually or collectively, to demand the hiring or firing of a specific employee below the level of manager/administrator. Such an action raises questions of propriety from several perspectives:

- *Do your personnel enactments reserve any such authority to the elected officials?* If you have a manager/administrator, your personnel handbook probably doesn't (and shouldn't) call for you to be involved in decisions involving subordinate employees. If you get involved in such decisions, you may be outside the scope of your authority and could get in trouble (see "Be aware of the scope of your authority" below).
- *What's the reason for doing an "end run" around the manager/administrator?* Do you have a "favorite" candidate for employment, or an employee who's on your "hit list"? Why are you championing or condemning someone rather than trusting your manager/administrator to make the right decision? Do you question his or her judgment or ability to make the right choice? If so, confront that issue; don't skirt it with an "end run."
- *Could what you're doing be perceived as retaliatory?* Along with all the other reasons why involvement in personnel matters can be very risky, consider the retaliation claim. Everyone is potentially in the category of persons who are legally protected from acts of retaliation. Retaliation claims are among the most difficult to defend. And, as can be seen from the situation in which the New Mexico mayor found himself, these kinds of claims can lead to massive liability.

But often, it's not the elected official who seeks, in the first instance, to become inappropriately involved in a personnel matter. Rather, there's pressure put on the official from outside. Either way, though, such involvement is the wrong thing to do. Don't be pressured by a member of the public, for instance, to interfere in a personnel issue that's been delegated to the manager/administrator. That citizen's not going to be around to help you if you get into trouble at his or her urging!

Similarly, don't give in when a subordinate employee is trying to use you to get around his or her supervisor, or when an applicant is trying to get a leg up on employment through you. Let the process unfold the way it's meant to unfold. If you have a concern about the way the manager/administrator's handling things, address that concern directly. If you cave in to pressure to involve yourself inappropriately, though, you may be enabling someone who wants to "game the system," or unfairly disempowering a manager or supervisor.

Be aware of the scope of your authority, and stay within that scope. From a liability standpoint, one of the worst things you can do is to act outside the scope of your legal authority. An area where authority issues often arise, particularly in smaller communities, is in the "committee" format for personnel administration. In this format, an individual councilmember or trustee is in a supervisory or oversight relationship with respect to a department, department head, or employee. Thus, a town might designate a trustee as "water commissioner," "police commissioner," etc.

What's troubling about this committee format is that it's often not described anywhere in the community's enactments, nor is the authority of each commissioner set forth in writing. Rather, this format seems to be a relic of oral history and tradition. But the lack of written guidelines means that there are significant personal risks to the commissioner. What if the commissioner takes an adverse job action, such as seeking to terminate an employee? Under what authority is the commissioner acting?

If the commissioner can't prove that the action was within the scope of his or her authority, there may be consequences from a liability and insurance coverage standpoint. The state Governmental Immunity Act, for instance, provides protections for public officials only when in the performance of their *authorized duties.* Likewise, liability coverage protections through CIRSA only apply when a public official is acting *within* the scope and performance of official duties.

Similar questions arise when an individual elected official chooses to become involved in a personnel matter in a way that isn't authorized by the entity's personnel enactments. Where is the authority for such involvement? If you can't find a firm source of authority, you may be heading for trouble.

Respect the principle that each employee should have only one boss. This seems like a pretty obvious principle that every organization should follow. You don't want an employee confused by multiple directions from multiple supervisors. You also don't want an employee playing one supervisor off against another, the way children sometimes play one parent off against the other. When elected officials become inappropriately involved in personnel matters, this basic principle is violated, and the result is chaos.

If you allow yourself to become embroiled in a personnel matter involving a subordinate employee, the employee may then feel that the word of his or her supervisor can always be disregarded. You may have forever undermined that supervisor's authority, or allowed the subordinate to do so. Likewise, if you were involved in lobbying for the hiring of a favorite applicant (even if it was for good reasons), that person may always feel that you, not his or her supervisor, are the go-to person on personnel issues.

This is not to suggest that a militaristic chain of command is required in every workplace. In fact, flexibility in reporting relationships is desirable in some situations. For instance, you wouldn't want to lock your employee into reporting a harassment claim only to an immediate supervisor, if the immediate supervisor is the one alleged to be engaging in the harassment. But you can maintain the needed flexibility without collapsing into the chaos that your inappropriate involvement in personnel matters will beget.

Conclusion

There's certainly a place for elected official-level decision-making in personnel matters, but those decisions should be reserved for the high-level issues that involve the entire organization. Examples of such high-level issues could include selection, evaluation, and discipline standards and procedures for the entity; could include salary and benefits plan for the workforce; and overall goals and priorities for departments. But when these issues begin devolving into the details of hiring, training, evaluating, supervising, managing, or disciplining particular employees, it's time to delegate them to your manager/administrator.

NOTES

Chapter 8

Executive Sessions

By Tami A. Tanoue, CIRSA General Counsel/Claims Manager

Chapter 8
Executive Sessions

At CIRSA, there has been an upswing in claims against members for alleged violations of the Open Meetings Law in the conduct of executive sessions. These types of claims are usually excluded from most commercial insurance coverages. However, CIRSA provides some defense cost coverage for claims alleging executive session violations by governing bodies. In this chapter, we'll go over the basics of the open meetings law, and summarize CIRSA's coverage for all allegations of open meetings violations.

> Under the open meetings law, C.R.S. Section 24-6-401 *et seq*., it is the public policy of the state that the formation of public policy is public business and may not be conducted in secret.

The Open Meetings Law

Under the open meetings law, C.R.S. Section 24-6-401 *et seq.,* it is the public policy of the state that the formation of public policy is public business and may not be conducted in secret. The core requirement of this law is that all meetings of a local public body (a term which includes the governing body and other formally constituted bodies of a public entity), at which public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times. "Full and timely notice" must be given of all meetings; this requirement is deemed to have been met if notice of the meeting is posted at least 24 hours prior to the holding of the meeting. No action taken at a meeting is valid unless it meets the requirements of the open meetings law.

There are a few exceptions to this core requirement of public openness, and a properly convened executive session may be held to discuss matters that fall into those exceptions. Some of the more commonly arising subjects that are proper matters for an executive session include:

- The purchase, acquisition, lease, transfer, or sale of any real, personal, or other property interest;
- Conferences with an attorney for the local public body for the purposes of receiving legal advice on specific legal questions;
- Certain personnel matters; and
- Determining positions on matters that may be subject to negotiations, developing strategy for negotiations, and instructing negotiators.

The open meetings law should be reviewed in its entirety for all of the applicable legal requirements, and legal advice should be obtained on its meaning. Home rule municipalities may have their own meeting and executive session procedures established pursuant to their home rule powers; this discussion is not intended to cover the variances in local practice in home rule municipalities.

The "courts of record" of the state have jurisdiction to issue injunctions to enforce the purposes of the open meetings law. Any citizen of the state may apply for such an injunction. The open meetings law states that, in any case in which the court finds a violation of the law, the court shall award the citizen prevailing his or her costs and reasonable attorney fees. In addition, a citizen may apply to the court for access to the record of an executive session; if the court determines, after listening to the record, that the local public body engaged in substantial discussion of any matters that were not proper subjects for an executive session, or took formal action while in executive session, then the record may be made accessible to the public.

Executive Session Coverage Through CIRSA

Defense costs coverage for executive session claims is provided to CIRSA property/casualty members by way of an amendment to the "non-monetary damages, fines or penalties" exclusion (Exclusion 10) in the public officials liability section of the coverage document. This coverage is subject to the following terms:

- It applies only to reasonable attorney's fees and reasonable and necessary costs included in the defense of an action brought solely under C.R.S. Section 24-6-402(9) of the open meetings law.
- It applies only to such an action brought against the member's governing body; subordinate boards and commissions holding executive sessions do not have this coverage.
- It does not apply to any plaintiff's attorney fees or costs that are assessed against the member as a result of losing such an action. Such fees and costs must be borne by the member.
- There is a sublimit for this coverage that is shared with certain other non-monetary defense coverages. As of this writing, the sublimit is $10,000 any one action, subject to a $30,000 annual aggregate per member. The member deductible does not apply to this coverage.
- Submitting an executive session claim to CIRSA is optional with the member; the member may choose to defend such a claim itself. If a member wants to avail itself of this coverage, the claim must be submitted to CIRSA, for handling by CIRSA-assigned defense counsel, at the time of commencement of the action.

A Few Suggestions

Of course, claims of executive session violations could be avoided entirely by never having an executive session! However, this may be an unrealistic goal because, as discussed above, there is a legitimate need for confidentiality in some matters. But consider the following:

- Hold executive sessions to the absolute minimum necessary to protect legitimately confidential matters.
- Utilize an executive session "script" to help guide you in the proper procedures for convening an executive session. CIRSA members may obtain a CIRSA sample by contacting tami@cirsa.org.
- When participating in an executive session, be vigilant of yourself and others to make sure that the discussion doesn't stray from the specific subject that was in the motion to go into executive session.
- Make sure you keep an electronic record of each executive session as required by the open meetings law. The only exception to the recording rule is an executive session for an attorney-client conference; these sessions should not be recorded.
- Stay out of the loop on personnel matters when feasible. One of the more common reasons for holding an executive session is the discussion of a personnel matter. However, if the employee who is the subject of the executive session so demands, the discussion must be done in public. Moreover, personnel matters that are not personal to a particular employee are not proper subjects for an executive session (unless some other lawful basis for holding an executive session applies). These and other complexities of the "personnel matters" basis for holding an executive session can be avoided if your personnel policies have been set up in a manner that delegates most personnel matters to your staff.

Each and every executive session your entity holds exacts a price in terms of loss of public confidence in open government and, if done improperly, can subject your entity to claims.

- If you have to take one of your own governing body members to the "woodshed," don't do it in an executive session. Some years ago, the "personnel matters" basis for holding an executive session was amended to state that executive sessions are not permitted for discussions concerning any member of the local public body or appointment of a

person to fill a vacancy on the local public body. Until this amendment was made, it was not uncommon to hold such a discussion in executive session under the theory that it was a governing body "personnel matter," but this theory is no longer viable.

- If the confidentiality of a matter is such that it warrants an executive session, then be sure to honor that confidentiality once the executive session is over, until and unless public discussion of the matter becomes legally permissible. Don't act outside the scope of your legal authority as an individual member of the governing body to waive confidentiality on your own.

Conclusion

Each and every executive session your entity holds exacts a price in terms of loss of public confidence in open government and, if done improperly, can subject your entity to claims. By complying with the strict requirements of the open meetings law, keeping executive sessions to the minimum necessary, and observing all of the formalities for holding executive sessions, you can keep that price low and public confidence high.

NOTES

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ELECTED OFFICIAL'S STARTER KIT

Advocacy, information and training to build stronger cities and towns.

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FOREWORD

Welcome to your new role as a municipal elected official!

For many years, the Colorado Municipal League has been the #1 resource for training for newly elected officials through our popular workshop program. These workshops have historically focused on core issues that are “mission critical,” covering topics such as liability, ethics and conflict of interest laws, roles and responsibilities, and general orientation to your new position and the relationships you now have to fellow elected officials and your municipal staff.

As times have changed, CML has recognized the need to provide training resources in formats that are affordable and accessible to our members statewide. Traveling to traditional “in-person” workshops can be costly and time-consuming, and with busy personal and professional lives, training resources need to be available in a format that you can fit into your individual schedule.

That is why we are so pleased to offer you *The Newly Elected Official’s Starter Kit*. Using the core content areas that we typically cover in our training programs, we have developed this compilation of reading material and recorded Webinar presentations to replicate in some way the training experience. While there will no doubt be many opportunities in the coming years for you to attend a CML training program (and we hope you do!), this starter kit will point you in the right direction and provide the resources and tools you need to begin your adventure as a municipal elected official.

As always, we appreciate your feedback and suggestions for ways in which we can serve you better. Remember, CML works for you!

NOW THAT YOU ARE IN OFFICE ...

Congratulations! After many long hours, months, of campaigning, you have won. You are now an elected official. And whatever your office — mayor or councilmember — you are probably experiencing some ambivalence. On one hand, you feel very exhilarated by and looking forward to your new challenges. On the other, you feel somewhat incredulous, like you have just stepped into the Twilight Zone. It's pretty weird and you can't believe you did it. "Was I out of my mind? How'd I get myself into this? I feel like I have the whole world in my hands." Well, very simply, you declared your candidacy, vigorously courted the citizens, and you won! So, for better or for worse (hopefully, better), you are married to this office for a while, and you will do just fine.

Believe it or not, you have lots of company. There are many others just like you, and there are many veteran local elected officials who know those feelings all too well. They are more than willing to mentor you and share their experiences in getting adjusted in surviving as a newly elected official.

Several years ago, then newly-elected official Jacquelyn Gist, alderman, Carrboro, N.C., was in your shoes. But through this experience, she learned so many important lessons about herself and her new job in the small town of Carrboro that she decided to write about it. The following, "Elected to office? Your life will never be the same," is so candid and down to earth, that we thought it was worth reprinting in its entirety, to help you put things in perspective.

ELECTED TO OFFICE? YOUR LIFE WILL NEVER BE THE SAME *by Jacquelyne Gist*

Three hours into a town board meeting — covered as always by cable TV — I ran my fingers through my hair and a pink foam rubber curler fell out. I grabbed it and shoved it in my purse. When I got home, my machine was full of messages. People reported that they had watched to see how long it was going to take me to realize that I had a curler hanging from my hair. No one mentioned the awe-inspiring decisions I made that night.

A few months ago, I ran into a local musician who told me that he and his roommates always watched our "show." They had really loved the "episode" where we talked about requiring people to put their cats on leashes. (That motion failed, by the way.)

An elected official in a small town is a public person. People watch you more closely than you would ever expect — both politically and personally. And the people who let you know today that there is a curler hanging from your hair are the same people who will come to the town hall tomorrow with recycling concerns. The musician who loved the cats-on-leashes "episode" also wanted action on the late night noise from the car wash across the street. The owner of my favorite restaurant, where I have eaten weekly for 12 years, talks to me about property he has just bought that is in the watershed protection district. The woman who has cut my hair for 10 years finds out that her new house is next to one of the sites being considered for a new landfill. One of my close friends applies to the town for a small business loan. The list goes on.

I have lived in Carrboro for almost 18 years and I know a lot of people. The people I hang out with and do business with, the people I spend my life with on a daily basis, are the same people for whom I am sworn to provide sound governmental decisions.

Sometimes I feel like the sibling who is left in charge while the parents are out for the evening. If I let everybody do whatever they please, mom and dad will ground me. If I enforce the rules, my siblings will hate me. What if I really believe, based on sound judgment and good information, that the best place for the new landfill is next to my hairdresser's house? What if it is in the best fiscal interest of the town not to grant my friend a small business loan?

Newly elected local government officials typically enjoy a wonderful honeymoon period with constituents, staff and the press. To those of you still on your honeymoon — to others who would join you — I say, “Savor it.” Pretty soon, something magical will happen. You will undergo a metamorphosis and become a “them.” No longer will you be the person who would be able to solve your community’s problems if only you were on the board. Instead, you will become the one whom people tell how they would solve the problems if they were on the board. This metamorphosis typically takes place around budget time. Life will never be the same.

Facing public prejudice

Being on the Carrboro Board of Aldermen has changed my life in ways I never expected. Most perplexing is the new way people react to me publicly. To people who are not close to me, I am one of “them,” a politician. During my first four years in office, I was accused of being everything from a socialist to a conservative. It seems that lots of people have fixed ideas of who and what elected officials are, how we make decisions, and what motivates us. Suddenly, I find myself being prejudged based on the fact that I am an elected official in ways that are often funny, usually wrong, and sometimes downright insulting.

Last year at a diversity sensitivity workshop, my fellow participants and I were asked to tell about times when we felt we had been prejudged and how that had affected our lives. Without giving it any thought, I found myself talking about problems I have had that have stemmed from people’s biases against politicians — problems that had crowded out for that moment my serious concerns about problems I have faced as a woman. Even my family distrusts politicians! It is part of the job, and I guess I deal with it by working hard to serve in a way that allows me to look into the mirror without feeling ashamed. I still get mad if people accuse me of “acting like a politician,” but at least I know they are wrong.

Facing the demands on your time

When I was first sworn in a little over four years ago, I got something I hadn’t counted on as I campaigned. After the high of the campaign and of being elected, the excitement of seeing my name and picture in the paper every week, after the congratulatory letters and phone calls, after the intense sense of teary eyed joy I felt the night my mother held my family Bible for me during my swearing in — after all of these intense emotional experiences had passed — I found that I had a second full-time job. It required hours of reading, long meetings, and attention to hundreds of details. It was a job that required me to be an expert on areas that I knew next to nothing about. It was a full-time job that I was supposed to do after I finished the full-time day job that paid my bills. All of a sudden, instead of working eight hours a day, I was working 10, even 18, hours a day. And by nature I am a lazy sort. The life of a local elected official? “What life? I don’t have a life; I have meetings!”

That was kind of hard to get used to — all the hours of work and the never-ending meetings. When I was first running for a seat on the Carrboro board, I believed that the job entailed one meeting a week on Tuesday nights. Wrong! Instead, I find my typical week involves two to three lunch meetings squeezed into my job schedule, one or two 5:30 meetings, and two or three 7:30 meetings, in addition to that regular board meeting.

Facing the demands on your professional life

So, being an elected official has changed the rhythm of my waking hours and my perceptions of what is important in governance. It has also changed other areas of my life.

When I was first elected, I was working as a social worker in a small nonprofit advocacy organization. The agency’s work required frequent communication with human service, education, government and media organizations. After being in office a few months, I discovered that the people in these organizations would return my phone calls faster than they had before. Because of my public position, I suddenly had access to people that the agency had been trying to build relationships with. I was in a position to get public attention for the agency’s agenda, but I wasn’t even the agency’s director, although some people thought I was. And I felt uncomfortable, knowing that people were responding to my role as an alderman, not my role as a social worker, even if it was for a good cause. My newfound access to the community’s leaders strained my relationship with my boss, whose phone calls were not returned as fast as mine. I ended up changing jobs.

In my new job, I bend over backward to keep my political life and my professional life separate — and not just because I believe that I should do the job I am paid to do by my employer. It also helps to keep me sane and provides a justifiable escape from political life. It is nice to be able to tell people who call me about town business while I am at work that I am really sorry, but I will have to ask them to call me at home after work. I have found particular satisfaction in telling people who call to yell at me about things like wasting tax dollars on overpaid employees that I am sorry, but I will have to call them after I get off work because my employer doesn’t pay me to spend time dealing with town business. They have a hard time arguing with that!

I am pretty certain that I now have the ability to block out the personal and political implications of decision making. It is one of life’s harder things to do, but I try hard. I believe that my job as an elected official is to serve the best interest of my whole town, not just of those who voted for me or, even harder, not just of those who are my friends. There have been several meetings where I was shaking as I voted my conscience and then went home and cried. I remember reading

a tall tale years ago about a couple who moved to a small New England town where every year a harvest king is chosen from among the men of the town. For a year, the harves king reigns supreme. Everyone fawns on him and all his needs are satisfied to excess. the husband decides that this looks like a pretty good deal and begins a ruthless campaign to be crowned harvest king. He is successful and very excited. On the night of the coronation, when he is to take his place as king, he shows up at the ceremony, is crowned, and then learns that his first duty is to watch the execution of his predecessor. All that work, all the honor and attention, and then they kill you! In my darker political moments, I think of that story.

