City Council

Special Meeting Agenda

January 13, 2020
City Hall
749 Main Street, Spruce Room
6:30 PM

I. CALL TO ORDER

II. OPEN GOVERNMENT TRAINING

III. ADJOURN
Introduction

Speaker Bio

Sam Light is General Counsel for the Colorado Intergovernmental Risk Sharing Agency (CIRSA). Previously Mr. Light was a partner with the Denver law firm of Light | Kelly, P.C., specializing in municipal and other public entity law, insurance law and defense of public entities and elected officials. Sam is a frequent speaker on municipal law and has practiced in Colorado since 1993.
Introduction

Colorado Intergovernmental Risk Sharing Agency

• Public entity self-insurance pool for property, liability, and workers’ compensation coverages.

• Formed by in 1982 by 18 municipalities pursuant to CML study committee recommendations.

• Not an insurance company, but an entity created by IGA of our members.

• Total membership today stands at 276 member municipalities & affiliated entities:
  • 273 are members of the PC pool
  • 144 are members of WC pool

• CIRSA views pre-claim assistance and proactive approaches as critical member services – is a win-win.

Introduction

Presentation Overview

• Suggestions for Good Governance – Best Practices.

• Are based on our years of observing the ways in which elected bodies and their members can get into or stay out of trouble from a liability standpoint.

• Presentation is a training resource only; is not intended as legal advice on any specific, pending issues.

• In case of any inconsistency between author’s remarks and views of your City Attorney...your Attorney’s views prevail!
Suggestion One:
Recognize the Change in Roles

• Being a public official means your role has changed:
  • Citizen-official (government official 24/7!)
  • Outsider-insider
  • Critic-representative
  • Single-issue focus – broader policy focus

Suggestion One:
Recognize the Change in Roles

• When you took office, you took an oath to uphold constitution, laws and City charter and ordinances. What does that oath embody?
  • A commitment to respect the boundaries and allocations of responsibility set by law.
  • A commitment to lawful conduct, including following laws that apply to how you do business, such as providing “due process” and following criteria in making decisions.
  • A commitment to ethical practices.
  • A commitment to professional courtesy and respect for one another’s divergent viewpoints and styles?
Suggestion One:

Recognize the Change in Roles

• Whatever your role may have been to the City previously, you are now all elected leaders – guardians – stewards – of the City.

• The protection of the City’s interests and assets is perhaps your most critical function now.

• The guiding principle in decision making should always be, “what is the right thing for the City?”

Suggestion One:

Recognize the Change in Roles

• To be effective, and avoid liability risks, recognize:
  
  • You are now part of a collective decision-making body.

  • Each individual has a fraction of the power of the body, but that power can’t be exercised alone. Under law, the power and authority belongs to the Council itself.

  • Success in your position can’t happen without collaboration and consensus-building: Getting to being on the prevailing side.
Suggestion One:
The Role – Good Governance is Part of the Job

• As elected leaders, part of your oath and “job duties” is good leadership which, at root, is based both practically and legally on a few core concepts:
  • Openness & Transparency (open meetings/records laws);
  • Fundamental Fairness (due process);
  • Predictability (following applicable laws & ordinances); and
  • Mutuality of Respect.

Suggestion Two:
Avoid “outside the scope” and “willful and wanton” conduct

• You have protection from personal liability under the Colorado Governmental Immunity Act (GIA) if you are “within the scope of employment” and not acting “willfully and wantonly.” (GIA & City Code Chapter 2.26).
  • Concept of “scope of employment” applies to everyone - elected & appointed officials, employees, and authorized volunteers.
  • Means everyone needs to know & respect their “job description.”

• Conduct that is “outside the scope” or “willful and wanton” can create liability and result in a loss of governmental immunity.
Suggestion Two:

Avoid “outside the scope” and “willful and wanton” conduct

• Can also result in loss of insurance coverage. Public official liability policies provide for your defense and pay judgments where required.

• For example, typical Public Officials Liability (POL) coverage applies to “wrongful acts” you are alleged to have committed, such as allegations of civil rights violations or improper activities concerning employment practices.

• But, these policies follow “course and scope” and “willful and wanton” concepts. That is, they extend coverage to elected and appointed officials “in their capacity as such” (or similar), providing coverage for officials while they performing their authorized duties for the city/town...

Suggestion Two:

Avoid “outside the scope” and “willful and wanton” conduct

• Coverage is subject to certain coverage exclusions.

• Common POL coverage exclusions include where liability is based on willful & wanton conduct, fraud, ill-gotten gain, or criminal or malicious acts.

• Insurers must look to the allegations to assess coverage. If allegations are of willful and wanton or other bad conduct, the insurer may not cover, or cover under a reservation of rights.

