BOARDS & COMMISSIONS

HANDBOOK

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INTRODUCTION

Congratulations! Your appointment to a board or commission in your city or town provides you with a valuable opportunity for public service, and your time and effort are appreciated. Although the specific duties assigned to the board or commission you serve on may vary, the information contained in this handbook will serve as a general guide to your new role.

Scope of this handbook

This handbook cannot address every subject that appointed board and commission members may face. Nor does this handbook claim there is any one best way for appointed board and commission members to perform their jobs. Instead, it is a compilation of the ideas and experiences of a large number of municipal officials from Colorado and other states, assembled here with the hope that it may offer both veteran and newly appointed officials the benefit of this perspective and experience.

State statutes provide considerable detail on what municipalities can and cannot do. While this book does more than merely outline legal matters, much of the content is based on pertinent provisions of the state statute. This text is not intended as a substitute for study of the statutes or for competent legal counsel.

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MUNICIPAL GOVERNMENT STRUCTURE: AN OVERVIEW

The democratic heritage of municipal government

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 to whether the potholes in the streets need repairing. 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.

Colorado is home to 272 separate municipalities that range in population from fewer than 20 residents to more than 600,000.

Colorado cities and towns operate under provisions of Colorado state statutes (and are referred to as "statutory" cities and towns) unless voters adopt a municipal charter to become a "home rule" city or town. Home rule is based on the concept that the citizens of a municipality have the right to decide how their local government should be organized and how their local problems should be solved. Municipal home rule derives its authority directly from the Colorado Constitution. Home rule governance affords residents freedom from the need for state-enabling legislation and protection from state interference in both local and municipal matters.

The role of the governing body

Local governing bodies in Colorado may be in the form of an elected city council or board of trustees. Elected officials become caretakers of their community's public life. The job of the municipal governing body is often stated simply: set public policy.

The governing body sets the vision that reflects what they believe best represents their constituency's interests and sets priorities for the municipality in order to develop this vision. One of the most important ways the governing body does this is through the adoption of an annual budget.

The role of manager or administrator

The city (or town) manager is the chief administrative officer of the city and is responsible directly to the city council for the performance of his or her duties.[1] The manager directs the work of staff in implementing the vision set by the governing body.

The role of boards and commissions

Boards, commissions, and citizen committees provide the governing body with a great deal of assistance by recommending public policy and transforming policy decisions into action. Some boards or commissions are required or permitted by statute, while others are created by ordinance, resolution, or motion. Some are empowered to make administrative

1 C.R.S. § 31-4-211.

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, while others are established for a limited time to accomplish a single purpose and cease to exist once their functions are completed.

Boards and commissions give the municipality an opportunity to leverage the talents of local specialists in certain fields and permit community members with special interests to serve the community in an area of personal concern.

The first step to understanding a board or commission's role in its municipality is to look at the original authority for the creation of the board or commission. This is found in a variety of places, such as the home rule charter or in ordinances or resolutions. In some cases (such as planning commissions), the authority is derived from state statute.

The second step to understanding the role of a board or commission is to identify whether it is an advisory body or a decision-making body. Again, this information can be found in the enabling authority of the board or commission. Decision-making boards are those that have specific authority to rule on policy decisions. Some examples of this type of boards and commissions are planning commissions,[2] liquor licensing authorities,[3] and zoning boards of adjustment.[4] Your municipal attorney is also a resource for clarifying your roles and responsibilities.

The role of staff liaison

Staff support is available to boards and commissions through the various staff members assigned as liaisons to help each group. The staff liaison may handle meeting logistics such as scheduling, setup, and public notification, as well as agenda preparation and distribution. The staff liaison is a great resource for any questions you may have.

2 C.R.S. § 31-23-202.
3 C.R.S. § 12-47-201, et seq.
4 C.R.S. § 31-23-307.

MEETING PROCEDURE BASICS

This section is an overview of the methods for conducting meetings of city and town boards and commissions. Please consult with your city or town staff for specific guidelines that may apply to the board or commission on which you serve. Legal considerations for conducting meetings under the Open Meetings Law are discussed later in this manual.