But sometimes I am able to do something that has a tangible positive effect on the town that I love so much. And it is a wonderful feeling to drive through a neighborhood that is a little safer because of an action I was part of, or to see people using bike lanes and sidewalks I helped to get. It is really satifying to know that every now and then it matters to somebody that the board took a positive action. When I was working the polls on the day I was up for re-election, people would come up to me and say things like, “I am voting for you. I don’t always agree with you, but I trust you.” An old-time conservative told me that in front of my mother. I felt like I was in a Norman Rockwell painting!

Being an elected official has affected me publicly, professionally, and socially, but it has also changed me privately. It has changed who I am and how I define myself as a person. My best friend — a calm, rational attorney — says that I am much tougher than I was four years ago and, in her words, much less gullible. She tells a story about something that happened when I first ran for the board. I had not been endorsed by the Home Builders Association, but I did receive a $50 campaign donation from two builders and a lovely note saying that they had supported me and were sorry that I had not gotten the group’s endorsement. I thought that this was really sweet and told my friend about it. “Sweet?” she said. “Don’t you know that they are planning to build the new subdivision behind your house?”

Then there was the time that a developer looked me straight in the eye and told me that our development ordinance would not allow him to save trees or open space, even though he wanted to. I apologized for the inadequacy of our ordinance and ran off to talk to the town staff about ways to fix a horrible problem that was keeping these good people from doing the right thing. The staff informed me that they had offered the developer numerous options to preserve the woods and open space, all of them allowed in our ordinance, but that he had rejected every one. A few weeks later, when I voted against the guy’s proposal, he turned to a mutual friend and asked, “Why did Jacqui vote against me?” Our friend said, “Well, you lied to her.” “But I had to!” the developer replied.

After several incidents like this, I began to be less willing to just believe anything someone told me. I don’t think that people lie a lot in the political arena; it’s just that they only tell that part of the story that makes them look best or promotes their interest. So I have had to work toward developing a way of reserving judgment.

This runs counter to my personality, and I now find that in all areas of my life, I am not as trusting as I once was or as I would like to be. I feel that I have lost a part of me that I liked.

I am also not always very nice anymore. I used to work very hard at being nice, because it seemed like the right thing to do. After a year or so on the board, I began to get the feeling that I was sometimes being taken for a chump. Staff members, neighbors, and business people would come to me with issues or problems — they would come and tell me horrible stories and I would rush right out and try to fix them. Often I would learn later that they purposefully had been playing to my social work side and had misled me. After a few particularly blatant incidents, I stopped trying to be everybody’s friend all the time and realized that providing sound, well-reasoned leadership meant that there would be many times when not everyone would like me. So, I am not so nice anymore, but I am a better alderman.

The effect has spilled over into my private life. In matters having nothing to do with town business, I am also not so concerned anymore with trying to make everyone happy all the time. I figure I work hard, try to be fair, and use my best judgment. That is what people have a right to expect. If they don’t like it, it’s not my problem. Four years in public office is more productive than 10 in therapy. Finally, I am no longer afraid to be wrong or to admit that I made a mistake. I have found that being willing to change your mind or reverse your stand on something doesn’t really bother or offend anybody except the press, and who cares what they think? (Well, I do, but I try not to let it affect me.) The longer I am in this job, the more I learn that what is really important is getting the best possible decisions made in a manner that allows the community to have faith in the integrity of those decisions. My personal reactions or political needs are secondary. When I was first elected, I was always worrying about how I did in meetings. Now I worry about what I did — Did the meeting have the outcome I wanted it to? Sometimes getting to that point means not pleasing everybody, disagreeing with my friends, saying “no” to allies, publicly changing my mind, and admitting that I was wrong.

Recently all of this happened in the same meeting! For three years I had been going to meetings of the leadership committee of an intergovernmental task force on crime. At one particular meeting, I along with a fellow member of the board of aldermen, was to present the recommendations of a subcommittee on youth. We had worked on the recommendations for months, and my friend and I had spent weeks working out how we would present the recommendations and exactly what we wanted from the leadership committee. We needed money, legislation, and political support. This was serious stuff. Well, to start with, the meeting had been moved from its regularly scheduled 5:30 start to 5 p.m. I was so used to going at 5:30 that I hadn’t bothered to check the meeting time on the agenda and

I cruised in at 5:30. Our presentation had been first on the agenda, so they had moved it back because I was late. After that embarrassment, my colleague finally made our presentation and the group began discussing it. Overall, they were supportive. Then the committee chair said, “Let’s refer this to the three managers for a recommendation.” The week before, after much argument, our group had decided that this was what we wanted and were hoping for just such an action by the committee. But based on my original reservation, which I had finally overcome, I automatically started arguing against it. “No,” I said, “if we refer it to staff, it’ll get watered down and lost.” My fellow alderman stared at me, wishing, I am sure, that he were close enough to kick me. I suddenly realized what I had done, took a deep breath, and said, “I take that back. I do want it to go to staff. Sorry.” People looked at me like I was crazy. But the motion carried. Later in the meeting, I also managed to inadvertently insult Chapel Hill’s mayor, and then I left before the meeting was over to go teach a workshop. I felt stupid and embarrassed, but the meeting had the outcome I had hoped for. Daddy always said that life ain’t easy.

The day after that weird experience, I had lunch with my mentor and friend, Sue, who is on the school board, and I said, “How on earth did this happen? How did we get to be in charge? If we mess up, there is nobody higher up to fix it. We can really do damage!” Sue replied, “Well, it took you four years, but you finally figured it out.”

I ran for town council on issues of social change, but then I found out I was supposed to make decisions on sewer pipes, acres of impervious surface, transition zones, and intergovernmental fund transfers — stuff we hadn’t really covered in my days at the School of Social Work. So I now find that maybe a few times a year I deal directly with the issues I first ran on. I had thought that I could march into office and say this, this, and that need to change and this is how we are going to change them — ta-da! It’s all fixed! It took me about two years to learn that even my brilliant ideas weren’t new and that if there were simple overnight answers to my community’s problems, they would have happened long ago. This has been hard to convey to the small group of social change and environmental activists who first encouraged me to run for the board. They now accuse me of being, horror of horrors, a “moderate.”

But I have learned that it is not big flashy headline-grabbing political actions that determine the quality of government in a town. It is the small details, the product of long meetings and hard work, that determine the quality of town policy. In the long run, the boring meetings on zoning, sewer, budget, and personnel have a more profound effect on social justice or environmental integrity than do a bundle of flashy resolutions.

The bulk of board work that truly affect the day-to-day lives of people goes by without much notice. I have learned that responsible stewardship fo a community is the real job of an elected official.

I love Carrboro (some would say to the point of obsession) and I worry a lot about doing something that would harm it. I also love being an elected official (some would say to the point of obsession). It is the place where those two obsessions clash that I find most personally terrifying. The point where what is best for Carrboro may not be what is best for me politically. I had to face that monster in the 1993 election. There was a hotly controversial issue that came up in the late summer and early fall just as I was gearing up for my re-election campaign. I wished that it would wait until December, but it didn’t. I drove my friends crazy worrying about it, but decided that my political life was less important than the welfare of the town, and I stuck by my position. October was hell, election day was tough, but I won by a large margin. At the time, I swore I would never go through that again. But I know I will.

So, to newly elected officials, I say, “Welcome to the strangest club in town.” It may be hard, it may be wonderful. You may have moments when you want to just throw in the towel. But when all is said and done, it is easier to be on the council than to sit by and watch some other group of idiots mess things up. Good luck, and have fun!

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MODERN LEADERSHIP

FOREWORD

Wanting to lead and believing that you can lead are only the departure points on the path to leadership. Leadership is an art, a performing art. And in the art of leadership, the artist's instrument is the self. The mastery of the art of leadership comes with the mastery of the self. Ultimately, leadership development is a process of self-development.

– *James Kouzes and Barry Posner,* The Leadership Challenge

What does it take to be a good leader?

Becoming a leader is largely due to self-determination, and developing your leadership skills must be the result of a decision on your part to become a better leader. And, as a public official, you have a unique responsibility to do so. When you make the decision to run for public office, your community does, and should, expect nothing but your best efforts to be an effective leader. The good news is that most people have basic, common core competencies that provide the "raw material" for good leadership. What makes a great leader is the ability, through deliberate actions and experience, to shape and hone those core competencies to maximum benefit.

LEADERSHIP, WHAT DOES IT LOOK LIKE?

Old leadership models were centered on the idea that strong leaders had a command-control approach. That theory worked very well for many industrial-age corporations, many of which grew into empires that exist today. However, the world we live in is remarkably different than it was for the generation before us. When this command-control leadership model dominated, the environment that many organizations were working under was highly ordered and predictable. As a local government official today, you simply need to look around your community to understand that it is anything but ordered and predictable! With the constantly changing demographics, trends and globalization, the only certain thing in today's environment is change itself. With a dynamic environment we must find and cultivate dynamic leaders.

As an elected official, you are a leader, and your community's destiny is in your hands. Will you be a command-control leader, floundering in world of change and flux, or will you be a dynamic leader, ready to learn and grow in your capacity? The good news is that you can determine what kind of leader you'd like to be and, with careful thought and reflection, you can learn the habits and traits of good leadership to emulate.

The servant-leader

During the Iran-Contra scandal, at the conclusion of his testimony to the Senate committee, George Schultz was asked by the chairman, "Do you have any advice for the American public?" His answer? "Don't give power to people who can't live without it." There are limits to the concept of "power" and the role of ego in elected office.

The idea of a servant-leader is a relatively new one. In the command-control leadership model, the leader dictated his/her desires to subordinates who then did what they were told. The servant-leader model turns that notion on its head by suggesting that the leader is actually working for the subordinates, providing support and resources needed to get the job done.

The servant-leader model fits well with elected office – you are, after all, a public servant. Elected officials are there to serve the community and fulfill the public trust. Officials are not there to fulfill their own egos and demonstrate how intelligent and "right" they are. An elected official defines and clarifies the problem (leader), then empowers the municipal staff to do what is necessary to solve the problem through the appropriate authorization and resources (servant) and, once

the task is complete or the problem is solved, the official acknowledges and thanks those involved in the success (leader). The servant-leader changes roles dynamically as the problem or task unfolds – first as a leader by clarifying the issue and providing direction, next as a servant providing the necessary support and, lastly, as a leader once again, crediting those involved with the success. Just as leaders should not be "those who cannot live without power," neither should they be people who must hoard all the credit for themselves.

The question of ego

When discussing aspects of "power," the question, "Does ego have a place in the life of an elected official?" must certainly be considered. The most politically correct answer would be "no" – ego tends to imply negative connotations. For elected officials, the actual answer is "yes, but…" First, the importance of ego. Running for office is a challenge, and even at the local level, the going can get tough. Officials may not only find their opinions and views on issues attacked, but also may have their personal affairs attacked. Having a strong ego can help weather the difficult situations, not by countering the attack with assertions of being "right," but by providing the confidence and internal strength to carry on. In elected office, ego can be equally valuable when taking harsh criticism of decisions. Some of the criticisms may be groundless, but during the times when the criticism and negative feedback is valuable, having a solid self-confidence will allow officials to check emotions at the door and actively listen to and appreciate the constructive criticism.

Reality check – understanding strengths and weaknesses

Being a good leader is not as elusive as it may seem – good leaders aren't born, they are made through careful study and deliberate development of leadership qualities. One of the most fundamental exercises in developing leadership potential is a simple analysis of strengths and weaknesses.

When taking inventory of strengths, think not only of credentials and learned abilities and knowledge, but also of natural assets. For example, a councilmember with background in engineering can lend expertise to a discussion of the new wastewater plant. The same councilmember may be an exceptional communicator and able to summarize discussions and ask clarifying questions. By identifying these traits, leaders are able to use the full range of their strengths.

Understanding weaknesses is an equally valuable exercise. There are some weaknesses that can be changed – perhaps an individual is not well versed in proper meeting management. This can be remedied through a training course or reading on the subject. Other weaknesses are more innate, part of who we are and more difficult to change. These, too, do not have to stand in the way of leadership skills. By simply identifying and acknowledging weaknesses, one can mitigate their affect on other, stronger leadership qualities.

Finally, good leaders understand the importance of being dynamic. Think of your community – chances are it has seen its fair share of change in recent years. What "worked" a few years ago probably doesn't quite fit now. Likewise, a community's leadership needs likely has changed as well. An individual may have brought certain leadership qualities and assets to the position a few years ago that were very useful for the community at that time. But the needs may have changed – and leaders should change, as well. Each person has many strengths to offer the community, good leaders adapt to the changing needs around them, making themselves as relevant and necessary to their communities today as they were the day they got elected.

Decisiveness

A look in the dictionary under "decisiveness," shows a variety of descriptive words: conclusive, firmness, resolute. Being decisive can be challenging as an elected official – balancing multiple interests, values, and trade-offs. Being decisive means taking a position, and when it's a tough issue, taking a position can be very uncomfortable.

This is, unfortunately, all part of the role of an elected official. While sometimes decisions will be painful and controversial, an official could be doing the community a disservice by endlessly hemming and hawing over an issue and dragging out the final decision, thus allowing emotions, resources and discord to gain further momentum. While there is a time and place for careful consideration and weighing of all the facts (which is indeed another obligation of the elected official), there comes a time when a decision must be made and there is an equal obligation to do so. While there are no hard and fast rules determining when "decisiveness" is required, simply understanding the human inclination to avoid making tough decisions will help identify possible situations when a decision is being unnecessarily delayed.

Likewise, when considering the terms used to describe decisiveness (conclusive, firmness, resolute), being a leader means being assertive – make a decision and let there be no question that you are behind the position 100 percent. When exercising leadership in a political environment, fellow council or board members rely on each other to stand behind a decision; and citizens also expect and deserve assertive and decisive leadership.

SOME KEY CHARACTERISTICS OF EXCEPTIONAL LEADERS

Problem-solving

Have you ever been to a "problem-solving meeting" where many issues are addressed, but the core problem isn't solved? This can be an immensely frustrating experience, and for an elected official, time is very limited. Good leaders understand the importance of systematic problem solving – by using logical thinking and good human relations skills, leaders can draw practical solutions. When looking at a particular problem, it is natural to think of it in a "big picture" context. For example, Main Street is riddled with potholes. An elected official naturally thinks about the problem as it relates to the budget and capital improvement plans. While this is important and has an appropriate place, it is equally important to be able to focus on the immediate problem at hand and not be overwhelmed by insurmountable obstacles. Effectively leading through a problem-solving process requires clarity and, in many cases, a clearly defined problem is a half-solved problem. Some authors have related a systematic problem-solving method to a traditional scientific method, a process that resembles the following:

1. Clearly define the problem
2. Collect the facts
3. Identify the causes of the problem
4. List the driving forces
5. List the restraining forces
6. Generate alternative solutions
7. Evaluate the alternative solutions
8. Develop a plan of action
9. Implement the plan of action
10. Follow up

Following a logical, "scientifically-based" process doesn't guarantee a problem-solving process will be free of conflict. In fact, conflict is a natural and necessary component to achieving the best solutions. Leaders understand the necessity of conflict, of "playing the devil's advocate" because it can reveal aspects of a problem and tangential issues that may not have otherwise surfaced if everyone was in agreement. When respectfully managed, conflict can lend tremendous creativity and thoroughness to a problem-solving process.

Information and networks

Related to problem solving, good leaders understand the importance of information and networks. Information can take a variety of forms and, in today's digital age, information is more accessible than ever. However, such availability of vast information can be a detriment – too much information can be paralyzing by clouding the problem with numerous peripheral facts and figures. Without proper application, information is just that – facts and figures. Information becomes knowledge when it is targeted and useful, and good leaders learn to sharpen their eye toward information, correctly siphoning out what information is really needed (knowledge) and knowing where to go to get it. An elected official is required to be a generalist – she/he must have a basic understanding of an enormous realm of public issues. It is unrealistic to be an expert in any one topic, therefore, officials must learn to rely on the available resources. In many cases, this will mean relying on municipal staff and their ability to find the appropriate information that is needed and to help translate that information to knowledge.

On a similar note, good leaders understand the importance of networks. The term network is often used to imply social circles, but in the context of leadership, its significance relates to resources. Think of the last time you were at a networking event involving fellow public officials. Perhaps it was something more socially-oriented, like a dinner, or perhaps it was more formal, such as a training or workshop. What information did you share with your peers? What information did they share with you? Knowing what your networks are, and who your potential sources of information and knowledge are, can help you and your colleagues be more efficient in your job. You can save yourself, your colleagues, and your municipal staff a tremendous amount of time by leveraging your networks to gain advice, knowledge and wisdom on any number of issues you face in public office.

Quality and achievement

Leadership is easy when times are good – when revenues are strong, when there is good management among the municipal staff, when the community supports the local government, and projects and initiatives are progressing as planned. The mark of a good leader, however, is someone who can weather the ups and downs – not simply by retaining their position, but by ushering the community through challenging times. It's when challenges arise that true leaders are put to the test. Good leaders have a constant emphasis on quality and achievement through it all, both in their own behavior as well as the goals they set for their community. Simply put, they seek out the positive and celebrate even the small achievements. At the same time, these leaders acknowledge and face their challenges, but draw on success stories, an established tradition of quality and achievement, to inspire solutions to the challenges facing their community. As an elected

official, this can be a difficult task. Very often, when challenges arise, officials find themselves and colleagues in the spotlight and subject to criticism. It's at these moments, though, when a community most needs clear focus on the positive accomplishments and an honest, but optimistic, acknowledgement of challenges.

Responsibility

There will be times during the career of an elected official when it will be difficult to move forward on issues of importance. With so many interests and priorities to balance, there are some that simply cannot be accomplished, no matter how much you or a constituent group wants them. When things don't go your way on council, how do you explain it to others? It's tempting for those who do not succeed in getting what they want to play the victim. How easy it is to shift the attention and blame to some outside force. For example, "I tried to argue for the new skate park, but no one would listen to me," or "I think others on council already had their minds made up on this one," or "in the end, this really was just a political decision," are the excuses of someone who is a "victim." By using statements like these, they are essentially shifting attention away from themselves while undermining the collective decision of the council or board that they should be supporting.

A responsible leader would view these disappointments differently. Rather than whining and complaining, a responsible leader copes, takes full responsibility for his or her actions, and shifts the focus toward dealing with the problem rather than making excuses for why it didn't go their way.

So how do we become responsible leaders? Here are some thoughts on responsibility in action:

1. Be aware of victim behavior. Think of recent experiences and identify times when you may have acted more like a victim than a responsible leader. Think of what some more appropriate responses might have been. Simply being aware of this behavior will help minimize the times when it may sneak up on you.
2. Be dependable. Be cautious of the commitments you make – once you make a commitment, follow through. If you can't guarantee a certain outcome, don't make the commitment!
3. Understand that there will be times when you are conflicted – you'll be stuck between two equally important and valuable options. Remember, as an elected official you have a special obligation to your city or town, and there will be times when you will need to do what's best for the community, even if it involves a personal cost.
4. Know that there will be times when, no matter what you do, there will be someone in your community who will disagree with your decision. While these individuals or groups may not agree with you, they will certainly respect your accepting responsibility for your actions.