• Public entity liability policies do not insure against punitive damages.
Suggestion Two:
Tips to avoid “outside the scope” and “willful and wanton” conduct

• Understand “job description” & stay within it.

• Before acting, particularly if you are thinking of acting individually, ask whether you have authority to act (and if you don’t, don’t do it).

• Recognize that elected officials act primarily as a BODY, and exercise responsibilities mainly by VOTING in a PUBLIC MEETING.

• If you are doing anything other than that ... make sure you are properly authorized.

Suggestion Two:
Tips to avoid “outside the scope” and “willful and wanton” conduct

• “We” not “I”!

• If you find yourself about to act in terms of “I” rather than “we” ...that’s a red flag.

• Be particularly cautious once Council has voted on a matter.
  • If you feel there is a need to change a decision, use proper channels.
  • Recognize some decisions cannot be undone without liability.
Suggestion Two:

Roles & Liability Risks

• Why is understanding & respecting the role—i.e., “role discipline”—a liability issue; some real-life examples resulting in claims against elected officials individually:
  • An elected official directs or gets involved in a personnel decision entrusted to some other supervisor.
  • An elected official interferes with a routine item that is staff’s responsibility.

• As important: Do the members have a common understanding of our “expectations” of how we “act” outside of our meetings?
  • Warning signs: “He/she/they did what?!” & “Can they do that?!”

Suggestion Two:

Final Thoughts on the GIA & Immunities

• The GIA provides “public employees”—including officials, employees, authorized volunteers—qualified immunity. They are immune from state tort liability when performing their duties if “within the scope of employment” and not acting “willfully and wantonly.” If conduct is “willful and wanton,” no immunity and can be personally liable.

• The GIA applies only to STATE LAW torts and does not apply to federal law claims (such as civil rights claims) or breach of contract.

• A federal form of qualified immunity protects government officials from liability for civil damages “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”
Suggestion Three:

Protect the City’s Confidences

• Government is conducted in the open – but there are certain legitimately confidential matters where non-disclosure of information or an executive session may be warranted.

• Under the City Charter, executive sessions are authorized only for a specific, limited number of topics.

• Make sure your systems for executive sessions and for identifying and protecting confidential information are well-established, understood and followed.

Section 5-2. Executive Sessions - Authorized Topics.

(a) Matters where the information being discussed is required to be kept confidential by federal or state law;
(b) Personnel matters involving the dismissal, demotion, discipline or review of the performance of employees directly appointed by the Council, consideration of complaints or charges against employees appointed directly by the Council, and other personnel matters only upon request of the City Manager or Mayor for informational purposes only;
(c) Consideration of water rights and real property acquisitions and dispositions by the City, but only as to appraisals and other value estimates and strategy for the acquisition or disposition of such rights or property; and
(d) Consultation with an attorney representing the City with respect to pending litigation.
Suggestion Three:

Protect the City’s Confidences - Scenario

In executive session the Council develops a strategy for negotiating the purchase of the old ice rink, which the City intends to develop into a public rink. It will at some future time hire a private firm to manage the facility. The appraiser’s confidential report states a value range of $475,000-$525,000, and the Council consensus is that the Mayor and City Manager should meet with the landowner and negotiate for a contract up to $500,000. Councilmember Jones, who also manages a private gym and intends to propose to contract with the City to manage any City-owned rink, sees the landowner at the coffee shop the next day and, eager to get the deal moving, tells him the City is willing to pay $500,000 and may go higher as the appraiser thinks the property may be worth up to $525,000. Problem?

Suggestion Four:

Honor Transparency

• Transparency is a basic expectation for public entities.

• Citizens take interest in the goings-on of the City, how/when those goings-on are discussed, and the opportunities afforded to them to listen in on/participate in the discussion.

• A lack of transparency can cause massive trust and credibility issues, and potential claims/disputes over compliance.
Suggestion Four:
Honor Transparency – OML & City Charter

• The Open Meetings Law (OML) applies to all meetings of the governing body, boards, commissions, committees, etc.

• Applies to 3 or more or a quorum, whichever is less.

• Requires discussion/action on public business to take place at a meeting open to the public and, if action will be taken or a quorum will be present, there must also be timely notice given. Per Charter, meetings must:
  • Be in public buildings and public facilities accessible to the public;
  • Agenda must be posted at least 72 hours in advance, along with agenda-related material.

Suggestion Four:
Honor Transparency – OML & City Charter

• How can you break faith with the OML? Let’s count some ways...

  • Three or more members Councilmembers hold “meetings before the meetings” to sort things out.

  • You hold executive sessions for purposes not listed in the Charter, or your executive sessions veer “off topic.”

  • Your “fyi” comments during a meeting morph into “substantive discussions” of matters not on the agenda.