General and legal requirements

Regular, required meetings

Regular meetings are those meetings of a municipal governing body, such as the city council or town board, that occur at fixed or established intervals. The statutes do not require either city or town boards or commissions to meet at regular intervals. However, a municipal code might set meeting requirements for certain or all boards and commissions. Attendance expectations and requirements vary and may be outlined in your municipality's code or resolutions.

For persons serving on boards and commissions, you may be interested in attending the regular meetings of your governing body in order to understand the policies and processes on which you are making recommendations and/or taking action. Your board or commission may also be asked to present your recommendations at a regular meeting of the governing body.

Special meetings

A special meeting of a municipal governing body is a separate session that is held at a time different from that of the regular meeting. Special meetings are convened most often to consider only one or two items of business that require the immediate action of the board or commission prior to the next regular meeting. The method for calling a special meeting, if permitted for a board or commission, is often prescribed by local ordinance.

Rules of procedure

Each board and commission should adopt a set of rules by which to operate. These rules can incorporate *Robert's Rules of Order*[5] or any other set of prepared rules, or simply be established by the governing body. Such rules guide the board or commission, make the process more stable and predictable, and reduce disputes concerning correct procedure.

Meeting routine

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) nonprocedural items of business that may vary from meeting to meeting.

5 Henry M. Robert, et al., Robert's Rules of Order Newly Revised (10th ed., 1981) [hereinafter *Roberts Rules of Order*].

There is no “correct” organization or ordering of business, and state law requires no particular order be followed. Many cities and towns, however, have prescribed a local ordering of business, either 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:

- Call to order
- Roll call
- Reading and approval of minutes
- Public comments
- Reports from officers or municipal staff
- Public hearings, final reading and voting
- Unfinished business
- New business
- Extended public hearings
- Adjournment

Agenda

A meeting’s agenda is the statement of the purpose for the meeting and the basis of all other planning. A written copy of the agenda often is prepared and distributed to board or commission members and other interested persons to inform them of the specific items of business that will be considered at a meeting.

While the municipal staff often prepares the agenda, this responsibility varies from municipality to municipality and is usually set by the governing body.

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. If there are 32 items on the agenda and each item is estimated to take “only” 10 minutes, the board or commission is in store for a six-hour meeting. Reducing the number of items placed on the agenda is often a difficult task. Some ideas to eliminate or consolidate agenda items are:

- A specific type of decision may be handled by staff with a brief summary report being made to the board or commission from time to time.
- The board or commission may establish policies to handle reoccurring decisions, then direct staff members to follow the policy.
- The board or commission 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, board and commission 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. 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.

- The board or commission may set definite times for the meeting to come to order and to adjourn. Few board or commission meetings achieve much of value after four hours, and two 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 board and commission members.

Conducting the meeting

Quorum

Before a body, such as a board or commission, may proceed to its first item of business, the presiding officer must determine that a quorum is present. A quorum is a majority of all the members of the body and it is a number that, if present, is sufficient to transact most government business. In the absence of a quorum, any business transacted and actions taken by the body will be null and void. In fact, the only action that may be taken by a board or commission in the absence of a quorum is a motion to adjourn.

The presiding officer

The presiding officer, often referred to as "the chair," is the director and leader of any meeting of the municipal body. It is the presiding officer's 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. For a board or commission, a similar presiding officer is necessary to lead the smooth process of business.

The success of presiding officers may depend upon their ability to remain impartial and to keep business moving. Frequent displays of partisanship or favoritism risk destroying members' and citizens' respect for the presiding officer.

Agenda item discussion

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 should announce the agenda item and briefly describe the subject to be discussed.
2. The presiding officer should invite the appropriate people to report on the item and provide recommendations. The report may come from a member of the board or commission, municipal staff, or a member of the public invited by the board or commission to provide information on the item.