A FINAL NOTE

Leadership and elected office

Throughout this handbook, the discussions of leadership qualities have used very real examples of what you may experience as an elected official. In discussing different approaches to leadership, the "servant-leader" model is highly relevant to elected office. Warren Bennis, an acclaimed researcher of leadership traits in top executives, said, "leaders are people who do the right things and managers are people who do things right." Leaders, in the context of elected office, are responsible for their community's overall direction and vision. Managers, or municipal staff, are responsible for the day-to-day task of implementing the direction and vision in the most effective and efficient manner possible. For this elected official-staff relationship to operate effectively, trust must be a constant underlying theme. The public trust is your personal responsibility while in office; and you must have genuine and consistent trust in the municipal staff carrying out your vision and direction.

Maintaining this dynamic can be difficult at times, particularly in a political environment. Problems and conflict are inevitable. As an elected official, however, you are a problem-solver and, as discussed previously, conflict can be respectfully managed to enrich and bring creativity to the problem-solving process. Additionally, information and networks are important. Problems and conflict can be minimized by establishing – and actively using – your networks and trusting the expertise and knowledge of your municipal staff.

As an elected official, you are expected to facilitate your community's progress. That can be an exciting chapter during your tenure in office, but also can be wrought with additional challenges. Understanding the importance of responsibility, quality and achievement, and having an optimistic attitude toward challenges can inspire solutions during even the most difficult times. Good leaders understand that with any new endeavor, mistakes are a natural part of the learning process. Imagine if we only pursued new initiatives that were guaranteed to succeed, with no mistakes or setbacks along the way. Progress would come to a complete halt. Leaders learn to embrace mistakes and missteps as opportunities for improvement and insight, not threats to the overall success of the community or municipality. Indeed, possessing and applying only individual leadership qualities do make a good leader – it is the combination and application of numerous traits and characteristics in tandem that together create empowering leadership, creativity and progress.

To reiterate the themes introduced in the beginning of this handbook, leadership is an on-going and deliberate process of self-development. True, some people are blessed with charisma and seem to gravitate naturally into a leadership role, but

good leadership is far more multi-faceted, requiring many other skills and traits. The topics discussed in this handbook are merely highlights on some of the traits and characteristics of good leaders – through your own experience, you will likely learn and develop many more. The purpose of this handbook is to inspire confidence in yourself. As quoted by Kouzes and Posner in the opening section, "Wanting to lead and believing that you can lead are only the departure points on the path to leadership." By entering public office, you have taken that first step toward leadership – by applying common sense, careful study and reflection, and a personal commitment to your own self-development, you are well on your way to exceptional leadership and true service to your community.

SUGGESTIONS FOR FURTHER READING

- *An Invented Life: Reflections on Leadership and Change*, Warren Bennis
- *Art of Leadership*, George Manning
- *Building Community*, George Manning
- *Good to Great*, Jim Collins
- *Insights on Leadership: Service, Stewardship, Spirit, and Servant-Leadership*, Larry Spears
- *Leadership from the Inside Out*, Kevin Cashman
- *Leadership is an Art*, Max Depree
- *Leadership Jazz*, Max Depree
- *Leadership Without Easy Answers*, Ronald Heifetz
- *Leadership: Theory and Practice*, Peter Northouse
- *Leading Change*, Jim O'Toole
- *Leading Minds: An Anatomy of Leadership*, Howard Gardner and Emma Laskin
- *Leading With Soul*, Lee Bolman and Terrence Deal
- *Learning To Lead*, Warren Bennis and Joan Goldsmith
- *The Leader of The Future: New Visions, Strategies, and Practices For The Next Era*, Marshall Goldsmith
- *The Leadership Challenge*, James Kouzes and Barry Posner
- *The Leadership Triad: Knowledge, Trust, and Power*, Dale Zand
- *The Power Principle – Influence with Honor*, Blaine Lee

Thanks to Susan Wehrspann of Wehrspann & Associates for her help compiling this reading list.

BIBLIOGRAPHY

Bennis, Warren and Robert Townsend, *Reinventing leadership – Strategies to empower the organization*. William Morrow and Company, New York: 1995

Cooper, Robert, Ph.D and Ayman Sawaf, *Executive EQ – Emotional Intelligence in Leadership & Organizations*. Grosset/Putnam, New York: 1997

Hitt, William D., *The Model Leader – A Fully Functioning Person*. Battelle Press, Columbus: 1993.

Wareham, John, *The Anatomy of a Great Executive*. HarperBusiness, New York: 1991.

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EFFECTIVE MEETING PROCEDURES AND TECHNIQUES

INTRODUCTION

Need for rules of procedure

Every legislative body should adopt a set of rules by which to operate. These rules can be simple or detailed; they can incorporate *Robert's Rules of Order Newly Revised*, or another set of prepared rules. Alternatively, the council or board may establish their own rules. The goal is to guide the council or board; make the legislative process more efficient, stable and predictable; and reduce disputes concerning correct procedure.

Rules of procedure not only protect the minority from arbitrary use of power by the majority, but they also protect the majority from the capricious use of power by the minority to thwart the wishes of the majority. Rules of procedure can help reduce interpersonal friction, result in better decisions and add to the credibility of the council or board.

In addition, there are other practices and techniques that help the council or board operate more as a team, instill confidence in the municipal government and otherwise serve the public interest. Some of these suggested practices and techniques are included in this handbook.

Regardless of procedures used by a governing body, it is important that the procedures emphasize openness to the public, scrupulous fairness to all sides of the issues presented before the council or board, and consistency. Whether the meetings are formal or informal, incorporate Robert's Rules or follow their own unique procedures, these three basic objectives should be accommodated.

Finally, it is important to note that there is no single "right" way to conduct an effective meeting and, in some cases, the items discussed in this handbook may be legally prescribed in a municipality's ordinances or charter. This handbook is intended to provide a general snapshot of procedures and information that should be relevant and useful to many municipalities. When in doubt, elected officials are advised to consult with their municipal attorney to determine what legal requirements may be in place.

MEETING PREPARATION AND PROCEDURES

Meeting routine

The meeting routine or the established order in which various categories of business are to be considered by the governing body differs somewhat from one municipality to another. Despite variations in arrangement, most agenda formats may be divided into two categories: (1) procedural items of business that occur at most meetings, including the roll call, opening ceremonies, reading and approval of minutes, etc.; and (2) substantive items of business that may vary from meeting to meeting and include public hearings, ordinances, resolutions, etc.

There is no single correct order of business for municipalities to follow and state law does not require any particular order. Many cities and towns, however, have prescribed an order by charter, ordinance, resolution or the body's rules of procedure.

While variations on the order of business abound, a fairly common order might look like this:

1. Call to order
2. Opening ceremonies and proclamations
3. Roll call
4. Reading and approval of minutes
5. Public comments

6. Reports from officers, boards, committees, the municipal manager and/or the municipal attorney
7. Public hearings, final reading and voting on ordinances
8. Unfinished business
9. New business
10. Extended public hearings
11. Adjournment

Some of these general categories may include:

Opening ceremonies
This is optional for municipal governing bodies, and may include an invocation and the Pledge of Allegiance. Some councils and boards follow this section with a "Ceremonies and Proclamations" section during which they present special citations and awards.

Reports from officers, boards and committees
The mayor, chair, manager, attorney, treasurer or finance office, or other department heads may have reports to present, and standing and special committees and boards report their findings or recommendations.

Public hearings, final reading and voting on ordinances
Ordinances that are before the council or board for the final reading and voting are placed on the agenda at this point.

Although some municipalities, such as statutory towns, may enact certain ordinances at the same time they are introduced, most ordinances must be brought before the council more than once. Introduction of ordinances occurs under New Business.

Unfinished business
This category includes business that was not disposed of at the preceding meeting or that was postponed to the present meeting. Unfinished business should only include items of business that meet these criteria and that cannot be properly placed under any other agenda item.

New business
Notices, petitions, recommendations, ordinances on first reading and resolutions are placed under new business. Many of these items need to be processed in some manner before being presented to the governing body for disposition. They, therefore, may have been previously referred to a member of the city or town staff or to a committee or board. When such items – with the requested recommendations, comments, or information from the staff member or committee attached – are placed on the agenda, they are classified as new business because no substantive action has yet been taken by the governing body.

The presentation of bills, invoices and claims, and the authorization of warrants, occurs under new business
At the end of new business, board or council members are often given a chance to make comments, give reports on meetings they have attended, or discuss citizen complaints they have received. Following this, the chairperson asks for or makes any announcements and requests a motion for adjournment.

The role of the agenda

A meeting agenda is the statement of the purpose for the meeting and the basis of all planning for the meeting. A written copy of the agenda is therefore prepared in advance and distributed to council or board members, citizens, the media and other interested persons to inform them of the items of business to be considered.

The municipal clerk or manager often prepares the agenda. This responsibility varies and is usually set by the governing body. In addition, the clerk or manager follows the appropriate public notification procedures as outlined in state statute.

Agenda analysis (Are meetings too long?)
An agenda should include only as many items of business as can be considered in the time allotted for the meeting. Some effort should be made, therefore, to estimate approximately how much time agenda items will take, and to take these time estimates into consideration when planning the meeting. If there are 32 items on the agenda and each item is estimated to take "only" 10 minutes, the council is in store for a six-hour meeting. Some method to eliminate or consolidate the agenda items should be considered.

Reducing the number of items placed on the agenda is often a difficult task, especially when certain decisions must be made by the governing body, and when citizens have a right to know the reasons behind decisions. In such a case, some ideas to eliminate or consolidate agenda items are:

Time-saving ideas

1. A specific type of decision may be handled by an administrator, with a brief summary report being made to the board or council from time to time.

2. The board or council may establish policies to handle reoccurring decisions, then direct staff members to follow the policy.
3. Items may be handled by a committee, which does the initial gathering of opinion and facts, organizes the information and recommends a course of action to the council or board. (CAUTION: Committees don't always save time; in fact, they may actually add to the work of the governing body. They must be used wisely and sparingly, and their use should be evaluated to see if they are reducing or adding to the workload.)
4. The council or board may evaluate whether items are being postponed to future meetings when they could be dealt with at the present meeting. While decisions should not be made in a casual or hasty manner, council and board members should resist postponing items in the hope that, at the next meeting, a whole new set of facts will surface and make the decision easier. The "new set of facts" may make the decision more difficult and "perfect" solutions rarely materialize. Delay, when it results in a better decision, is commendable; but delay so that an official does not have to act on a sticky question may be inefficient and irresponsible.
5. The city council or town board may set definite times for the meeting to come to order and to adjourn. Few council or board meetings achieve much of value after four hours, and three to four hours is usually enough time to allocate for most meetings. Time limits also may be set for special hearings that are not required by law, for citizen participation periods and for the debate by council members and trustees. (Any council or board that wishes to set time limits for an entire meeting should refer to the special orders section(s) in Robert's Rules of Order Newly Revised.)
6. Establish a consent agenda.

Consent agenda

A consent agenda allows the board or council to approve several items of routine business with one vote. Considered to be one category of business, the consent agenda contains routine items that are not controversial in nature and do not require further discussion.

Each governing body can determine which items of business are routine andcan be placed on a consent agenda. Typical consent agenda items might include:

- Approving minutes
- Receiving and filing reports
- Receiving, filing, or referring communications
- Approving license applications and bonds
- Approving payment of contracts
- Approving certain appointments and accept resignations
- Approving finance warrants

It also is important to note that items can be removed from the consent agenda, often at the request of a single council or board member, for consideration by itself.

Study sessions

Study sessions are a common way for councils and boards to manage the time of formal meetings more effectively. Study sessions are meetings held outside of the regular council or board meeting primarily for educational purposes. Certain issues before the council or board are more complicated than others, and therefore require extra time and depth that is difficult to accommodate in a regular council or board meeting. Many councils and boards choose to have study sessions on a regularly scheduled basis, while others opt to have study sessions on an as-needed basis. By conducting the majority of the in-depth discussion at a study session, time allotted during the regular council or board meeting can be reserved for public input and formal decision-making.

Executive sessions

State law specifies in detail subjects that can be considered in executive sessions and procedures for calling and conducting executive session. These legal requirements should be carefully adhered to and, when in doubt, the municipal attorney should be consulted.

THE PLAYERS – ROLES AND RESPONSIBILITIES

Presiding officer

The presiding officer is the director and leader of any meeting of the municipal governing body. It is his or her responsibility to see that the meeting moves forward in an orderly fashion, that discussion is guided and controlled, and that the meeting runs as smoothly as possible.

The presiding officer has the principal duty to maintain order and decorum in the meeting of the governing body. Robert's Rules suggests 10 separate duties for the presiding officer, including:

1. Call the meeting to order and ascertain the presence of a quorum.
2. Announce and maintain the agenda.
3. Recognizing members entitled to the floor.
4. State, take the vote and announce the results of the vote on all questions legitimately put before the body.
5. Refuse to recognize obviously frivolous or dilatory motions.
6. Enforce procedural rules pertaining to debate, order and decorum.
7. Expedite business within the procedural guidelines adopted by the body.
8. Decide all questions of order, subject to appeal or, if in doubt, submit them to a vote of the body.
9. Respond to inquiries on parliamentary procedure or factual information relevant to the proceedings.
10. Upon the adoption of a motion to adjourn, or in the case of a sudden emergency, declare the meeting adjourned.

City council and town board meetings are formal meetings and, above all, the presiding officer should know and enforce the council or board rules of procedure and parliamentary law. It is the presiding officer's duty to see that all members know and understand the rules being applied. The municipal attorney may be very helpful in explaining parliamentary and procedural rules, when needed.

Mayor pro tem

When the presiding officer is absent from a council or board meeting, the mayor pro tem (or in other cases, the president pro tempore) presides. The mayor pro tem is a member of the council or board and has been elected or appointed to his or her position by the governing body.

Council and board members

The corporate and legislative authority of nearly all Colorado municipalities is vested in either a city council or town board, which is generally composed of between seven and 13 representatives chosen by the electorate for fixed terms of office. As previously discussed, the presiding officer is a member of the council or board.

All members of the municipal governing body have the right to full participation in the proceedings. That is, a member has the right to make motions, to speak in debate on motions and to vote on all questions put before the council or board. In some municipalities, the mayor votes only in case of a tie.

Agenda item discussion in a nutshell

Meetings normally have a written, published agenda, which constitutes the body's agreed-upon road map for the meeting. While there are several approaches to agenda item discussion and no single "right" way to conduct the discussion, one possible format follows.

1. The presiding officer or chair (normally the mayor) should announce the agenda item and briefly describe the subject to be discussed.
2. The chair should invite the appropriate people to report on the item and provide recommendations. The appropriate people may be a member of the governing body, a committee chair, or a staff person responsible for providing information to the body.
3. The chair should then open the agenda item to the council or board to ask questions.
4. If appropriate, the chair may invite public comments after the council or board has had the opportunity to ask their questions about the agenda item. More information on involving the public is available in Section 6 of this handbook.
5. Once the public comment period (if applicable) is over, the chair can request a motion to be made from the governing body. A second is typically required to ensure that more than one person on the board or council is in agreement with the motion before the question is posed to the rest of the body for vote. The chair may wish to announce who made the motion and the second for purposes of meeting minutes.
6. Once the motion has been made and seconded, the chair can entertain debate from the council or board. If little or no discussion takes place, the chair can proceed directly to the vote. If the discussion is more lengthy, the chair may wish to restate the motion to be sure that everyone understands the question before them before taking a vote.
7. After closing the discussion, the chair calls for a vote. The vote typically involves asking for the "ayes" and then the "nays." Unless specific legal provisions require a super majority, a simple majority is all that is needed to pass a motion. The chair announces the results of the vote and may note the dissenting votes for the purpose of meeting minutes.

Motions in a nutshell

Motions are vehicles for decision-making. There are three basic types of motions:

The basic motion
The basic motion is the one that puts forward a decision for consideration. A basic motion might be: "I move that we create a five-member committee to plan our annual fundraiser."

The motion to amend
If a member wants to change a basic motion under discussion, he or she would move to amend it. A motion to amend might be: "I move that we amend the motion to have a 10-member committee."

The substitute motion
If a member wants to completely do away with the basic motion under discussion and put a new motion before the governing body, he or she would "move a substitute motion." A substitute motion might be: "I move a substitute motion that we cancel the annual fundraiser this year."

Motions to amend and substitute motions are often confused. They are very different, and so is their effect, if passed.

- A motion to amend seeks to retain the basic motion on the floor, but to modify it in some way.
- A substitute motion seeks to throw out the basic motion on the floor and substitute a new and different motion for it.

Other types of motions
Beyond the basic motions listed above, there are other types of motions that are used on occasion during meetings. For more information about the types of motions and examples, please refer to Robert's Rules of Order, Newly Revised.

Privileged motions are matters of urgency, such as a motion to adjourn or recess.

Incidental motions are motions that pertain to matters of procedure, such as enforcement or suspension of the rules and objections to the main motion.

Multiple motions
Up to three motions may be on the floor simultaneously. When two or three motions are on the floor (after motions and seconds) at the same time, the first vote should be on the last motion made.

INVOLVING THE PUBLIC

How the governing body handles citizen participation can affect the meeting and the impression citizens have of their municipal government. For example, if the council or board has made no specific provision for citizen participation, any item of business may be sidetracked by a citizen who wishes to speak. It is, therefore, important that the governing body decide how and when citizens may participate, and adopt or amend rules of procedure accordingly.

The method by which citizens are allowed to speak at a council or board meeting varies from community to community, and the procedures may be established by ordinance, resolution, rule or tradition. Basically, however, there are five methods of placing citizen participation on the agenda. It is important that regardless of the method used to involve the public, citizens attending the meeting should have a clear idea of where in the agenda their comments will be heard before the meeting begins.

1. Citizens are recognized throughout the meeting. The council or board recognizes citizens and allows them to speak at any time throughout the meeting, as long as their comments are restricted to the agenda item currently under consideration.
2. Citizens invited to be heard. During this period, the council or board recognizes citizens and allows them to speak only on matters of business listed on the agenda. This method may be used exclusively or in addition to the public comment described below.
3. "Public comment welcomed." In this instance, the governing body recognizes citizens and allows them to speak only on matters of business listed on the agenda and labeled "public comment welcomed."
4. Public comment. During this period, the council or board recognizes citizens and allows them to speak on any matter other than those listed for the governing body's consideration. This method is used most often in combination with the previous two methods. When a council or board holds a public-comment period, it must consider certain issues: How quickly will council or board respond to a citizen's request? Will any discussion be allowed? For example, if a citizen brings a request for a drainage improvement on his or her property, will discussion of this concern occur?
5. Public hearings. Under the agenda category "public hearings," citizens are allowed to speak only on matters listed for hearing. The public hearings category is usually a necessary agenda item for all cities and towns on certain subjects and may be used in addition to any other method.

Public hearings vs. public comment

A public hearing is any meeting or portion of a meeting of the municipal governing body at which members of the public are given the opportunity to speak on specific matters on the agenda for hearing. As such, public hearings are distinguished from citizen participation or public comment.

Public hearings and other citizen participation sessions

Public hearings are held to allow citizens in the community and other interested persons to speak to the town board or city council. Some public hearings are called to hear comments on only certain specific subjects; others are open-ended and allow citizens to speak on any subject. Some councils set aside time for public comment during each council meeting; other public hearings are completely separate from council meetings. Some public hearings are required by law. The council does not make a decision until it has closed such hearings.