  • Using e-mail as a substitute for a meeting.
Suggestion Four:
Honor Transparency – OML Scenarios

• Two members of the Council meet with the City Clerk; is that required to be an open meeting?

• Three members of the Council attend a County Commissioners meeting. Must the City post a notice and agenda for that meeting?

• There is an urgent need to approve a contract to replace a failed water pump (sole source > $50k) but the Council does not meet until next week. The suggestion is made to “poll” each member by e-mail for their vote. Is that allowed?

Suggestion Four:
Honor Transparency – Social Media

Anti-fracking activist sues outgoing Lafayette Mayor Christine Berg over alleged First Amendment violation

Should the First Amendment apply to Facebook? It’s complicated.

Can Elected Officials Censor Their Critics on Social Media?

Escondido Mayor Sued for Blocking Profile on Facebook

Mayor Sam Abed is one of dozens of politicians found to be blocking profiles on their social media accounts, according to reports obtained by NBC 7 Investigates.
Suggestion Four:
Honor Transparency – Social Media

• While we don’t yet have court decisions in Colorado, recent decisions elsewhere confirm that elected officials’ social media pages can be subject to First Amendment principles and limits on protected free speech.
• For example, if the site is used to fulfill some function/goal of government, then it is governmental in nature. As such, it is a First Amendment violation for the Chair of the County Board of Supervisors to ban a person from her Facebook page for posting accusatory comments. Davison v. Randall, 2019 WL 114012 (4th Cir. 2019).
• First Amendment concepts will also apply to City sites.

Louisville Open Government Training

BREAK TIME!
Suggestion Five:

Run Great Meetings!

• How your run your meetings and interact with interested parties at your meetings can greatly impact your effectiveness & liability risks.

• Recognize that certain liability risks can be exacerbated by “bad facts” relating to how you conducted your meeting. Thus,

  • Use and expect civility; avoid reactive, inflammatory, and off-topics comments (applies to all settings/participants but particularly true for quasi-judicial hearings—can look (and be) bad on a transcript!)
  • Understand your words/actions “stick” to you as government officials and have power and impact.

Suggestion Five:

Run Great Meetings!

• Be consistent in handling agenda items: use opening comments and/or scripts to set the stage and manage the process and expectations.

• Be consistent and fair in your use of parliamentary procedures.

• Maintain a level of formality; e.g., recognition by presiding officer, direct comments to Council, limit your use of e-devices and side discussions, be consistent in public comment periods, emulate other behaviors you want to see.

• Have a plan for dealing with disruptions–but don’t suppress the content of protected speech!
Suggestion Six: Honor Due Process

• Sometimes you are “legislators”—making general rules that apply generally.

• But sometimes you decide specific “cases” affecting persons’ protected property rights and for these “quasi-judicial” matters—mostly zoning and other land use decisions—you are essentially acting as judges and therefore must behave like judges.

• In this role you are required by law to provide “due process” and a failure to provide due process exposes you and the City to liability.

Suggestion Six

Honor Due Process

• Contrast – A Legislative Act:
  • Reflects public policy relating to matters of a permanent or general character.
  • Not normally restricted to particular individual or entity.
  • Affects the legal rights of specific individuals only in the abstract.
  • Prospective in nature.
  • Example – Recent Ordinance No. 1779, Series 2019 adopting a new sign code.

• As applied to land use, we are acting as legislators when we make the general rules, but...

• When we apply those general rules to specific persons and property, we are acting as quasi-judges.
Suggestion Six

Honor Due Process

• **Contrast - A Quasi-Judicial Act:**
  - Determines the rights of a specific person/entity for specific property.
  - Is based on facts developed at a hearing to resolve the particular interests in question.
  - In this process, we apply the existing legal standards to the specific case.

• The key characteristics of a quasi-judicial process are notice, a hearing, and a record-based decision made by a fair and impartial decision-maker.

Suggestion Six:

Honor Due Process – Avoid Trouble as a Quasi-Judge

• Consider land use and other quasi-judicial matters only at the duly notice public hearing.

• Remain fair and unbiased; don’t make up your mind before the hearing.

• Don’t participate if you have a financial or other personal interest in the matter (code of ethics).

• Don’t make your decision on the basis of irrelevant or non-existent criteria.

• Don’t engage with one side or the other before a hearing (ex parte contacts).
Suggestion Six:
Honor Due Process – Avoid Trouble as a Quasi-Judge

• A critical duty of the quasi-judge is to avoid “ex-parte” contacts, meaning any “outside the hearing” discussion with an interested party about the subject matter of the hearing.

• A proceeding loaded with “ex-parte” contacts is a path to having your decision overturned and, as important, having the integrity of your process eroded.

• When we advise against ex-parte contacts, we are protecting your ability to participate, and your ultimate decision.