3. The presiding officer should then open the agenda item to the board or commission to ask questions.
4. If appropriate, the presiding officer may invite public comments after the board or commission has had the opportunity to ask their questions about the agenda item. More information on involving the public is available in the section, “Involving the public.”
5. Once the public comment period (if applicable) is over, the presiding officer can request a motion to be made from a member of the board or commission. A second is typically required to ensure that more than one person on the board or commission is in agreement with the motion before the question is posed to the rest of the body for a vote. The presiding officer 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 presiding officer can entertain debate from the board or commission. If little or no discussion takes place, the presiding officer can proceed directly to the vote. If the discussion is lengthier, the presiding officer may wish to restate the motion to be sure that everyone understands the question before them prior to taking a vote.
7. After closing the discussion, the presiding officer 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 presiding officer 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, that member would “move a substitute motion.” A substitute motion might be: “I move a substitute motion that we cancel the annual fundraiser this year.”

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*.

Involving the public

Each board or commission may afford members of the public an opportunity to speak to any matter coming within the purview of the board or commission. The board or commission may impose time limitations on such public input as necessary to conduct the business of the meeting in a timely and efficient manner.

The method by which citizens are allowed to speak at a board or commission meeting varies from community to community, and the procedures may be established by ordinance, resolution, rule, or tradition. It is important to ensure that the ground rules of the meeting are known to all, not just the chair. Remember that some of the public participants are first-time visitors and some may have never participated in a professional meeting before. Methods of allowing public comment include:

- Allowing the public to comment at any time throughout the meeting as long as their comments are restricted to the agenda item currently under consideration.
- Allowing a specific period during which the public is invited to speak on matters listed on the agenda.
- Allowing a specific period during which the public is invited to speak on any matter other than those listed on the agenda. This method is often used in combination with one of the two previous methods.

When a board or commission holds a public comment period, it must consider certain issues: How quickly will the commission 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?

Public hearings

A public hearing is any meeting or portion of a meeting of a body, such as the town board or commission, 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.

Some public hearings are required by law. The board or commission cannot make a decision until it has concluded public hearing on the matter.

No public hearing can be successful unless the people attending the hearing understand the issues to be discussed. The following recommendations can promote orderly public participation during a public hearing.

- 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 or otherwise sign-up to help keep track of comments and the persons making those comments for the public record.
- Set time limits on how long speakers can talk and apply the limits on every person who speaks.
- Allow each person who wishes to speak a chance to do so before allowing a second round of comments.
- To clarify for the audience and the public record, 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.
- Establish ahead of time whether board or commission 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.

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. 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 may also simply ask members in the audience who are in agreement with the speaker to stand and acknowledge that fact in lieu of speaking. Additionally, the presiding officer can set shorter time limits per speaker.

COLORADO'S OPEN MEETINGS LAW

All 50 states, as well as the federal government, have enacted a variation of a "Sunshine Law," requiring certain proceedings of government agencies to be open to the public.

This section will answer the most common questions concerning the requirements of Colorado's Open Meetings Law:

- Who is covered?
- What is a "meeting"?
- When are "executive sessions" permitted?
- What advance notice of a meeting is required?
- What exemptions are there?
- What happens to those who violate the law?

Scope of the Open Meetings Law — "Local public bodies" and "meetings"

Put simply, the Open Meetings Law declares that whenever three or more members (or a quorum of the members, if fewer than three) of the "local public body" get together and public business is discussed or formal action may be taken, the gathering is a "meeting" and must be open to the public.[6]

What is a "local public body"?

The Open Meetings Law defines a "local public body" to include political subdivisions of the state, such as municipalities, and any other formally constituted body of the political subdivision that performs an advisory, policymaking, or rulemaking role.[7] This definition, by its terms, includes boards, committees, commissions and authorities of the municipality. However, "persons on the administrative staff" of a local public body are specifically excluded.[8]

What constitutes a "meeting"?

The statute broadly defines a "meeting" as "any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication."[9] Conversely, chance meetings of public officials, or social gatherings at which discussion of public business is not the "central purpose," are not subject to the provisions of the Open Meetings Law.[10] However, be aware that a chance meeting may develop into a problem if you have a quorum of the body in attendance and the conversation turns to official matters.