While public hearings should generally not be highly formalized, many councils have found it helpful to establish several procedural ground rules and to inform the public of these rules.

Preparing citizens for hearings

No public hearing can be successful unless the people attending the hearing understand the issues to be discussed. It is just as important for citizens to understand the issues as it is for council members. Little true headway can be made at a public hearing if there are already misconceptions about either the issues or the council's intentions for dealing with them, and such misconceptions can cause substantial harm.

When citizens understand the issues, they are more likely to make intelligent and worthwhile comments about the advantages or drawbacks of the plan under consideration. Even when citizens oppose the government's position on a particular issue, it is still better if they accurately understand the facts.

Procedures to promote orderly public comment

- Establish rules of procedure before the hearing and read them at the beginning of the hearing so that everyone understands how the hearing will be conducted.
- Announce that issues will be considered in the order listed on the agenda.
- Ask anyone who wishes to speak at the hearing to register.
- Set time limits on how long speakers can talk.
- Allow each person who wishes to speak a chance to do so before allowing a second round of comments.
- Ask each speaker to begin by stating his or her name and address, any group being represented, if any, and how many people he or she represents.[1]
- Establish ahead of time whether board or council members or other participants at the hearing will be allowed to ask questions of a speaker after his or her presentation.
- State that disruptive behavior will not be tolerated.

A FINAL WORD ON DECORUM

Professional respect and courtesy are of the utmost importance to elected officials, and it is imperative that elected officials serve as a model representative of their community at all times. Not only will composure and professionalism enhance the quality and effectiveness of meetings, but it also will earn respect and attentiveness from colleagues, municipal staff, the media and the public. Here are just a few basic professional responsibilities of elected officials:

1. Be prepared for each meeting, read the agenda and other advance materials thoroughly, and to arrive at the meeting by the specified time.
2. Strive to contribute relevant information and opinions to the council's or board's proceedings within the framework of proper procedure, avoid "grandstanding" or repetitive speech.
3. Confine remarks and questions to matters before the governing body as specified by the agenda format or order of business.
4. Listen to and refrain from private conversation when citizens or other members of the council or board are speaking.
5. Accord courtesy to councilmembers or trustees, to municipal officials and employees, and to citizens appearing before the governing body.

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1 *When a large number of citizens attend a meeting to speak about an issue, there are a number of strategies to ensure that everyone's opinion is heard without unduly lengthening the meeting. First, the presiding officer can ask the citizens to sign in either "for" or "against" the particular issue at hand, and then request a representative from each group to speak on behalf of the others. The body also may simply ask members in the audience who are in agreement with the speaker to stand and acknowledge that fact in lieu of speaking.*

6. Refrain at all times from rude and derogatory remarks, reflections as to the integrity of others and statements as to the motives and personalities of others.
7. Work toward consensus whenever possible, recognizing and respecting the strengths, knowledge and opinions of fellow council and board members.

RESOURCES

The Good Meetings Guidebook, Colorado Municipal League, 2000.

Handbook for Municipal Elected Officials, Colorado Municipal League, 2006.

Municipal Clerks Handbook, Colorado Municipal League, 2003.

National Association of Parliamentarians, *www.parliamentarians.org*.

Roberts Rules of Order (Newly Revised, 10th Edition), Perseus Publishing, 2000.

Handbook compiled by CML Membership Services Manager Sara Reynolds, Colorado Municipal League, 2004

SELECTIONS FROM

THE HANDBOOK FOR ELECTED OFFICIALS

INTRODUCTION

THE DEMOCRATIC HERITAGE OF MUNICIPAL GOVERNMENT

Modern municipal mayors, councilmembers and trustees are the heirs to the traditions of democracy first embodied in the ancient Greek city-state. This tradition is reflected in our modern reference to large cities or urban areas as "metropolises," derived from the ancient Greek, meaning "mother city."

Today towns and cities are the functional equivalents of the Greek city-states. Modern municipalities are extremely complex organizations but, at the same time, their operation is closer to the Greek ideal of direct democracy than any other unit of governance.

Municipal officials, unlike their counterparts in federal and state offices, are in direct contact with the citizens they serve on a continuing basis. Citizens hold their local officials responsible for everything from the state of the local economy and the level of pollution in the air to whether the potholes in the streets need repairing or the neighbor's dog should be restrained. This is municipal government in action: a living demonstration that people who live together in a community can and want to solve their own problems.

HISTORY OF COLORADO MUNICIPALITIES

The establishment of settlements in Colorado followed the 'frontier' pattern of fate, not planning. The earliest settlements were military forts, the first being Bent's Fort, established in 1832 near present-day La Junta. Other forts included Fort Lupton, established in 1836, and Fort Pueblo in 1842.

The first permanent civilian settlements were established by Mexican Americans in southeastern Colorado. Among these was San Luis, established in April 1851, today the oldest continuously inhabited town in Colorado.

Other Colorado towns were established in waves. The first wave was fueled by the Pikes Peak Gold Rush of the late 1850s. The front-range communities of Denver, Boulder, La Porte (predecessor to Fort Collins), Fountain City (predecessor to Pueblo) and El Paso (predecessor to Colorado Springs) were established in 1859. Later, waves of settlements were fueled by the silver boom and the cattle industry during the 1870s. Silver towns included Leadville, Silverton, Idaho City (now Idaho Springs), and later Aspen, Rico, Telluride and Creede. Cattle towns, called colony towns, included Greeley, Longmont and Sterling.

Colorado towns and cities grew and multiplied over the decades. At present, Colorado is home to more than 270 separate municipalities that range in population from fewer than 20 residents to more than one-half million.[1]

CLASSES OF COLORADO MUNICIPALITIES

With the exception of home-rule municipalities, the Colorado Constitution leaves the classification of municipalities to the state legislature:

> The General Assembly shall provide, by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four, and the powers of each class shall be defined by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions.[2]

1 Colorado Municipal League, *2009 Colorado Municipal Directory.*
2 Colorado Constitution Article XIV § 13.

Colorado municipalities are divided into four general classes: statutory towns, statutory cities, territorial charter cities and home-rule municipalities (both towns and cities). Statutory towns are defined as municipal corporations with a population of 2,000 or fewer, while statutory cities are those municipal corporations with a population greater than 2,000.[3]

The Colorado General Assembly has granted stautory municipalities broad powers:

> municipalities shall have the powers, authority and privelages granted by [Title 31, C.R.S.] and by any other law of this state together with such implied and incidental powers, authority and privileges as may be reasonably necessary, proper, convenient or useful to the exercise thereof. All such powers, authority, and privileges are subject to the restrictions and limitations provided for in this title and in any other law of this state.[4]

Home-rule municipalities have a state constitutional status that make them somewhat different from their statutory "cousins. Home-rule municipalities are those cities and towns that have, either upon incorporation or some time later, chosen to adopt a home-rule charter pursuant to Article XX, section 6 of the Colorado Constitution. Home-rule municipalities are empowered with "all ... the powers necessary, requisite or proper for the government and administration of its local and municipal matters."[5] In stark contrast to statutory towns and cities, home-rule municipalities' ordinances regarding "local municipal matters" actually *supersede* state laws which may conflict.[6]

Finally, one city, Georgetown, has retained its old territorial charter. In contrast to home-rule charters, this charter may be amended only by the General Assembly.[7]

Some cities have diminished to fewer than 2,000 residents since their incorporation, and a few towns have increased in population to more than 2 ,000 since they incorporated under their present form. Under current Colorado law, reorganization of a town to a city or a city to a town based on a crossing of these population thresholds is purely optional.[8] Home-rule municipalities may call themselves either a town or a city.

Forms of government

The forms of government for statutory and charter municipalities are prescribed by statute. Municipalities choosing to organize or reorganize as home-rule municipalities under Article XX of the Colorado Constitution may choose the form of government that most suits their needs.

CARRYING OUT THE GOVERNING BODY'S JOB

THE JOB OF THE MUNICIPAL LEGISLATOR

Getting elected

You have been elected to municipal office. What were your motivations to run in the first place? Will these factors determine what role you play as an elected official in your city or town? Let's examine some of the common factors involved in running for local government office.[9]

"Certain issues are being ignored."
You have personal feelings on a particular set of issues that you feel current officeholders are ignoring. You want to fix these issues once you are elected. Will you?

"I disagree with the ideological position of the incumbents."
You have a philosophical disposition on issues or policies that is basically different from the incumbents. You want to change the direction of policy making as a result.

"I love politics; it's my passion in life."
You are hooked on politics in every manner and form. Involvement in elected office is in your blood.

"I now have the time. Commitment is not a problem for me."
For example, you are retired. You have served on advisory boards in the past and it always interested you. Now, you have the time to make even a deeper time commitment.

"This community has done so much for me. I want to give back something in return."
You have been successful in your professional life, and the community has been supportive of you. You now want to return that support in the form of elected public service.

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3 §§ 31-1-101(2); 31-1-1101(13), *Colorado Revised Statutes*.
4 § 31-15-101(2), C.R.S.
5 Colorado Constitution Article XX § 6. For more information, see Colorado Municipal League, *Home Rule Handboo: An Introduction to the establishment and exercise of Municipal Home Rule* (1999).
6 *Id.*
7 *See generally* Georgetown v. Bank of Idaho Springs, 99 Colo. 519, 64 P.2d 132 (1936).
8 *See* § 31-2-216, C.R.S.
9 Taken from Susan A. MacManus, "Why Dick and Jane Run," *Colorado Municipalities*, p.16-17 (July 2000).

"I got drafted for the position by the group in which I am involved."
Often times, candidates have been pressed into service by a local civic group or service organization in which they are involved. That is what happened in your case.

"I ran because no one else would."
Lack of competition for municipal elected office sometimes leads a person to declare their candidacy when no one else appeared willing. This is what happened to you.

"We need an elected body that is more representative of the diversity of the community."
The city council or town board as currently constituted is not representative of the community as a whole, and you feel your presence as an elected official can elevate the awareness of diversity.

While not reflective of all of the reasons why a person decides to run for municipal elected office, they do reflect a set of general impressions as to why people decide elected office is meant for them. However, what prompts a person to run, and then be elected, may become very different once sworn into office. What happens before an election and afterward once a person begins to serve on an elected governing body can seem like two different worlds.

Becoming oriented

The newly elected mayor or member of the governing body will have little difficulty finding those who will tell him or her what to do and what not to do. It's not hard to find out the composition of the governing body-number of members, length of terms, who can be elected, etc. It isn't long until he or she knows how an ordinance is passed, or what the debt limit is, or when approval by the voters at an election is required. But these are not the most perplexing questions. Often what is most important to find out is simply how to do a good job.

There are roles taken before being elected, but what is the role now? Beyond all else, the person elected to office at the municipal level takes on the role of a leader. This means establishing public policy that can have broad impacts within and outside of the municipality. This means a person who is responsible for and responsive to the needs and concerns of municipal residents. This means a person involved in a variety of tasks internal to the organization of the municipality itself.

Local elected officials become caretakers of their communities' public life. Local elected officials can help strengthen local governance and problem solving in ways to make the future brighter. Municipal leadership motivates people to work together for a common good – to transform goals and objectives into a positive reality.

Municipal leaders wear many hats

University of Michigan Professor Arthur W. Bromage, following his experiences as a member of the Ann Arbor City Council, concluded that a councilmember must wear several hats to meet the responsibilities of the position.

Lawmaker
The adoption of formal policies and local laws, generally known as ordinances, takes up a great deal of time for any municipal elected officeholder. These regulations will have the force of law and cover many policy areas such as land use, liquor licensing, tax policy and community redevelopment.

Financier
Although a municipal staff person may prepare the budget, the final decision rests with the elected official. The buck literally stops with the city council member or town trustee. Tax and spending decisions are critical roles that will be played by any elected official.

Employer
An elected official has duties and responsibilities that may oversee the municipality's workforce. Working conditions, employment agreements, salary and benefit schedules all play a part in this.

Constructive critic
An elected officer oversees the policies that govern the operations and administration of the municipality. This may mean bringing observations and input to municipal administrators to help the city or town run more effectively.

Intergovernmental relations
An elected official must decide, for example, whether to sell water services to fringe areas and also may be asked to represent the city or town viewpoint before state governing bodies and to make policy that determines the relation of the municipality to the federal government.

Public relations representative
An elected official serves as a representative of the community as a whole. Frequent contact with the media and speaking to groups come with the territory.

These examples illustrate only a few of the experiences on the job. The real task is to provide leadership and direction for the community, to decide what needs to be done, and to help prepare the municipality for future generations.

Public policy making

The job of the municipal governing body is frequently stated thus: the governing body sets public policy.

Sound policy decisions are the result of hard work. The policy-making job in a municipality is amazingly complex. It requires from each member of the governing body a belief in the municipality, an understanding of its people, and a concept of what government is, does, could do and should do.

Sound policy decisions result when elected officials possess determination, imagination, and devotion to the best interests of the public. A member of the governing body who cannot view public interest apart from personal interests is of little help in determining sound public policies. How opinions or feelings may have been expressed during an election campaign might have to be modified once elected.

Each official has his or her own philosophy about what the municipality ought to do or ought not to do. The decision to run for office was no doubt influenced by satisfaction or dissatisfaction with the way in which the municipality was being governed. Upon taking office, however, the official may soon be confronted with many problems that had not occurred to him or her.

Finding out what must be done

How does a municipal official find out about problems facing the municipality? How does he or she decide what activities or projects the municipality should or should not undertake?

The elected official already may know of problems or activities that need to be addressed; municipal employees also may have identified problems. Perhaps most important, the official must find out what the people want done. As their representative on the governing body the official wishes to respond to constituents' concerns about public policy.

The member of the governing body may frequently find that what needs to be done, what the people want done and what is possible to do may not coincide. What needs to be done may be impossible because the people don't want it done; what the people want done may be impossible for various reasons.

Pressures on municipal officials

Discovering what the people want may be difficult, and the people may not always agree. Without special effort, of course, the official will receive expressions of interest or protest, in the form of telephone calls, letters to the editor in the local newspaper, protest petitions and attendance at meetings of the governing body. However, these expressions may or may not reflect the desires or best interests of the community as a whole.

The elected official truly concerned with representing the best interests of the people will go beyond these expressions and seek out opinions and ideas on every occasion-informal conversations, discussions with friends and business associates, and speaking engagements. One might assume that the citizens don't care how a problem is resolved unless they express themselves; however, a few loud voices on a certain issue may be misleading.

Much of the municipal legislator's work will be to seek public opinion, balance pressures from different interests and determine what course public policy should take.

Keeping the public informed

Discovering what the people want done is not a one-way process. Government is a public matter, and the governing body has a responsibility to the residents of the community to let them know what has been done or will be done.

Statutes set minimum requirements for informing the public. Publication of items such as ordinances, franchises, annual financial statements and notices of budget hearings provide a way to let the people know about governmental activities. Exceeding these minimum requirements, however, can greatly increase interest and build confidence in the municipal government.

A well-informed public results in an improved flow of ideas and opinions, easier law enforcement, and increased understanding of the problems that face the municipal government.

Ways to inform the public are a matter of common sense and most of the techniques are obvious. Here is a partial listing:

- Expand personal contacts. Just as he or she asks for expressions of opinion from personal acquaintances and business associates, a member of the governing body also may use many day-to-day situations to explain what the municipal government is trying to do.
- Encourage attendance at meetings. Although citizens can find out easily when meetings of the governing body are held, members of the governing body should be sure that all meetings are given advance publicity to encourage attendance. They also can make sure that anyone attending a meeting has an opportunity to be heard.
- Establish good relations with the media. Members of the governing body may find that what they say makes news. Newspapers and radio and television stations can be of real assistance in letting the public know about governmental activities. Most reporters are anxious to do the best possible job in relating activities at the town or city hall. By helping

them in this job, by making it easy for them to get the news, by being frank and clear about municipal problems and activities, the governing body can serve the public by keeping the record straight.

By understanding what makes news, an elected official can improve his or her own media relations by anticipating in advance what the news angle will be in any situation, and thus be prepared when the reporter calls. It is not the responsibility of the reporter to keep the official from making erroneous or premature statements. If your municipality maintains a community access cable television channel, use this vehicle as another way to communicate with the public at large.

Conflicts of interest

Any member of the governing body of a city or town having a "personal or private interest in any matter proposed or pending before the governing body" must disclose the interest to the body and not vote on the matter. Further, the member must refrain from "attempting to influence the decisions of the other members."[10]

In practice, this means that the member having the conflict should announce his or her interest before discussion is commenced on the matter and should not participate in discussions or any voting. One relatively simple way to achieve this is, after disclosing the interest, to leave the room until after all discussion and voting has taken place. The statute does allow the member having the interest to vote on the matter "if his participation is necessary to obtain a quorum or otherwise enable the body to act." However, if this is done, the member must also make a written disclosure to the Secretary of State, in accordance with a statutory procedure.[11]

The statutes do not specifically define what an "interest in a matter proposed or pending" is, but a general rule of thumb is that if the matter involves anything in which the member has or might have a financial interest, direct or indirect, including an interest in a business that could be placed in a superior competitive position by the action proposed to be taken, such actions constitute an interest that must be disclosed and may not be voted upon. Obviously, the municipal attorney should be consulted whenever there is any question about whether a member has an interest that requires disclosure and abstention from voting.

Local government officials are not permitted to hold an interest in any contract made by them in their official capacity or by any body, agency or board of which they are members or employees. Excepted from this rule are: (1) contracts awarded to the lowest responsible bidder based on competitive bidding procedures; (2) merchandise sold to the highest bidder at public auctions; (3) investments or deposits in financial institutions that are in the business of loaning or receiving moneys; (4) a contract with an interested party if, because of geographic restrictions, a local government could not otherwise reasonably afford itself of the subject of the contract; and (5) a contract with respect to which any local government official has disclosed a personal interest and upon which the official either has not voted or voted not withstanding the disclosed conflict in order to achieve a quorum or otherwise enable the body to act.[12] Any contract made in violation of this law can be voided at the insistence of any party to the contract except the officer with the conflicting interest.[13]

The "Code of Ethics" statute,[14] which is applicable to local elected officials, contains many restrictions on use of public office for private gain. For example, the statute prohibits use of confidential information for personal financial gain and acceptance of gifts or benefits as rewards or inducements for official action.[15] As well, there are criminal statutes that make it an offense to trade in or abuse public office.[16]

Finally, local officials should check whether their municipality has charter or ordinance provisions concerning conflicts of interest, and should consult with their municipal attorney before taking any action that may involve a conflict of interest.

Some final guideposts

Municipal government is a team operation. No one member can hope to master every phase of governmental activity. Some people, however, are afraid of appearing "green" and are subsequently pressured into approving something they do not fully understand. The newly elected mayor, trustee or councilmember should not fear appearing to be "green" to the old hands.

There are many sources of information about municipal government available to the newly elected member. The publications and the information services of the Colorado Municipal League, meetings, institutes and conferences for municipal officials, and journals of the various professional associations of municipal officers and employees all provide basic information about the many problems and activities of municipal government.