• An ex-parte contact can be problematic whether with the applicant, citizens, or in some instances, staff.

Suggestion Six:
Honor Due Process – Avoid Trouble as a Quasi-Judge

• Contrast – For your general legislative and policy making discussions and matters, it is okay: to lobby (and be lobbied) outside the meeting; to base your decision on your own personal policy perspectives, and to base your decision on information obtained from most any source.

• But, for a quasi-judicial matter, it is not. Rather, just like a judge presiding over a trial, because of constitutional due process requirements, you must make your decision based on the evidence presented to you at the hearing, and you must base your decision upon legal standards, and you may not engage with interested parties about the case outside the hearing.
Suggestion Six:
Honor Due Process – Deliberations Matter!

• Discussion of the evidence is critical; this is where:
  • The Council formulates the bases of its impending decision
  • The applicant and others gain an understanding of your position
  • Interested persons (and any reviewing judge) look to understand why you decided the matter as you did (and whether it comports with your criteria and the law)
  • Deliberate – Talk Amongst Yourselves

Suggestion Seven:
Put Ethics First

• In Colorado, ethics scandals are rare – but happen from time to time.
  • Ethical misjudgments greatly undermine public confidence in public bodies, and appearances of conflicts can be just as damaging as actual conflicts.
  • Can result in personal criminal and civil liability.
  • There is often a “personal benefit” exclusion from public officials liability coverage.
Suggestion Seven:

Put Ethics First

• Louisville Code of Ethics: Charter Sections 5-6 through 5-17. The main theme that runs through the Code: It is not permissible to gain a personal benefit by virtue of holding public office.

• Conflicts of Interest: General Rule: If you have a situation where your official action as a Councilmember will affect your own financial interest, you must: Disclose the conflict; not participate in the discussion; leave the room; and not attempt to influence others.

• Don’t have a financial interest in City contracts or purchases, and if you will have such interest follow all rules.

• Don’t disclose or use any confidential information for personal benefit.

• Abide by City gift rules.

Suggestion Eight:

Be Cautious in Administrative Matters

• Inappropriate involvement in administrative matters by members of the governing body, collectively or individually, can:

  • Undermine the structure of the body or organization.
  
  • Waste resources.
  
  • Increase the risk of liability for yourself.
Suggestion Eight:

Be Cautious in Administrative Matters

Remember Your Charter: Section 8-5. Council’s Relationship to Employees.

(a) The City Manager shall be responsible to the City Council for the proper administration of all matters placed in the Manager’s charge by this Charter or by ordinance not inconsistent with this Charter.

(b) Neither the Council nor any member of the Council shall dictate or interfere with the appointment of, or the duties of, any City employee subordinate to the City Manager, the City Attorney, or the Municipal Judge, or prevent or interfere with the exercise of judgment in the performance of the employee’s City responsibilities.

(c) A member of the Council may discuss any matter pertaining to City operations with any employee, including the City Manager, but shall not give any direct orders to any such employee.

Suggestion Eight:

Be Cautious in Administrative Matters

• Understand and observe “role discipline” between policy and administrative matters, particularly with respect to personnel matters, permitting matters and others that are assigned to staff.

• For example, the Council has an appropriate role:

  • Selecting and supervising the Council’s few “direct reports.”
  • Determining budget and plan and classification plans.
  • Setting policy governing City permits.

• But...
Suggestion Eight:
Be Cautious in Administrative Matters

• Make sure your involvement in these “big picture” issues does not devolve into:

• Getting individually and improperly involved in the selection, evaluation, salary details, or disciplinary matters involving a specific individual who is not the Council’s direct report.

• Becoming an individual “HR Manager” -- if folks are bypassing the chain of command, how do return to the proper chain?

• Getting individually involved in staff permit decisions.

Suggestion Eight:
When dealing with staff – speak with one voice

• The Council is made up of individuals, each with different goals and priorities; however; it is not a group of seven bosses.

• Therefore, resolve to speak with one voice to your staff.

• There is but one Council and it should commit to act as one. It alone can—and should—carry the burden of sorting out and reconciling the goals and priorities of its members with the goal of establishing a singular set of goals, priorities and directions to staff.

• This can be done even if there are strong differences of opinion or a split vote.
Suggestion Nine:
Use Your Power Wisely and Humanely

• As a Council, commit to a “no surprises” approach with one another & staff.

• Use your staff as a resource to help you do well, and look good while doing it.

• Understand you are perceived as holding the most powerful positions in your local government.

• Commit to act as “we” and not as “I,” to build strong relationships between the Council and staff.

• And, always keep in mind that you are the stewards of the your City’s best interests and assets.

Conclusion

And thank you for your public service!

And for the opportunity to present.