6 C.R.S. § 24-6-402(2)(b).
7 C.R.S. § 24-6-402(1)(a)(i).
8 C.R.S. § 24-6-402(1)(a)(i).
9 C.R.S. § 24-6-402(1)(b).
10 C.R.S.§ 24-6-402(2)(e).

Meetings conducted by "telephone, electronically, or by other means of communication"

The General Assembly has included electronic, as well as "other means" of communication under the statutory definition of "meeting."[11]

The Open Meetings Law now explicitly subjects the e-mail communication of elected officials to the statutory requirements if it includes discussion of pending legislation or other public business.[12]

What this means is that the open meetings requirements apply to your board and commission, regardless of the manner in which the meeting is held. For example, if a discussion of official matters unfolds over email and a quorum of the body is included on the email, the open public meetings requirements apply.[13]

Retreats

Under the expansive definition of "meeting" in the statute, "any kind of gathering" that is held to discuss public business may qualify. Thus, if the retreat is attended by three or more members of the local public body, or by a quorum of the body (if fewer than three), and public business is discussed, the retreat qualifies as an open meeting to which requirements for notice apply.[14] Of course, an unlimited number of administrative staff members may attend the retreat, due to the specific exclusion of administrative staff from the "local public body" definition.[15]

Providing notice of the meeting

The public cannot exercise its right to attend open meetings unless given sufficient notice. Therefore, the Open Meetings Law requires that the public receive "full and timely notice" of any meeting held, and the posting shall include specific agenda information where possible.[16]

"Full and timely" notice

The statute does not explicitly specify or limit what may constitute "full and timely notice." The statute does, however, indicate that a meeting notice must be posted in the designated public place no less than twenty-four hours before the meeting.[17] The courts have found that the notice provisions of the Open Meetings Law establish a "flexible standard," the requirements

11 C.R.S. § 24-6-402(1)(b) A meeting is also described in the context of email communications, is presumed by many municipal attorneys to imply that such email communications must occur in a "chat room" format or otherwise be contemporaneous, in order to constitute a "meeting." At this writing, however, no Colorado court decision had adopted this presumption.

12 C.R.S. § 24-6-402(2)(d)(III) This requirement presents numerous potential practical problems for local government officials seeking to comply with the openness, notice, and other requirements of the Open Meetings Law, in the email context. Close consultation with the municipal attorney is advised.

13 However, electronic mail communication among elected officials that does not relate to pending legislation or other public business is not considered a meeting. C.R.S. § 24-6-402(2)(d)(III).

14 C.R.S. § 24-6-402(2)(c).

15 C.R.S.§ 24-6-402(1)(a).

16 C.R.S. § 24-6-402(2)(c),

17 C.R.S. § 24-6-402(2)(c).

of which may vary depending on the particular type of meeting involved.[18] However, the statute requires the local public body to designate the public place where the body will post notice at its first regular meeting each year.[19]

Emergency meetings

Unlike similar statutes from other states, the Colorado Open Meetings Law contains no reference to emergency meetings, which by their very nature present a challenge in terms of public notice. The Colorado Court of Appeals has recognized the need for municipalities to hold emergency meetings on occasion, and has upheld an ordinance providing for such meetings without prior public notice, where action taken would be ratified at a subsequent public meeting for which full and timely notice is provided.[20] The court defined an emergency as "an unforeseen combination of circumstances or the resulting state that calls for immediate action,"[21] and acknowledged that the notice requirement may be affected by the type of meeting involved.[22] While this decision finds no conflict between a local emergency meeting ordinance and the Open Meetings Law, officials should remain mindful of the law's intent and give as much notice as possible under the circumstances.