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10 § 31-4-404(2); § 24-18-109(3)(a), C.R.S.
11 § 31-4-404(2); § 24-18-109(3)(b), C.R.S.
12 *See* §24-18-201, C.R.S.
13 § 24-18-203, C.R.S.
14 §§ 24-18-101, C.R.S. *et seq.*
15 *See* § 24-18-104(1), C.R.S.
16 §§ 18-8-301, C.R.S. *et seq.*

In addition, there are specialists and professional consultants who can help with technical problems. Remember, however, that these persons are advisers and that the policy decisions should be left to the elected officials. The elected official must learn to evaluate the advice of specialists.

Overall, the most important job of the governing body is to make policy. It is easy for a governing body to lose sight of its policy-making function by spending most of its time looking down storm sewers or watching demonstrations of new types of equipment.

In the final analysis, no state law, handbook or any other guide can adequately outline the elected official's role in the governmental process. There is no formal requirement that the member of a governing body do anything more than comply with a few written rules. If he or she chooses not to run for re-election, there is nothing to prevent him or her from serving out the term of office doing no more than attending meetings, casting an occasional vote, and avoiding conduct that might be cause for removal. The member of the governing body must decide what his or her role shall be.

Yet, the member of the governing body has a real responsibility to the citizens. Members of the governing body are the trustees and custodians of the privilege of local self-government in this country, and the individual member, regardless of the size of the municipality, is engaged in the vital process of making American democracy work.

ESTABLISHING ADMINISTRATIVE MACHINERY

The management process

Good public policy decisions do not go into effect automatically. No matter how much time and careful thought may go into formulating public policy, there is always a management job to be done, and someone or some group must assume the responsibility to plan, organize, coordinate and control the administrative machinery. In smaller communities, members of the governing body may become more involved in this administrative process than do officials in other forms of government.

For many years, theorists have attempted to fit policy making and policy implementation into two neatly divided compartments. The justification was that every decision made in government involved either a "what" judgment (policy determination) or a "how" judgment (administrative execution of the policy). Nevertheless, the decision to build, for example, a sewage disposal system for the municipality (the "what" decision) can hardly be made without also deciding which method of treatment will be most suitable for the municipality's purpose (the "how" decision). Thus, even the theorists now agree that the "what judgment" and the "how judgment" are both parts of a single decision, instead of two separate decisions.

Types of administrative organization

Administration of municipal affairs may be carried out by the mayor, appointed administrative officers or by the governing body. More common is a combination of the three, sometimes supplemented by the use of special boards and advisory committees.

The mayor as chief administrator

In some municipalities it may be the mayor who hires and fires employees, who orders supplies and who checks to see that the streets are cleaned, chuckholes repaired and park lawns watered. In these municipalities, department heads report directly to the mayor, not to the governing body, and the mayor may meet with the department heads at times other than at meetings of the governing body. In Colorado this is not a common form of municipal administration.

Appointed administrative officers

In some municipalities, execution of municipal business rests almost solely with appointed municipal officials. Where there is no coordinating administrative official, municipal administrative responsibility often is divided among independent department heads and other officials. Each department head supervises department employees and activities and reports to the governing body. Approval is necessary before undertaking new projects, and each department concentrates on activities directed by the governing body or of special interest to the department head.

This system of operation, where no one person is responsible for municipal administration, may engender uncoordinated and inefficient administration.

As a result, an increasing number of Colorado municipalities have provided by ordinance for the position of city or town manager, administrator or superintendent. This person serves as the chief administrative officer, coordinates municipal administration, supervises other employees and is directly responsible to the city council or board of trustees. This system permits administrative responsibility to be centralized in one full-time employee and may lead to better coordinated administration and more professional leadership in municipal government. Nationally, Colorado is viewed as a state that strongly supports this approach to municipal government.

Administration by committees

In municipalities where neither the mayor nor any appointed municipal official has the responsibility to direct municipal affairs, the governing body must supervise and coordinate municipal administration. This can be done as a collective

endeavor, but more often the governing body forms committees that recommend policy and supervise administration of programs within each committee's sphere of responsibility.

The mayor may appoint members of the governing body to various committees, or the members may choose to organize their own committees and make their own appointments. Each member may serve on one or more committees composed of several members of the governing body. The names and scope of the committees may vary with each municipality, but commonly include water and sewer, street and alley, police and fire, finance, park and recreation, and health and welfare.

In some municipalities the governing body relies almost entirely on its committee structure to supervise administration of municipal affairs. Under such an arrangement, the street superintendent, for example, would report to the street and alley committee. In practice, the committee chairperson may assume most of the responsibility and control and directly oversee administration within the committee's area of responsibility. Committees provide a way to divide up the work, study activities in greater detail and more closely supervise municipal administration. This system usually requires members of the governing body to devote a great deal of time to committee work, leaving less time and energy to solve overall municipal problems.

Both systems — administration by the governing body and administration by committees — go against modern public management practice, which holds that only one individual should have the responsibility to supervise and coordinate administrative operations. As a result, neither administration by the governing body nor by council committees may be a sound and effective system for supervising and coordinating municipal administration.

Boards and commissions

Boards, commissions and citizen committees can provide the governing body with a great deal of assistance both in recommending public policy and in transforming policy decisions into action. Some are required or permitted by statute, while others are created by ordinance, resolution or motion. Some are empowered to make administrative decisions, others can only make recommendations to the governing body, and still others are primarily fact-finding bodies. Some boards and commissions are permanently established, with members appointed for overlapping terms to add continuity to committee operations, while others are established for a limited time to accomplish a single purpose and cease to exist once their functions are completed.

In some situations, municipal governing bodies may find the use of special boards and commissions to be to their advantage. They may be helpful in analyzing technical problems considered beyond the scope of the governing body. Boards and commissions give the municipality an opportunity to use the talents of local specialists in certain fields and permit citizens with special interests to serve the community in an area of personal concern.

Here is a partial listing of special boards and commissions authorized or required by state law (numbers in parentheses refer to title, article and section number of the C.R.S. in which the board or commission is authorized):

Board of Trustees, Police Pension Fund (31-30.5-203); Board of Trustees, Fire Pension Fund (31-30.5-202); Library Board of Trustees (24-90-108); Planning Commission (31-23-202); Zoning Commission (31-23-306); Board of Adjustment (31-23-307); Local Liquor Licensing Authority (12-46-103-104; 12-47-103-104).

Others boards or commissions may be set up by the governing body to follow a particular project through to completion. Frequently, citizen committees are appointed to study such things as possible new sources of revenue; the need for new building codes; the need for new municipal facilities such as swimming pools, fire stations or parks; or the desirability of launching new projects. In many cases, persons who serve on such advisory committees may be carried over onto permanent commissions or boards upon completion of their study projects.

There are advantages and disadvantages to the extensive use of special boards, commissions and citizen committees. They can provide a convenient way to obtain technical advice, and they also may provide two-way access to important areas of public opinion and a way to build and maintain public support.

On the other hand, they are not a substitute for responsible administration, and too many boards or commissions may hamper efficient administration by spreading authority and responsibility too widely. Sometimes the needed information or advice can be better obtained from within the municipality's administrative organization or from professional consultants, therefore making a study committee or advisory committee a cumbersome addition to municipal organization.

BUDGETING

More than a document

There is a tendency to think of budgeting only in terms of the frenzied attempts to prepare a complicated document in sufficient time to comply with deadlines established by state law. Then, once the budget is filed, it can be forgotten until the next deadline rolls around. Municipal budgeting, however, is a year-round activity that involves not only preparation of a budget document, but also putting the budget into effect. In preparing a budget, the municipal governing body, in effect, promises that the municipality will do a certain amount of work with a certain amount of money. It is an agreement with the taxpayers as to what they will get for their tax money during the coming year.

This taxpayer-governing body agreement is of little value, however, if no attempt is made to carry out the program as promised. This process is usually known as budget execution or budget control. Budget control, properly exercised, is perhaps the most valuable administrative device for seeing that legislatively authorized programs are put into effect. By frequently comparing the budgeted revenues and expenditures with actual figures, the governing body can check its program commitments to see which activities are exceeding budget plans and which are lagging behind.

The budget as a work program

The purpose of a budget is obvious-it attempts to keep expenditures within the municipality's estimated income. In simple language, the budget document is a work program converted to dollars and cents. The budget consists of two parts: first, a carefully prepared estimate of revenues and, second, a tabulation of the estimated amounts of money required to finance each activity listed.

In budgeting, the governing body makes important decisions about the work program of the municipality. Is a swimming pool more important than storm sewers? Does the municipality need a new library more than it needs extra policemen? Should the chuckholes be filled or the street completely rebuilt? It is a process by which the governing body determines the community's standard of living-what the community needs and wants, what it is willing and able to pay, and what services it can expect to receive for its tax dollars.

The capital budget

A capital budget is a long-term plan for capital improvements. It usually is prepared along with the annual operating budget. After an estimate of revenue available for public improvement is prepared, a list is made of needed capital improvements in order of priority for the planning period. And the capital budget is enacted. The planning period is generally for about five years, although there is frequently a sketchy overall plan prepared for a longer period.

While the capital budget covers several years, it should be revised as needed and reenacted annually. A capital improvement budget is particularly necessary where the municipality wants to take advantage of the state law authorizing the appropriation and accumulation, over a period of years, of a capital-improvements fund for expenditures on public works projects.[17]

Every municipality should have a capital budget. By planning for public improvements, the governing body may be able to minimize problems, avoid crash programs and, perhaps, avoid financial embarrassment. Capital budgeting forces the municipality to make the more important big purchases and capital improvements first and helps provide a stabilized tax rate.

17 *See* § 31-15-302(1)(f)(I), C.R.S.

RESOURCES

THE COLORADO MUNICIPAL LEAGUE

CML is a nonprofit, nonpartisan organization that has served and represented Colorado's cities and towns since 1923. The League offers membership to any incorporated city or town in Colorado, and currently serves more than 99 percent of Colorado's municipalities.

Major policies of CML are established by the membership at an annual business meeting and by the CML Executive Board, Policy Committee and standing committees. The Executive Board is comprised of 19 officials who are elected by the membership at the CML annual business meeting. They serve for two-year terms. Service on the Policy Committee and standing committees is open to any municipal official from a member city or town. Daily operations of the League are carried out by CML staff.

CML also has special-interest sections that cooperate with and help the municipal officials performing specific functions for their communities. Examples of sections include Mayors and Councilmembers, Managers, Attorneys and Clerks.

CML is organized into 14 districts, along the same geographic lines as the state's 14 planning regions. Each district elects officers and holds at least one meeting a year that includes a program of interest to officials in that district. The sections and districts give CML depth and breadth in its understanding of municipal needs.

Advocacy

CML is your voice before the state and federal government, employing a general counsel, staff attorneys and full-time lobbyists to ensure that all municipalities are well represented at the State Capitol.

The League monitors the Colorado Legislature for proposals that would affect municipalities and works to pass, defeat or amend legislation in accordance with general municipal interests and membership direction. The work of state agencies also is under the watchful eye of CML, as are statewide ballot issues.

Respected and honored with many awards, CML is recognized as the leading municipal voice before the General Assembly, Congress and the courts.

CML represents Colorado' municipal interests at the federal level, as well, and is an active member of the National League of Cities.

The League participates as *amicus curiae* (friend of the court) in state and federal appellate court cases that involve issues important to municipalities.

Information

CML provides the accessible information you need to serve your municipality and its residents.

Each year, staff responds to individual inquiries with information and advice about municipal government as well as sample documents from the League's extensive library.

CML periodicals (the bimonthly magazine, *Colorado Municipalities*; biweekly *CML Newsletter;* and *Statehouse Report* while the General Assembly is in session) and books capture important technical and legal research.

The League also distributes email (*Issues Update* and *CML News*) on emerging issues and posts regularly to our Web site, *www.cml.org*, as well as facilitates information through networking by email listservs that allow peers to share information and ideas electronically.

Training

CML offers dynamic events and workshops to support your continuing education and training. The sessions and meetings attract about 1,000 participants from throughout Colorado every year.

League workshops are affordable, capacity-building sessions that promote better understanding of municipal government and provide tools for effective leadership. Topics are timely and relevant. Examples include leadership, meeting facilitation, communication and parliamentary procedure.

Each June, the *CML Annual Conference* is the premier meeting for municipal officials in Colorado; municipal officials from throughout the state attend the three-day series of seminars. The *Seminar on Municipal Law* is held each fall, while each February brings officials from cities and towns across the state to meet in Denver for the *Legislative Workshop* and an audience with state lawmakers.

The League also hosts informative meetings across the state each spring and fall.

Contact the League for more information

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www.drcog.org

District 4
Pikes Peak Area Council of Governments
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www.prairiedevelopment.com

District 6
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www.seced.net

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www.pacog.net

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www.slvdrg.org

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www.archuletacounty.org

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53 IDEAS:
HOW GOVERNING BODY MEMBERS CAN GOVERN BETTER

Reprinted from the League of Kansas Municipalities' brochure, "Suggestions for Successful Public Service."

Governing is clearly more of an art than a science. There are no ultimate answers on how to govern; different approaches are to be expected, and probably desired. However, there do seem to be some fundamentals. The suggestions that follow range from practical, common sense fundamentals to those more philosophic and theoretical. These tips for successful and effective public service are intended to assist mayors, council members, and board trustees. While most suggestions relate to individual officers, others apply to the governing body as a whole. These two applications, however, are interdependent—the capacity of a governing body to govern effectively is dependent on the collective capacities of at least a majority of its membership. These suggestions are not in any priority order, and not all are universally accepted. All of them, however, are worth consideration by anyone who would serve the public through an elective local office.

Further contributions and suggested revisions to this list are welcome; please send any such suggestions to CML.

1. Learn all you can about your city, its history, its operation, its financing. Do your homework. Know your city ordinances. Dust off your comprehensive plan.
2. Devote sufficient time to your office and to studying the present and future problems of your community.
3. Don't bum yourself out on the little things but recognize that they are often important to the public. Save some energy—and time—for the important matters.
4. Don't act as a committee of one; governing a city requires a team effort—practically and legally.
5. Don't let honest differences of opinion within the governing body degenerate into personality conflicts.
6. Remember that you represent all the people of your community, not just neighbors and friends. Be wary of personal experiences coloring your public decisions.
7. Take your budget preparation job seriously, for it determines what your city does or does not do for the coming year and will also influence what happens in future years.
8. Establish policy statements. Written policy statements let the public, and the city staff, know where they stand. They help the governing body govern, and writing them provides a process to develop consensus.
9. Make decisions on the basis of public policy, and be consistent. Treat similar situations similarly, and avoid favoritism.
10. Focus your attention on ways to prevent problems, rather than just trying to solve them as they occur. Filling potholes is one approach to governing; developing plans to prevent them is more important.
11. Don't be misled by the strong demands of special interest groups who want it done now, their way. Your job is to find the long-term public interest of the community as a whole, and you may be hearing from the wrong people.
12. Don't rush to judgment. Few final actions have to be taken at the first meeting at which they are considered. Avoid "crisis management."
13. Don't be afraid of change. Don't be content to just follow the routine of your predecessors. Charge your appointed officers and employees with being responsible for new ideas and better ways. Listen to what they have to say.
14. Don't give quick answers when you are not sure of the real answer. It may be embarrassing to appear ignorant, but it can be more embarrassing, and damaging, to tell a person something which is wrong.
15. As an individual, even if you are the mayor, don't make promises you can't deliver! Most decisions and actions require approval of the governing body, and this takes a majority vote.
16. Remember that you have legal authority as a governing body member only when the governing body is in legal session.
17. Don't spring surprises on your fellow governing body members or your city staff, especially at formal meetings. If a matter is worth bringing up for discussion, it's worth being on the agenda. Surprises may get you some publicity, at the embarrassment of others, but they tend to erode the "team" approach to governance.
18. Participate in official meetings with the dignity and decorum fitting those who hold a position of public trust. Personal dress and courteous behavior at meetings help create an environment for making sound public decisions.
19. Conduct your official public meetings with some formality, and follow rules of procedure. Have an agenda, and follow it. Most governing body members agree that formal meetings expedite the process and promote better decision making.
20. Don't be afraid to ask questions. It is one of the ways we learn. But do your homework by studying agenda material before meetings.
21. Vote yes or no on motions. Don't cop out by abstaining except when you have a conflict of interest. A pass does not relieve you of responsibility when some decision must be made.

22. Once a majority decision of the governing body has been made, respect that official position and defend it if needed, even if you personally disagreed.
23. Respect the letter and intent of the open meetings law, but also keep private and confidential matters to yourself. Don't gossip.
24. Retain competent, key employees, pay them well, trust their professional judgment, and recognize their authority and responsibilities.
25. Don't bypass the system! If you have a manager or other chief administrative officer, stick to policy making and avoid personal involvement in the day-to-day operations of the municipality. If you do not have an administrative officer, make sure you have some management system that officers, employees, and the public understand.
26. Don't let others bypass the system. Insist that people such as equipment or service suppliers work with your city staff. If direct contact with governing body members is necessary, it should be with the governing body as a whole, or a committee, and not on a one-on-one basis.
27. Don't pass the buck to the staff or employees when they are only following your policies or decisions.
28. Don't always take no for an answer. The right question may be "How can we do this?" instead of "May we do this?" Be positive!
29. Learn to evaluate recommendations and alterative courses of action. Request that your staff provide options. Encourage imaginative solutions.
30. Avoid taking short-term gains at the expense of long-term losses. Be concerned with the long-term future of the city.
31. In determining the public interest, balance personal rights and property interests, the possible harm to a few versus the good of the many. Recognize that in some situations, everyone can't be a winner.
32. Remember that cities are for people! Be concerned with the total development—physical, economic, and social—of your community.
33. Don't act as if the city operates in a vacuum. Cities must work within the intergovernmental system to be effective. Keep in contact and cooperate with your federal, state, county, and school officials. CML can assist with some of these contacts.
34. Know your neighbors. Get to know the officials of neighboring and similar size cities. Visit other cities, particularly those with a reputation of being well run.
35. Learn to listen—really listen—to your fellow governing body members and the public. Hear what they are trying to say, not just the words spoken.
36. Keep your constituents informed, and encourage citizen participation.
37. Be friendly and deal effectively with the news media. Make sure what you say is what you mean. Lack of good communication, with the media and the public, can be a major problem for municipal officials.
38. Remember that what you say, privately and publicly, will often be news. You live in a glass house. Avoid over-publicizing minor problems.
39. Expect, and respect, citizen complaints. Make sure that your governing body members, and your city, have a way to deal effectively with them. Have a follow-up system.
40. Be careful about rumors. Check them out. Help squelch them when you know they are false.
41. Appoint citizen advisory committees and task forces when you need them, but be prepared to follow their advice if you use them.
42. Take care in your appointments to boards and commissions. Make sure they are willing and capable as well as representative of the whole community.
43. Never allow a conflict of interest to arise between your public duties and your private interests. Be sensitive to actions you take that might even give the appearance of impropriety.
44. Seek help. Use manuals, guides, and other technical assistance and information available from the League and other agencies. Attend workshops and conferences put on for the benefit of you and your city.
45. Pace yourself. Limit the number of meetings you attend. Set some priorities, including the need to spend time with your family. Recognize that life—and the city—is dependent on a lot of things you have little control over.
46. Establish some personal goals and objectives. What do you want to help accomplish this year? Next year?
47. Help develop some short-term and long-term goals and objectives for your city, and check your progress at least every six months.
48. Similarly, help your city develop a vision of the future. Plan from the future to the present—no vision, no plan. One of the important purposes of a governing body is to establish a vision for the future.

49. Focus on the future, and try to leave your city better than that which you inherited as a city officer.
50. Be a leader, as well as part of the team of elected and appointed officials who were selected to make your city an even better place to live.
51. At least once a year, schedule a governing body discussion about how you are governing. Review the processes and procedures. Sit back and ask, “How are we doing? How can we do things better?”
52. Be enthusiastic about your public service and the privilege you have, and let the public know it. But maintain your sense of humor. Don’t take yourself or the business of government so seriously that you don’t enjoy it. It should be fun as well as a rewarding experience.
53. Celebrate! Always focusing on problems and issues may lead you, the governing body, and the public, to believe that nothing positive ever happens. Good things do happen. Let the public share your successes.

ETHICS

SELECTIONS FROM
ETHICS HANDBOOK

ISSUES AND CONSIDERATIONS REGARDING ETHICS

Overview

In addition to the legal requirements discussed in the accompanying Webinar, there are a number of other laws, principles and related issues that involve ethics for municipal officials.

First, the Colorado statutes, in addition to the code of ethics, the disclosure and abstention statute and the criminal code, provide a list of "ethical principles." These principles, while written in the statute books, are not legally binding. They serve primarily as guidelines for conduct and best practices.

The second paft in this section discusses nepotism, cronyism, and employment of spouses, and statutes relevant to these issues.

We conclude this section with a brief discussion on ethics and the expectations of your community and citizens. Like the "ethical principles" in the state statutes, these expectations are not legally binding. Yet these expectations are important when considering ethical conduct of municipal officials.

Non-binding ethical "principles" in the Colorado state statutes

The Colorado statutes (CRS 24-18-105) provide "ethical principles" that are not written to be legally binding, but are intended to provide supplemental guidance for ethical behavior.

- The principles in this section are intended as guides to conduct and do not constitute violations as such of the public trust of office or employment in state or local government.
- A public officer, a local government official, or an employee should not acquire or hold an interest in any business or undertaking which he has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by an agency over which he has substantive authority.
- A public officer, a local government official, or an employee should not, within six months following the termination of his office or employment, obtain employment in which he will take direct advantage, unavailable to others, of matters with which he was directly involved during his term of employment. These matters include rules, other than rules of general application, which he actively helped to formulate and applications, claims, or contested cases in the consideration of which he was an active participant.
- A public officer, a local government official, or an employee should not perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when he has a substantial financial interest in a competing firm or undertaking.

Nepotism and cronyism

Nepotism is commonly defined as "favoritism (as in appointment to a job) based on kinship." Cronyism is "partiality to cronies especially as evidenced in the appointment of political hangers-on to office without regard to their qualifications." Neither of these words are specifically mentioned in the state statutes, and neither cronyism or nepotism are specifically prohibited by Colorado law.

The Colorado statutes on unfair or discriminatory employment practices do, however, contain provisions concerning employment of spouses. 24-34-402 (1) (h). While generally providing that it is a forbidden employment practice to discharge an employee or refuse to hire a person based solely on the fact that the person is married or plans to marry another employee, the statute says these actions are not a violation when:

- One spouse directly or indirectly would exercise supervisory, appointment, or dismissal authority or disciplinary action over the other spouse;
- One spouse would audit, verify, receive, or be entrusted with moneys received or handled by the other spouse; or
- One spouse has access to the employer's confidential information, including payroll and personnel records.

Some local governments in Colorado have taken the initiative to pass their own anti-nepotism ordinances. However, even absent express prohibitions on cronyism or nepotism, elected officials should be aware that there may be times when disclosure and abstention from voting on matters that directly concern their relations, close friends or financial or political supporters may be desirable. Trustees and council members at times excuse themselves from votes regarding these matters to avoid the potential appearance of impropriety. If a situation like this arises, consult with your municipal attorney.

Expectations of your community

It is important to note that laws are limited in their ability to provide guidance for every situation you encounter. While an action may be legal, it may not necessarily be ethical or viewed by the public as ethical behavior. As many popular references suggest, laws should be regarded as a floor for ethical behavior, not a ceiling. The public probably isn't aware of all the laws that apply to your position as a public official; nonetheless they will have expectations of your behavior and will hold you to a high standard – regardless of the law.

What the public expects from public officials:

- Honesty
- Decisions that put the community first, rather than the interests of the individual public official
- An open, impartial and fair decision-making process
- Respect for individual rights and community rights
- Accountability
- Forthrightness
- Decorum and professionalism
- Personal character and lawful personal behavior

OTHER LEGAL CONSIDERATIONS

In addition to the laws, there are several related legal issues that often go hand in hand with an ethics discussion. In order to keep this discussion focused and concise, we did not address these issues. However, the League has publications or resources available on each of these topics, if you would like more information on them.

- Quasi judicial proceedings, and the associated restriction on *ex parte* communications
- Campaign finance laws
- Open meetings laws, including openness, notice and executive session requirements (please see CML's publication, *Open Meetings, Open Records*)
- Open records laws and personal correspondence (including email) (please see CML's publication, *Open Meetings, Open Records*)

STICKY SITUATIONS — QUESTIONS TO ASK

Unfortunately, not all of our questions involving ethics are black and white or addressed clearly in the laws. When you are faced with a difficult ethical question, it may be helpful to ask yourself the following questions:

1. What does the law require in this situation?
   The law should be considered a minimum standard for ethical conduct. It can and should be a starting point for your decisions.
2. What does our own municipal ethics code require in this situation?
   If your city or town has a locally-adopted ethics code, make sure you understand it and apply it to your decisions. Like state laws, local ethics codes always should be considered a floor for your decisions, not a ceiling.
3. Is this a right vs. wrong situation? Is the issue simply that doing the "right" thing involves significant personal cost?
   Remember, your responsibility is to do the right thing for your community, regardless of personal cost. Ethics and the associated legal requirements are written to avoid improper conduct, not to serve as an excuse for avoiding politically difficult decisions.

4. Would I be embarrassed to read about my actions in the local newspaper?
   This is a simple "self-test," but can be very useful in clarifying a sticky situation!
5. Which decision will build or preserve the most public confidence in our municipality and the leadership of this council/board?
   The public expects you to base your conduct on the highest standards – even the appearance or perception of unethical behavior can test the public's confidence in your leadership.
6. Which decision is most consistent with my values?
   Is it fair? Compassionate? Respectful of all parties involved? Am I keeping my word?
7. Does this decision represent the interests of everyone in my community? Are there other stakeholders or members of the public who should be heard before this decision is made?
   Keeping your procedures open and accessible to the public not only ensures that everyone has an opportunity to be heard, but also that you make the best decisions for your community.
8. Does this decision involve conflicting values? If so, what are the facts? Is there a decision that best reflects my responsibility to the community as a whole? Does this decision do more good than harm? Is there something we can do to make this decision more fair and equitable?
   Sometimes, no matter what you do, there will be someone in your community who disagrees with your decision. However, if you have carefully thought through all of these considerations, you can be assured that you have done everything possible to ensure a fair – and ethical – decision.

AMENDMENT 41 AND MUNICIPAL OFFICIALS AND EMPLOYEES: A PRACTICAL INTRODUCTION

INTRODUCTION

At the statewide general election held on Tuesday, Nov. 7, 2006, Colorado voters overwhelmingly approved Amendment 41, which adds a new Article XXIX, entitled "Ethics in Government," to our state constitution. Article XXIX addresses a variety of topics, from limitations on receipt of gifts by various public officials and employees to strict limitations on giving by "professional lobbyists," limitations on how soon former state legislators may become lobbyists, and creation of an independent "Ethics Commission," at the state level. Certain of these provisions, especially those limiting receipt of gifts or "things of value," as well as those provisions creating the state Ethics Commission, should be of immediate interest to municipal officials and employees in Colorado.

This memo responds to numerous requests from our membership for guidance concerning the provisions of Amendment 41. It should be understood that the observations contained in this memo are preliminary, as local government attorneys across Colorado continue to wrestle with numerous ambiguities and questions concerning the requirements of this complicated amendment. Consequently, while we hope this material provides a useful introduction and some guidance concerning Amendment 41, this material should not be viewed as a substitute for legal advice from your own municipal attorney.

The language of Amendment 41 (following) is somewhat dense and difficult to track. Thus, we have presented the requirements of the amendment in an "outline" format, in hopes that this may aid understanding. We have paraphrased the requirements, while retaining critical language. When appropriate, we have inserted our own comments and observations, denoted by a check mark.

The principal limitations of Amendment 41 that affect municipal officials and employees are found in sections 3(1) and 3(2) of the amendment. The reach of these prohibitions is determined by the definitions of "government employee" and "local government official," which are found in section 2 of Amendment 41. This outline begins with discussion of these prohibitory provisions, followed by an introduction to the provisions creating the state Ethics Commission and defining its role. Finally, we address the home rule provision in §7 of the amendment, which presents home rule municipalities with a significant alternative to the requirements of Amendment 41.

PROHIBITORY PROVISIONS AFFECTING MUNICIPAL OFFICIALS AND EMPLOYEES

Who's covered?

The Amendment 41 restrictions apply to various classes of persons. Among those covered are the following, which include municipal officials and employees.

"Government employee," defined (section 2(1)), in pertinent part, as "any employee, including independent contractors, of … any local government."

"Local government official," Defined (section 2(3)), in pertinent part, as "an elected or appointed official of a local government."

"Local government," as used in the foregoing definitions, is defined in section 2(2) to include only counties and municipalities. Thus, when Amendment 41 limits receipt of gifts, etc., by "government employees" or "local government officials," those limits do not apply to officials and employees of Title 32 special districts or school districts, among others.

What prohibitions does Amendment 41 impose on receipt of money or gifts?

Sections 3(1) and (2) are the principal sections of the amendment potentially affecting municipal officials and employees. Note that these provisions limit what may be received. The donee, not the donor, is the object of these sections.[1]

§3(1) A government employee/local government official shall not "accept" or "receive" any:
money
"forbearance" or
forgiveness of indebtedness
without receiving "lawful consideration of equal or greater value" in return.

§3(2) A government employee/local government official shall not, directly or indirectly (via gift to spouse or dependant child) solicit, accept, or receive:
any "gift or thing of value," having a fair market value or "aggregate actual cost" greater than $50.00 "in any calendar year,"
without receiving "lawful consideration of equal or greater value" in return.

Notably, these limits apparently apply regardless of whether the gift or fiscal benefit is provided in relation to or for the purpose of influencing official action. The Independent Ethics Commission has, however, found receipt of various gifts not violative of Amendment 41 when there is no violation of the public trust, such as when the animus for the gift has nothing to do with the recipients public position.

The $50 limit in section 3(2) is on the "fair market value" or "aggregate actual cost" of gifts received by the covered official or employee, from "a person," in "any calendar year." So it's a limit of $50 per year, per donor, per covered official or employee.

The limitation is on gifts, etc. received, per year, from "any person." "Person" is defined as "any individual, corporation, business trust, estate, trust, limited liability company, partnership, labor organization, association, political party, committee, or other legal entity." (Section 2(4))

One question: Is "person" the interested entity, on whose behalf a number of natural persons may provide gifts/meals, etc.? In other words, may an unlimited number of persons who work at West, Inc., buy lunch for legislator X (and bring along the company's lobbyist…), so as long as no one West, Inc., employee spends over $50? Or is West, Inc., as an entity, limited to $50 per year, no matter who it sends to lunch with the company credit card?

This section of the amendment declares that a "gift or thing of value" includes, but is "not limited to, gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts." Amendment 41 contains no formal definition of the terms "gift or thing of value," (which terms also appear in subsection 3(4), limiting what may be given by professional lobbyists). This list in subsection 3(2) is thus as close as we get to a definition of these terms in Amendment 41.

Receptions, etc. The actual costs of food, drink, etc., for a reception or similar event, to which covered officials and/or employees are invited, may fairly be divided equally among everyone that attends. As a consequence, the distributed "gift" or "value" received by each individual official or employee attending could be quite minimal (e.g., if 200 people attend a $2000.00 reception, covered officials/employees receive a $10 "gift" or "thing of value" from the event sponsor). See also exception (e), below.

Scholarships, etc. A common question is whether sections 3(1) or 3(2) preclude award of scholarships to covered officials and employees, or their children. The Independent Ethics Commission has determined scholarships awarded utilizing objective criteria unrelated to the applicant's status are not prohibited under Amendment 41.

What are the exceptions to these prohibitions?

The exceptions set forth in section 6 of the amendment provide that the limitations contained in subsection 3(1) and 3(2), described above, do not apply, if the gift or thing of value received by a municipal official or employee is:

a. **Campaign contributions "as defined by law."**
"Contribution" is defined very broadly in the Colorado Constitution, Article XXVIII, Sec. 2(5).

b. **An "unsolicited item of trivial value," less than $50, such as a "pen, calendar, plant, book, note pad or other similar item."**

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1 Which is not to say, however, that donors have nothing to be concerned about under Amendment 41. See the discussion below of the Amendment's penalty section, where those "inducing" a violation are subject to punishment.

Some have suggested that this exception may be read as including finger food and beverages provided at receptions or similar events attended by covered officials or employees. Complicating this interpretation is that none of the listed items in this exception is food or drink, while these items are expressly mentioned in exception "e" below.

c. **An "unsolicited token or award" in form of plaque, trophy, etc.**

d. **Unsolicited publications, subscriptions, or "informational material" related to "recipient's performance of official duties."**

e. **Admission and the "cost of food or beverages" at a reception, meal, or "meeting" before whom the recipient appears to speak or answer questions, as part of a "scheduled program."**
Note that it's the "program" that has to be scheduled, not the attendees. If attendees are amendable to answering questions, neither the cost of admission, nor the cost of food/drink that they consume counts against their $50 annual limit on gifts, etc., from the sponsoring entity or group. Note also that, strictly speaking, questions need not relate to public business, in order to qualify the respondent to not count admission cost or the value of food/drink consumed against his or her annual $50 limit.

f. **"Reasonable expenses" paid by a non-profit organization or local government for "attendance" by covered officials** or employees at a:
convention, fact-finding mission, trip, or "other meeting"
if the person is "scheduled" to:
deliver a speech, make a presentation, participate on a panel, or "represent" the state or local government,
provided the non-profit organization receives "less than 5% of its funding from for-profit organizations or entities."
Note that for this exception to apply, the actual "person" has to be scheduled, not just the "program," as is the case with exception (e), above.

g. **Gift, etc., that is given by "an individual" who is a relative or "personal friend" of recipient, "on a special occasion."**

h. **Compensation/incentive given to an employee.**

THE INDEPENDENT ETHICS COMMISSION

Section 5 of Amendment 41 concerns creation of an Independent Ethics Commission. The amendment does not specify what it is that the Commission is to be "independent" of, nor whether or where the Commission will be located in the state bureaucracy. The amendment provides, however, that the General Assembly "shall appropriate reasonable and necessary funds to cover staff and administrative expenses" of the Commission.

- The Commission is comprised of 5 non-paid members, one of whom will be a local government official or employee.
- The purpose of the Commission is to: (a) hear complaints, (b) issue "findings," (c) "assess penalties," and (d) issue advisory opinions.
- The Commission is authorized to do these things in connection with: (a) ethics issues arising under the provisions of Amendment 41, and (b) ethics issues arising under "any other standards of conduct and reporting requirements as provided by law." The latter language could fairly be read as giving the Commission jurisdiction to hear complaints, assess penalties, etc., in connection with alleged violations of existing "ethics" statutes, such as the Public Official's Code of Ethics, 24-18-101-205, C.R.S., the gifts & honoraria reporting statute, at 24-6-203, C.R.S., and the voting disclosure and abstention statute, at 31-4-404, C.R.S., among others.
- The Commission is given the authority to adopt rules for the purpose of "administering and enforcing": (a) the provisions of Amendment 41, as well as (b) "any other standards of conduct and reporting requirements as provided by law." The Commission's authority apparently includes rulemaking for the enforcement of various state "ethics" statutes, of the sort mentioned in the foregoing paragraph.

Complaints to the Commission

Subsection 5(3) describes the Commission's complaint process:

- "Any person" may file a complaint.
  No entity is designated as responsible for policing or enforcing compliance with Amendment 41.
- The complaint must be in writing.
- The complaint must ask the Commission to determine whether a covered official or employee failed to comply with:
  the requirements of Amendment 41, or
  "any other standards of conduct or reporting requirements as provided by law"
  within "the preceding twelve months."
- The Commission may dismiss "frivolous" complaints without a public hearing.
  "Frivolous" is not defined in Amendment 41. Implementing legislation or commission rules will likely address this issue.

- As to non-frivolous complaints, Amendment 41 requires the Commission to: “conduct an investigation,” hold a public hearing, and “render findings,” pursuant to written Commission rules.
- The Commission is authorized to assess penalties for “violations,” as prescribed in Amendment 41, and as “provided by law.” (Penalties for violation of Amendment 41 are set forth in section 6 of the amendment, discussed below.)
- Members of the Commission are authorized to subpoena documents or witnesses.

THE PENALTY SECTION OF AMENDMENT 41

Section 6 of the amendment provides that: any covered official or employee “who breaches the public trust for private gain,” and “any person or entity inducing such breach,” shall be liable to the state or local jurisdiction for “double the financial equivalent of any benefits obtained by such actions.”

Amendment 41 provides that the “manner of recovery” of these penalties may be provided by law, as may “additional penalties.”

Interestingly, section 6 makes no express reference to the requirements of Amendment 41 itself, nor to the requirements of any of the various state ethics statutes. The penalty for breach of the “public trust” apparently complements section 1(1)(d) of the amendment’s “Purposes and Findings” section, in which it is declared that “any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that [public] trust.” This language may provide helpful direction to courts and the General Assembly, in construing or clarifying Amendment 41 to avoid some of the unintended consequences that the language of the amendment might be otherwise be read as supporting.

The language of the penalty section making the person or entity that induces a breach of the public trust liable to the state or local government stands out in an amendment that, except for its provisions concerning professional lobbyists, focuses on covered officials or employees as recipients of gifts, etc. The jurisdiction of the Commission would apparently extend to assessing penalties on those who have led covered officials or employees astray.

LOCAL AUTHORITY AND THE HOME RULE PROVISION

Section 7 of Amendment 41 provides first that “any” county or municipality may adopt ordinances or charter provisions with respect to ethics matters that are “more stringent” than the requirements of Amendment 41.

Home rule municipalities and counties are then given substantial additional authority. Section 7 provides that the requirements of Article XXIX (Amendment 41) “shall not apply” to home rule counties or municipalities “that have adopted charters, ordinances, or resolutions that address the matters covered by [Article XXIX].”

This language has raised a number of questions among municipal attorneys representing home rule jurisdictions. First among these has been whether the “have adopted” language means that a home rule municipality must have had its local enactment on the books prior to Amendment 41 taking effect. CML endorses the interpretation that this language allows ordinances, charter provisions or resolutions, adopted after the effective date of Amendment 41 to remove officials and employees of that municipality from the Amendment 41 restrictions.

A second major issue has been what the “matters covered by” language requires to be included in the local ordinance, charter provisions or resolutions. It’s safe to assume the local provision should address gift limits of some sort, but what else, if anything, should be required? A complaint process? Penalty provisions? A cutoff for violations? Attorneys for home rule jurisdictions have been and will continue to analyze and discuss these and other interpretive issues arising out of Amendment 41. CML has available several recent municipal ethics enactments for your information.

City Charter

Revised April 6, 2004

HONOR THE PAST ~ ENVISION THE FUTURE

PREFATORY SYNOPSIS

Population growth and the change in legal status from a town to a city were primary motivations for creating and adopting the City of Fruita's first charter in 1981. Since that time, charter provisions have been reviewed and modifications offered for public consideration in 1984, 1986, 1988, and 1998.

In November of 2002 the City Council adopted Resolution 2002-59 appointing a Charter Review Commission in accordance with Article 11.5 of the Fruita City Charter, a provision that requires that the Charter be reviewed every six years. The Mayor and City Council charged the Commission with the task of reviewing the charter in full and then make suggestions that would bring clarity to the document. The goal of the 1981 commission was to create a charter which would guide the City of Fruita to be progressive as a community and responsive to its inhabitants. The 2002-2003 Charter Commission kept that goal as the primary focus and took steps to ensure that the document as proposed could meet the ever changing needs and desires of the community.

After reviewing and discussing the document thoroughly, there were no pivotal or dynamic recommendations for change made. The Commission continued to embrace the Council-manager form of government created in the original 1981 Charter and continued to embrace an independently elected mayor with veto authority. The Commission has offered a number of changes for consideration that are designed to improve citizen participation, clearly define the responsibilities of staff and the policy makers and increase the level of accountability to the elected officials by clarifying a commitment to the City Council-Manager form of government. The resulting clarity will help to better serve the citizens of Fruita.

The goal of 2002-2003 Charter Commission was to re-evaluate the Charter and provide recommended changes that will ensure that the document provide the necessary framework to keep Fruita a progressive and well managed community. The Charter Commission believes the recommended changes will help meet that goal.

CHARTER COMMISSION MEMBERS - 1981

James Adams

William Baird

John Barcus

Robert Burdett

Craig Caldwell

Barbara Cowley

James Garcia

Bert Harrison

Henry (Pat) Kelly

Carol Lage

Jean Lutz

Robert Orr

Florence Orr

Rick Pell

Judy Saunders

Thomas Saunders

Bernie Shaw

Donna Shaw

Ivol Tufly

Viola Ward

Charles Webster

CHARTER REVIEW COMMISSION - 2003

Jim Adams

Fred Espinosa

Clint Kreutzer

Darline Merling

Jim Morris

Viola Sis

Wanda Valencia

FRUITA CITY CHARTER
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ARTICLE I
NAME, BOUNDARIES AND
POWER OF THE CITY OF FRUITA

1.01 Name, Boundaries: The Municipal Corporation previously existing as the Town of Fruita shall continue under the name City of Fruita and with the same boundaries. The City shall have power and authority to change boundaries in a manner authorized by law.

1.02 Powers of the City: The City shall have all powers possible for a City to have under the Constitution and Laws of this State.

1.03 Form of Government: The form of government of the City of Fruita shall be the Council-Manager plan. All powers of the City shall be exercised by direction of a City Council which shall be elected as provided by this Charter. The Mayor shall have separate powers and duties as established by this Charter. The City Manager shall be the chief administrative officer of the city.

ARTICLE II
THE CITY COUNCIL

2.01 Composition: There shall be a City Council of six (6) members elected at large by the registered voters of the City. The terms of all Council members shall be four (4) years, and until their successors are elected and assume office. Three (3) Council members shall be elected at a regular election; three (3) at the next succeeding regular election. A quorum shall consist of at least four (4) members.

2.02 Eligibility: Only registered voters residing in the City which are twenty one years (21) of age or older shall be eligible to hold the office of Council member.

2.03 Salary: The Council members shall receive such compensation as may be fixed by ordinance. No salary increases shall be effective during the current term of the Council members enacting such ordinance. The Council members shall also receive reasonable actual and necessary expenses incurred in the performance of their official duties.

2.04 Vacancies:

A. When Existing: A vacancy in the office of a Council member shall exist when a Council member

1. Dies;
2. Resigns;
3. Moves from the City;
4. Fails to attend two (2) consecutive regular meetings of the Council, unless excused by the Council;
5. Is recalled;
6. Is convicted of a felony or after a due process hearing, is found to have wilfully engaged in unethical conduct as defined by ordinance;
7. Is judicially declared incompetent.

B. Procedures: When there is a vacancy in the Council, the Council shall have sixty (60) days from the date of that vacancy to appoint a qualified person to fill the vacancy until the next general municipal election. All appointments shall be approved upon a majority vote of the Council as then constituted at a public meeting. If the Council

fails to fill the vacancy within the sixty (60) days provided by this Charter, a special election shall be held not less than ninety (90) days from the date of the vacancy unless a regular municipal election shall occur within 90 days.

C. Loss of Quorum: If there are three or more concurrent Council vacancies, the Mayor shall call a special election in compliance with state law.

2.05 Powers and Duties of the Council: The Council is responsible for policy making. The Council shall have the power to:

A. Adopt the budget and determine the City tax levy;

B. Adopt ordinances, resolutions, and motions necessary for the orderly conduct of City affairs;

C. Review and ratify appointments made by the Mayor;

D. Appoint a City Manager and evaluate his performance;

E. Enact necessary legislation required for the operation of the City.

2.06 Prohibitions. Individual members of the City Council shall not, in any manner, control or demand the appointment or removal of any city administrative officer or employee whom the City Manager or any subordinate of the City Manager is empowered to appoint, nor shall individual members of the City Council give orders to any such officer or employee, either publicly, or privately but shall deal with city officers and employees who are subject to the direction and supervision of the City Manager solely through the City Manager. The City Council may express its view and fully and freely discuss with the City Manager anything pertaining to appointment and removal of such officers and employees.

2.07 Procedure for Meetings:

A. Meetings: The Council shall prescribe by ordinance the time and place of all regular Council meetings. There shall be at least one (1) Council meeting per month. Special meetings may be held on the call of the Mayor or of four or more members of the Council. Notice of meetings shall be given to the public pursuant to Colorado Revised Statutes.

B. Council meetings shall be open to the public, except that the Council and Mayor may recess for the purpose of discussing in a closed session the items stipulated in C.R.S. 24-6-402 (4). A summary of those items that may be discussed in executive session include:

1. Matters required to be kept confidential by federal or state law or consideration of documents protected by the Open Records Act.

2. The purchase or sale of any real property;

3. Personnel matters;

4. Matters subject to negotiation.

5. Conferences with an attorney for the purpose of receiving legal advice on specific legal questions.

6. Specialized details of security arrangements or investigations

C. Before a closed session, the Council shall state the subject of the closed session in a motion calling for the closed session. Voting on matters which have been discussed in a closed session shall occur in open session and shall be recorded publicly.

2.08 Rules and Record: The Council shall make its own rules and order of business. A public record of its proceedings shall be kept.

2.09 Voting Shall be by Roll Call: The order of roll call shall be rotated for each succeeding vote, and the ayes and nays shall be recorded. Final approval of an ordinance, shall be by the affirmative vote of a majority of the quorum present. Every member present must vote, except that Council members shall be excused from voting on matters involving a his own conduct or when his direct financial interest is involved.

2.10 Ordinances, Resolutions and Motions: The Council shall act only by ordinance, resolution or motion. All legislative enactments must be in the form of an ordinance; all other procedures may be in the form of resolutions or motions. Each ordinance or resolution shall be confined to one subject, except in the case of repealing ordinances.

2.11 When Ordinances are Required: In addition to other acts required by law or by specific provision of this Charter, acts of the Council shall be by ordinance which:

A. Adopt or amends an administrative code or establishes alters, or abolishes any department, office or agency;

B. Provide for a fine or other penalty or establishes a rule or regulations, for violation of which a fine or other penalty may be imposed;

C. Levy Taxes;

D. Conveys or authorizes the conveyance of any real property of the City and the lease of any real estate for a period of more than one year.

E. Granting of a franchise.

2.12 Enacting Clause: Every proposed ordinance shall be introduced in writing, and in the form for final adoption. No ordinance shall contain more than one subject which shall be clearly expressed in its title. The enacting clause shall be, "BE IT HEREBY ORDAINED BY THE CITY COUNCIL OF THE CITY OF FRUITA, COLORADO". The Council shall adopt a resolution prescribing the form by which repeals and amendments to existing ordinances shall be presented for discussion.

2.13 Procedure for Enactment of an Ordinance: Procedure for enactment of an ordinance by the Council shall be as follows:

A. Any person, including a Council member, may present a proposed ordinance to the Council. A member of the Council may introduce a proposed ordinance or request that a public hearing be set concerning the subject matter of the proposed ordinance;

B. Upon introduction of a proposed ordinance or a request for a public hearing, the Council shall set a date for a public hearing;

C. The clerk will publish a notice setting forth the time and place of the public hearing, and summarizing the subject matter of the proposed ordinance by title, or at the direction of the Council, may publish the entire ordinance. Where ordinances relate to real property the simplest, clear description of the location of the property shall be used. The public notice shall state that copies of the proposed ordinance are available for inspection at the office of the Clerk. The Mayor, Council members, and the City Manager shall each receive a copy of the proposed ordinance prior to the public hearing;

D. All interested persons shall have an opportunity to be heard at the public hearing;

E. Following the public hearing, the Council and Mayor shall discuss the proposed ordinance. The Council may adopt, defeat, or postpone the decision on the ordinance;

F. If the ordinance is passed and adopted:

1. For planning and zoning ordinances, publish again the title noted above, and adding that copies of the ordinance (containing the legal description) are available for inspection at City Hall;

2. Publish other Ordinances by title or, at the direction of the Council, in full.

G. Ordinances other than emergency ordinances shall become effective thirty (30) days after their adoption by the Council;

H. All ordinances which are the subject of an election shall, if approved by a majority of those voting, become effective upon such approval and the procedures of this section shall not apply.

2.14 Emergency Ordinances: To meet a public emergency affecting life, health, property, or the public peace, the Council may adopt one or more emergency ordinances. These ordinances may not regulate taxes or authorize the borrowing of money, except as otherwise provided by this Charter.

An emergency ordinance shall be introduced in the form and manner prescribed for ordinances generally, except that it shall contain, after the enacting clause, a declaration stating that an emergency exists and describing it in clear and specific terms.

The Council must, prior to the enactment of an emergency ordinance, receive evidence in support of the declaration that an emergency exists, and must make a specific finding of fact that a public emergency affecting life, health, property, or the public peace exists. An emergency ordinance may be adopted with or without amendment or rejected at the meeting at which it is introduced.

A summary of every emergency ordinance shall be published. It shall become effective upon adoption or at a specified time. Every emergency ordinance shall automatically stand repealed on the 61st day following the date on which it was adopted. This shall not prevent reenactment of the ordinance in accordance with the provisions set forth in Section 13 of this Article.

ARTICLE III
MAYOR

3.01 How Chosen: The Mayor shall be chosen by a regular election. If there are more than two candidates, a plurality is required to elect. The Mayor shall serve a two (2) year term.

3.02 SALARY. The Mayor shall be paid as determined by ordinance, except that no increase in salary shall take effect until after the next regular City election. The Mayor shall also receive reasonable actual and necessary expenses incurred in the performance of the Mayor's official duties.

3.03 Eligibility. Only registered voters residing in the City which are twenty one years (21) of age or older shall be eligible to hold the office of Mayor.

3.04 Vacancies:

A. When existing: A vacancy in the office of the Mayor shall exist when the Mayor

1. Dies;
2. Resigns;
3. Moves from the City;
4. Fails to attend two (2) consecutive regular meetings of the Council, unless excused by the Council;
5. Is recalled;
6. Is convicted of a felony or after a due process hearing, is found to have wilfully engaged in unethical conduct as defined by ordinance.
7. Is judicially declared incompetent.

B. Procedures: When there is a vacancy in the office of Mayor, the Mayor Pro-tem shall assume the office of Mayor until the next regular election.

3.05 Mayor Pro-tem: The Council shall elect from its membership a Mayor Pro-tem who shall act as Mayor during the absence or disability of the Mayor. The Mayor Pro-tem shall serve a two (2) year term. If there is a vacancy in the office of Mayor, the Mayor Pro-tem shall resign his/her council seat and assume the office of Mayor until the next regular election. If there is a vacancy in the office of Mayor Pro-tem, a Mayor Pro-tem shall be

elected by the Council to fill the unexpired term.

3.06 Powers and Duties of the Mayor: The Mayor is the recognized political leader and represents the City at official, civic and social functions. The Mayor shall have the power to:

A. Preside over Council meetings;

B. Call special meetings;

C. Subject to Council review and approval, appoint members of boards and commissions;

D. Recommend ordinances, resolutions, and motions;

E. Vote in the event of a tie vote of the Council;

F. Be recognized as the political head of the city government;

G. The Mayor shall approve or disapprove ordinances in accordance with Colorado Revised Statutes 1973 31-16-104, and any amendments, revisions and renumbering of that statute.

H. Other powers and duties as designated by the City Council.

3.07 Prohibitions. The Mayor shall not, in any manner, control or demand the appointment or removal of any city administrative officer or employee whom the City Manager or any subordinate of the City Manager is empowered to appoint, nor shall the Mayor give orders to any such officer or employee, either publicly or privately, but shall deal with city officers and employees who are subject to the direction and supervision of the City Manager solely through the City Manager. The Mayor, acting with the City Council may express his views and fully and freely discuss with the City Manager anything pertaining to appointment and removal of such officers and employees.

ARTICLE IV
ADMINISTRATIVE STAFF

4.01 City Manager:

A. Appointment, Qualifications, Compensation: The Council shall appoint a City Manager, by a majority of the entire Council, for an indefinite term and fix his compensation. The manager shall be appointed solely on the basis of his qualifications.

4.02 Removal of Manager: The Council may remove the manager from office by a majority vote of the entire Council.

4.03 Annual Evaluation of the Manager: The Council and Mayor shall, annually, evaluate the performance of the City Manager to determine if he should be retained. The procedure for such evaluation shall be as follows:

A. Not less than thirty (30) days prior to the date of the evaluation, the Council shall publish notice to the public, inviting comment on the performance of the City Manager;

B. At the time of publication of the notice, the form to be used by the Council in evaluating the City Manager shall be made available to the public;

C. The actual contents of the evaluation of the City Manager shall not be made public;

D. The determination of the Council, after reviewing the evaluation of the City Manager, shall be announced at a regular Council meeting.

4.04 Acting City Manager: By letter filed with the City Clerk, the City Manager shall designate an acting City Manager to exercise the powers and duties of the City Manager if he is temporarily absent or disabled. During the absence or disability of the City Manager, the Council may revoke the designation of the acting City Manager, and appoint another person to serve until the Manager shall return or his disability shall cease.

4.05 Powers and Duties of the City Manager: The City Manager shall be the Chief Administrative Officer of the City and is responsible for the management of the City. He shall be responsible to the Council for all City affairs placed in his charge by this Charter, the Council, or by law. He shall have the following powers and duties:

A. To appoint, with the approval of the Council, all heads of departments, offices and agencies.

B. To appoint acting department heads to act in case of temporary absence or disability of a department head.

C. To suspend or remove any City employee or administrative officer except as otherwise provided by personnel rules of the City. Removal of department heads must be reviewed and approved by the Council;

D. To direct and supervise the administration of all departments, offices and agencies of the City;

E. To attend all Council meetings unless excused by the Council and shall have the right to take part in discussions, but shall not vote;

F. To see that all laws, provisions of this Charter and acts of the Council, subject to enforcement by him or by officers subject to his direction and supervision, are properly performed.

G. To recommend to the Council personnel rules and policies in addition to the current personnel manual which is hereby adopted subject to revision and amendment by the Council.

H. To keep the Council and Mayor fully advised of the financial condition of the city.

I. To direct the preparation of the annual budget.

J. To make such other reports and perform such other duties as may be required by the Council.

K. Make recommendations to the City Council and Mayor concerning the affairs of the city.

4.06 City Attorney: The Council shall appoint for the City, an attorney (or firm of attorneys) licensed to practice law in the State of Colorado. He shall serve at the pleasure of the Council and perform duties determined by the Council. Compensation of the City Attorney shall be fixed by the Council.

4.07 City Clerk: The City Manager shall appoint a City Clerk, with the approval of the Council, who shall be custodian of the Seal of the City, and shall perform such other duties as required by this charter, the Council or the City Manager.

4.08 Chief of Police. The City Manager shall appoint a Chief of Police, with the approval of the Council, who shall be in direct command of the Police Department, and shall perform such other duties as required by this Charter, the Council or the City Manager.

ARTICLE V
MUNICIPAL COURT

The Council shall appoint a municipal judge who is licensed to practice law in the State of Colorado, who shall serve at the pleasure of the Council, subject to annual review. Compensation of the municipal judge shall be fixed by the Council.

ARTICLE VI
BOARDS AND COMMISSIONS

6.01 Boards and Commissions, Appointment and Compensation: Members of Boards and Commissions shall be appointed by the Mayor, with approval of the Council for a period of three (3) years, with overlapping terms, and shall serve without compensation. First appointments shall be for one (1), two (2), and three (3) year terms.

6.02 Meeting Procedures: Each Board and Commission shall operate under established rules of procedure at public meetings as approved by the City Council and in accordance with the state open meetings law. A record of each meeting shall be kept.

6.03 Established Boards and Commissions: The following Boards and Commissions are hereby established:

6.03.01 Board of Adjustment: A Board of Adjustment as established by ordinance.

6.03.02 Election Commission:

A. Colorado Municipal Election Law Adopted: Elections shall be governed by the Colorado Municipal Election Law in effect at the time of the election, except as the Council may prescribe by ordinance.

B. An Election Commission is hereby created consisting of the Clerk, who shall be Chairman, and two other members at large, who, shall not be the City officers, employees, candidates, or nominees for elective City office. These two (2) members shall be appointed by the Mayor for a term of two (2) years.

C. Powers and Duties of Commission: The Election Commission shall establish precincts and appoint election judges and clerks for each precinct. The Election Commission shall have the power to adopt reasonable rules and regulations not in conflict with the Constitution and Statutes of the State of Colorado, this Charter, and ordinances of the City of Fruita. In the event of a tie vote, the Election Commission shall determine by lot the person or persons who shall be elected. No member of the Election Commission shall serve as a municipal election judge or clerk.

D. Municipal Elections: A general municipal election shall be held on the first Tuesday of April 1982, and on the first Tuesday of April of every second year thereafter.

6.03.03 Planning and Zoning Commission: A Planning and Zoning Commission as established by ordinance.

6.03.04 Police Commission:

A. The Police Commission shall consist of one (1) Council member, and four (4) members at large.

B. The Police Commission shall recommend policies, standards, procedures, and limitations for the Police Department to the Council.

C. Upon the direction of the City Council the Police Commission may receive public comment on the operations and management of the Police Department.

D. Upon the direction of the City Council the Police Commission may provide input to the City Manager on the appointment of the Chief of Police.

E. Upon the direction of the City Council the Police Commission may provide assistance to the Chief of Police in selecting members of the department.

6.03.05 Parks and Recreation Commission:

A. The parks and Recreation Commission shall consist of one Council member and six (6) members at large.

B. It shall recommend to the Council plans for acquisitions, development and operation of parks, recreation areas, and recreation facilities owned and operated by the City.

C. It shall recommend to the Council Recreation programs.

6.04 Additional Boards and Commissions: The Council shall have the authority to create or abolish other Boards and Commissions.

6.05 Advisory Capacity: Except for the Election Commission and Board of Adjustment, Boards and Commissions serve in an advisory capacity.

6.06 Membership Requirements: Eligibility requirements for members of all Boards and Commissions shall be as set forth in ordinance or resolution.

6.07 Reasons for Removal of any Member:

A. Being found guilty of committing a felony:

B. Having failed to attend two (2) consecutive regular meetings, unless excused.

C. Is found to have wilfully engaged in unethical conduct as defined by ordinance.

ARTICLE VII
ADMINISTRATIVE DEPARTMENTS

7.01 Creation of Departments. The City Council may establish or abolish city departments, offices or agencies and may prescribe the functions of all departments, offices and agencies.

7.02 Department of Police:

A. There is hereby created a Department of Police, the director of which shall be the Chief of Police, who shall be appointed and may be removed in the same manner as other department heads.

B. The Chief of Police shall be in direct command of the Department of Police, and shall be assisted by the Police Commission in selecting members of the Department. He shall assign all members of the department to their respective posts, shifts, details and duties. He shall make rules and regulations affecting the department in conformity with the ordinances and resolutions of the City, concerning the operation of the department and the conduct of the department. He shall further provide for the care and custody of all property used by the department.

ARTICLE VIII
FINANCIAL PROCEDURES

8.01 Fiscal Year: The fiscal year shall be the calendar year or as determined by the Council by ordinance.

8.02 Budget: The City Manager shall direct the preparation of an annual budget, and shall submit the Annual Budget to the City (90) days prior to the end of the current fiscal year or at such time as directed by the Council.

8.03 Contents of the Budget: The year's proposed budget shall contain:

A. A list of anticipated revenues, and of any surplus funds from the preceding year;

B. A statement of the proposed expenditures for each department. This statement shall include a breakdown of the expenditures for personnel, operations, other expenses and capital outlays;

C. Subsidiary budgets shall be prepared for all city-owned utilities in conformance with Generally Accepted Accounting Principles;

D. An estimate of the amount of surplus funds which may exist at the end of the budget year;

E. An itemized comparison with the previous year's budget.

F. Any other supporting information that the Council may request.

8.04 Long Term Financing: The proposed budget shall also include:

A. A statement of all known capital construction projects to begin or continue during the budget year. The statement shall contain an estimate of the cost and necessary revenue measures to accomplish the completion of each project, and an estimate of the annual cost of operating each project.

B. A statement of bonded indebtedness, and of other long term obligations, with retirement schedules, interest requirements, and special reserve funds provided for those obligations.

8.05 Budget Hearing: A public hearing on the proposed budget shall be held before its final adoption. Notice of public hearing shall be published at least two weeks prior to the hearing. The complete proposed budget shall be available for public inspection for a period of not less than two weeks before the date of the hearing. Copies shall be made upon

request for purchase at cost.

8.06 Council Amendments: After the public hearing the Council may adopt the budget with or without amendment. If the total proposed expenditures are increased or decreased by more than five percent (5%) of the original amount, another public hearing shall be held.

8.07 Council Adoption: If the Council fails to adopt a budget by the first day of the fiscal year, the amounts appropriated for the prior fiscal year shall be pro-rated on a month to month basis until the Council adopts the budget.

8.08 Taxes: The right is reserved to impose any tax not specifically denied to cities by the statutes of the State of Colorado. Any new tax or increase in existing tax, except the general property tax and taxes on special improvement districts, must be approved by a majority of the voters in a special or regular election.

A. Property Tax Levy: Adoption of the budget constitutes appropriation of the amounts specified. The Council shall cause the property tax to be certified to the county for collection.

B. Taxes imposed on special improvement districts shall be exempt from the general election requirement. However, a majority of the voters in such a district must approve the special improvement bond issue.

8.09 Public Record: The budget is a public record, and copies may be purchased at cost.

8.10 Amendments to the Budget after Adoption:

A. SUPPLEMENTAL APPROPRIATIONS: If the City Manager certifies there are excess revenues, the Council by resolution and after notice of public hearing published five days prior to the public hearing, may make supplemental appropriations up to the amount of the excess. This section shall not limit emergency appropriations under the provisions of Section 10B.

B. EMERGENCY APPROPRIATIONS: To meet a public emergency the Council may make emergency appropriations. Such appropriations shall be made by emergency ordinance. If there are no available revenues to meet such an appropriation, the Council may, by emergency ordinance, authorize the issuance of short term notes. The 61 days time limit for emergency ordinances shall not apply to these short term notes.

C. REDUCTIONS OF APPROPRIATIONS: If during the year it appears probable to the City Manager that revenues will be insufficient, he shall report to the Council without delay, indicating the estimated amount of deficit, any remedial action taken by him, and his recommendation as to any other steps to be taken. The Council shall then take

action to prevent or minimize any deficit, and for that purpose it may reduce one or more appropriations.

D. TRANSFER OF APPROPRIATIONS: The City Manager may transfer part or all of any unencumbered appropriations within a department. The Council may transfer by resolution, part or all of any unencumbered appropriations from one department to another.

E. LIMITATION: No appropriation for debt service may be reduced or transferred.

8.11 Special Reserve Funds: The Council, may, by ordinance, provide reserve funds for debt service, future improvements, or other projects. Such funds are to be held in trust for each specified purpose.

8.12 Accounting Records: The City Manager shall use an accounting system guided by current Generally Accepted Accounting Principles. This system shall include:

A. An itemized method for handling of receipts and disbursements;

B. A monthly statement of receipts and expenditures from which the Council can determine compliance with the budget. This statement shall be made available for public inspection;

C. An annual report of all funds and financial operations.

8.13 Annual Audit: An audit shall be made annually by a certified public accountant (or accounting firm) licensed to practice in the State of Colorado. The accountant shall not be used for more than eight (8) years consecutively. The Council shall select the accountant and may call for more frequent or special audits. Audits shall be available for public inspection.

8.14 Purchasing: The City Manager, with the approval of the Council, may direct a central purchasing operation. The City may enter into a joint purchasing agreement with any other governmental entity.

8.15 Depository: The Council shall designate depositories for City funds.

8.16 Investments: Funds not needed for current operations may be invested by the City Manager pursuant to Colorado Revised Statutes with approval of the Council. Such investments shall take into account the time when the funds will be needed. The City Manager shall present a review of the investment program to the Council quarterly or more frequently if requested.

8.17 Forms of Borrowing: The City may borrow money and issue securities as follows:

A. Short term notes;

B. General obligation bonds;

C. Revenue bonds;

D. Industrial development revenue bonds;

E. Bonds for special or local improvement districts;

F. Any other like securities.

8.18 Limitations: Taking into consideration that the provisions of Article VIII, Section 20 of this Charter, which requires an election and disclosure of the current assessed valuation and outstanding general obligation bonded indebtedness of the City prior to the issuance of general obligation bonds, there shall be no limitation on the amount of bonds or other securities the City may issue except as may be stated in the documents pertaining thereto. All bonds or other securities issued pursuant to the provisions of this Charter shall be sold at public or private sale to the best advantage of the City at, above or below par. Bonds may contain provisions for redemption prior to maturity with or without the payment of a premium. The maximum premium payable on prior redemption of any general obligation bonds may, but need not, be specified in the bond question approved by the qualified electors. No action or proceeding concerning the issuance of bonds shall be maintained against the City unless commenced within 30 days after the date of passage of the contested resolution or ordinance.

8.19 Short-Term Notes: The Council may, by resolution without an election, issue short term notes maturing within twelve (12) months of the date of their issuance. The resolution shall include provisions for re-payment.

8.20 General Obligation Bonds: All general obligation bonds to which the full faith and credit of the City is pledged or which are payable in whole or in part from the proceeds of general property taxes shall only be issued after approval at a regular or special election. Such election shall be called pursuant to the requirements of Article X, Section 20 of the Colorado State Constitution and an ordinance, which shall include:

A. The bond question to be submitted;

B. The amount of the total current assessed valuation of the taxable property within the City;

C. The amount of the City's total general obligation bonded indebtedness as of the date of the ordinance and the total amount if the proposed bonds are issued.

D. The maximum premium payable on prior redemption of any general obligation bond may be specified in the bond question.

8.21 Revenue Securities: The Council may, by ordinance, issue securities made payable solely from revenues other than property taxes. These securities include, but are not limited to, those payable from revenues derived from:

A. The operation of the project or capital improvement acquired or bettered with the proceeds;

B. Any other projects or improvements;

C. The available proceeds of any sales tax, use tax, or other excise tax, or;

D. Any part or combination of such sources.

8.22 Industrial Revenue Bonds: Industrial revenue bonds may be issued as provided by Colorado Statute.

8.23 Bonds for Special or Local Improvements Districts: Subject to the approval of the owners of more than half of the property in the area concerned the Council may, by ordinance, contract for or construct special or local improvements within specified districts of the City. The Council shall determine the methods of assessing the cost of these improvements. The Council may provide a special surplus and deficiency fund. This fund shall provide separate accounting for any surplus or deficiency after the bonds for a district are completely paid. Any surplus may be applied to any other special improvements.

In addition, in consideration of general benefits conferred on the City at large from construction or installation of improvements in special or local improvements districts, for the purpose of paying assessments against any property owned by the City and as additional security for improvement bonds, the Council may provide for an annual tax levy, and annually transfer to such special fund any available money of the City.

Whenever 80% of the principal amount of the outstanding bonds of a special or local improvement district have been paid and canceled, and for any reason the remaining bonds of the district and the interest due thereon, and there are not sufficient monies in the special surplus and deficiency fund, then the City shall pay said bonds when due and the interest due thereon, and reimburse itself by collecting unpaid assessments due said district.

8.24 Refunding Securities: Any bonds or other securities may be refunded as provided by

Colorado Statute.

8.25 Long-term Lease Agreement: The Council may by ordinance enter into long-term rental or leasehold agreements. Payment may be made by general appropriations, by imposition of usage fees on the rental of leasehold property, or a combination of both general appropriations and usage fees.

ARTICLE IX
FRANCHISES

9.01 Granting of Franchises. Franchises ordinances relating to any street, alley or public place of the City must be approved by a majority of all the members of the City Council.

Any franchise relating to any street, alley or public place is subject to the initiative and referendum powers reserved to the people pursuant to Article XX, Section 4 of the Colorado Constitution.

9.02 Right of Purchase: Every grant of a franchise or right for public utility within the City shall provide that the City may purchase and take over the property and plant of the grantee, upon payment of its fair value, and in the manner to be specifically set forth in the ordinance granting such franchise. The Council shall have the power to extend or enlarge existing franchises by ordinance.

9.03 Powers and Regulations: The City reserves the right to make all regulations which may be necessary to insure safety and welfare, and to protect the public from danger or inconvenience in the operation of any franchise.

9.04 Review: Franchises shall be granted for a period not to exceed 25 years.

ARTICLE X
INITIATIVE, REFERENDUM AND RECALL

10.01 Definition of Initiative and Referendum:

A. Initiative: The registered voters of the City shall have the power to propose ordinances to the Council. If the Council fails to adopt such an ordinance without any change in substance, the voters may adopt or reject it at an election.

B. Referendum: The registered voters of the City shall have the power to require reconsideration by the Council of any adopted ordinance.

10.02 Scope of Ordinances: Any proposed, initiated, or referred ordinance may be submitted to the Council by petition, signed by the registered voters of the City equal to the number required (Section 10.7). Power of initiative or referendum shall not extend to the budget or capital programs or to any ordinance relating to the appropriation of money, authorizing the issuance of bonds, the levy of special assessments, or salaries of City officers and employees.

10.03 Recall: Any Council member or the Mayor may be recalled after holding office for six months.

10.04 Commencement of Proceedings: Petitioners Committee Affidavit: Any five (5) registered voters may commence initiative, referendum or recall proceedings by filing with the Clerk an affidavit stating they constitute the Petitioners Committee. They will be responsible for circulating the petitions, and filing them in proper form, and stating their names and street addresses, and specifying the address to which all notices to the committee are to be sent.

A. In the case of an initiative, the affidavit shall set forth the proposed ordinance in full.

B. In the case of a referendum ordinance, the affidavit shall set forth the referred ordinance.

C. In the case of a recall, the affidavit shall demand the recall of the Council member named in said affidavit, and shall contain a general statement, in not more than 100 words, of the ground or grounds for which the recall is sought.

10.05 Duty of Clerk: Upon the filing of the necessary affidavits by the Petitioners Committee, the Clerk shall prepare the appropriate petition blanks for the initiative, referendum, or recall, and shall designate the number of signatures necessary for each such proceeding.

10.06 Petitions:

A. Form and Content: All papers of a petition shall be uniform in size and style, and shall be assembled as one instrument for filing. Each signature shall be executed in ink and shall be followed by the street address of the person signing. Petitions for initiative or referendum shall contain or have attached, throughout their circulation, the full text of the ordinance proposed or to be reconsidered. In the case of a recall, the petition shall contain the name of the individual and the reasons for recall. All petitions shall be headed by this statement, "ONLY REGISTERED VOTERS RESIDING WITHIN THE FRUITA CITY LIMITS MAY SIGN".

B. Affidavit of Circulation: Each paper of a petition shall have attached to it when filed, an affidavit executed by the circulator thereof, stating:

1. The person personally circulated the petition;

2. The number of signatures;

3. That all the signatures were affirmed in his presence;

4. That he believes them to be genuine;

5. That each signer had an opportunity before signing to read the full text of the initiated ordinance proposed, the recall petition, or the ordinance to be reconsidered.

10.07 Submission of Petitions: After obtaining the necessary signatures, the petitions shall be returned to the Clerk not more than thirty (30) days after their issuance. The petitions shall be sufficient when submitted as follows:

A. Initiative: The petition shall be signed by the registered voters of the City, no fewer than fifteen percent of the total vote cast in the last regular municipal election.

B. Referendum: The petition shall be signed by registered voters of the City, no fewer than ten percent of the total vote cast in the last municipal election;

C. Recall: The petition shall be signed by registered voters of the City, no fewer than twenty percent of the total vote case at the last municipal election.

10.08 Examination by Clerk: Within ten days from the filing of any petition, the Clerk shall determine whether the petition is signed by the correct number of registered voters and if sufficient, shall attach a certificate of sufficiency. If the petition is insufficient, the Clerk shall immediately notify the Petitioners Committee by certified mail, at the address

designated by the Petitioners Committee. The petitioner may then be amended within ten days of receipt of notification of the certificate of insufficiency. Upon filing of the amended petition, the clerk shall, within five days, examine the amended petition, and shall attach a certificate. If still insufficient, the Clerk shall notify the Petitioners Committee of the insufficiency of the petitions and the proceedings shall terminate. Petitioners shall be retained only for a period of one year. The termination of any proceeding due to insufficiency of petition shall preclude the initiation of any proceeding pertaining to the same subject matter or same elected City official for one year.

10.09 Certification to the Council: If the petitions are certified as sufficient by the Clerk, the Clerk shall at the next regular Council meeting, present the petitions to the Council which shall act as follows:

A. In the case of an initiative ordinance, the Council shall, within thirty (30) days after the attachment of the Clerk's certificate of sufficiency, either:

   1. Pass said ordinance without any change in substance;

   2. Call a special election to be held not less than thirty (30) nor more than ninety (90) days, unless a regular election shall occur within 90 days, after certification to the Council.

B. In the case of a referred ordinance, the ordinance shall be suspended upon certification to the Council of the sufficiency of the petition, and the Council shall first reconsider the ordinance. If the ordinance is not entirely repealed by the Council, the proposed referendum ordinance shall be submitted, without alteration, the vote of the registered voters of the City. The elections shall not be held less than thirty (30) nor more than ninety (90) days after certification to the Council unless a regular election shall occur within 90 days.

C. In the case of recall, the Council shall set a date for a recall election. The election shall be held not less than 30 nor more than 90 days after certification to the Council.

10.10 Publication and Form of Ballot: The publication and form of ballot shall be as follows:

A. Initiative: The ordinance shall be published in full, not less than ten days prior to the date of the election. The ballot heading upon which the proposed ordinance is submitted shall contain a brief summary and the ballot shall contain the words, "FOR THE ORDINANCE" and "AGAINST THE ORDINANCE".

B. Referendum: Referred ordinances shall be published, and the ballot shall follow the same form as provided for initiated ordinances.

C. Recall: The ballot shall be published in full, not less than ten days prior to the date of the recall election. It shall contain the reasons set forth in the petition for recall, and there shall also be printed the words "SHALL (name of person upon whom the recall is filed) BE RECALLED FROM OFFICE?"

10.11 Effect of Election on Recall: If a majority of the registered voters favor an initiative, the proposed ordinance shall become effective immediately. If a majority of the registered voters favor a referred ordinance, the ordinance shall immediately go into effect. If the referred ordinance shall be rejected by the voters, the ordinance shall be repealed. If a majority of persons voting recall approve the recall, the office shall be declared vacant immediately. The vacancy shall be filled as provided in Article II of this Charter. The completion of any proceeding under this Article shall preclude the initiation of any subsequent proceedings pertaining to the same topic or same person for one year.

10.12 Submission by Council: The Council shall have the power to submit any proposed ordinance to the vote of the people.

10.13 Implementation: The Election Commission shall make such additional rules and regulations as are necessary to implement the procedures of this Article.

ARTICLE XI
GENERAL AND MISCELLANEOUS PROVISIONS

11.01 Present Form of Government Continues: Except as otherwise provided by this Charter, the form of government existing in the City of Fruita at the time of the adoption of this charter, shall continue unaltered, and all officers and other persons in the service of the City at the time this Charter takes effect, shall continue to serve and their compensation shall not be modified by the adoption of this Charter.

11.02 Responsibility of Transition: It shall be the duty of the Council in office when the proposed charter takes effect, to implement all the requirements of this Charter.

11.03 Present Ordinances Continued in Force: All laws, ordinances, resolutions, by-laws, orders, rules or regulations in force in the City of Fruita at the time this charter takes effect which are not inconsistent with the charter, shall continue in full force and effect until the Council otherwise provides.

11.04 Continuing Bonds: All official bonds, recognizances, obligations, contracts, and all other instruments entered into, or executed by or to the City before this charter takes effect, and all taxers, fines, penalties and forfeitures due or owing to the City, and all writs, prosecutions, actions, and causes of action, except as herein otherwise provided, shall continue to remain unaffected by this Charter.

11.05 Charter Amendments: This charter may be amended as provided by Article XX of the Constitution of the State of Colorado. More than one charter amendment or measure may be submitted at an election. The Charter shall be reviewed by the City Council at least once every 6 years.

11.06 Publicity and Legal Advertising: All legal notices of City business of general interest to the citizens of Fruita shall be publicized as required by law or by the Council.

11.07 Boards and Commissions: All Boards and Commissions now in existence shall continue as constituted.

11.08 Severability: If any provision of this charter is held invalid, the other provisions of the charter shall not be affected. If the application of this charter, or any of its provisions to any person or circumstance is held invalid, the application of the charter and its provisions to other persons or circumstances shall not be affected. Every ordinance introduced shall be deemed to contain a severability clause.

11.09 Codification: All ordinances shall be codified.

11.10 Employment: Where qualifications are equal, preference in hiring shall be given to

Fruita residents.

11.11 Effective Date: This charter shall be effective when filed with the Secretary of State following approval by the voters.