Direct notification requirements

The Open Meetings Law contains a provision requiring the clerk to maintain a list of persons who have requested, within the previous two years, direct notification of meetings, whether the request be for all meetings or only when certain specified policies will be discussed.[23]

The clerk is required to provide these persons with "reasonable advance notice" of such meetings, but the statute does not specify what sort of notice or what time frame will be considered reasonable.[24] Further, unintentional failure to give this direct notification will not invalidate actions taken at an otherwise properly published meeting.[25]

Minutes

The clerk, or other official in the clerk's absence, must take the minutes of any meeting of the local body "at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or could occur."[26] After the meeting, the minutes must be promptly recorded and are considered a public record open to inspection.[27]

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18 *Town of Marble v. Darien*, 181 P.3d 1148 (Colo. 2008) (citing Benson v. McCormick , 578 P.2d 651, 653 (Colo. 1978)); *VanAlstyne v. Housing Auth. of the City of Pueblo*, 985 P.2d 97, 100 (Colo. App. 1999).
19 C.R.S. § 24-6-402(2)(c).
20 *Lewis v. Town of Nederland*, 934 P.2d 848 (Colo. App. 1997); but *see VanAlstyne v. Housing Auth. of the City of Pueblo*, as to the limits of subsequent ratification of action taken in prior *non-emergency* meeting held without proper notice.
21 *Lewis v. Town of Nederland*, 934 P.2d 848, 851 (Colo. App. 1997) (quoting *Webster's Third New International Dictionary* 741 (1986)).
22 *Lewis v. Town of Nederland*, 934 P.2d 848, 851 (Colo. App. 1997).
23 C.R.S. § 24-6-402(7).
24 C.R.S. § 24-6-402(7).
25 C.R.S. § 24-6-402(7).
26 C.R.S. § 24-6-402(2)(d)(II).
27 C.R.S. § 24-6-402(2)(d)(II).

Executive sessions

Because the underlying principle of the Open Meetings Law is that the formation of public policy is public business, and therefore cannot be conducted in secret, the exceptions provided by statute are limited and strictly tailored to situations where the General Assembly has determined that public discussion could be contrary to the public interest.

Topics of executive sessions

The statutes limit these private meetings, referred to as "executive sessions," to the following situations:

- the purchase, sale, or lease of real and personal property;
- attorney conferences;
- confidential matters under state or federal law;
- security arrangements or investigations;
- negotiations;
- personnel matters; and
- documents protected under Open Records Act.

Procedure for calling an executive session

Local government bodies may only call an executive session at a regular or special meeting.[28] While the Open Meetings Law requires "full and timely notice" of the regular or special meeting, there is no notice requirement that would impair the body from spontaneously calling an executive session during one of its meetings.

The local government body must first announce the topic of discussion, including the specific citation to the Open Meetings Law that authorizes consideration of the announced topic in executive session, as well as identify the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized, and then vote on whether to hold the session for the purpose of discussing only the topic announced. Two-thirds of the quorum present must vote affirmatively before the local government body can close the meeting to the public.[29]

The local government body cannot utilize the open meeting to simply "rubber stamp" the position adopted by it while in executive session.[30] The public cannot "participate in a public meeting if [it] witnesses only the final recorded vote."[31]

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28 C.R.S. § 24-6-402(4).
29 C.R.S. § 24-6-402(4).
30 *Littleton Educ, Ass'n v. Arapahoe Cty Sch. Dist.* No. 6, 553 P.2d 793, 798 (Colo. 1976); Bagby v. Sch. Dist. No. 1, 528 P.2d 1299, 1302 (Colo. 1974); *Hudspeth v. Bd. of Cty. Comm'rs of Routt Cty.*, 667 P.2d 775 (Colo. App. 1983).
31 *Bagby v. Sch. Dist. No.1, Denver*, 528 P.2d 1299, 1302 (Colo. 1974).

The executive session record

The Open Meetings Law requires that an electronic record be made of an executive session of a local public body,[32] unless the attorney representing the local public body (who must be in attendance) determines that the attorney-client privilege applies to the executive session.[33] The law requires that executive session records reflect the "actual contents" of the discussion during the session, as well as the citation to the specific provision of the Open Meetings Law that authorizes the session. If a written record is used, the record must include a signed statement by the person presiding over the session attesting that the minutes "substantially reflect the substance" of the discussion that took place.

The executive session record must be retained for at least 90 days following the date of the executive session.[34]

Penalties for violation of Open Meetings Law

The underlying goal of the Open Meetings Law is to create an atmosphere of openness in public matters, not to "punish" those who violate the provisions. In keeping with this prevailing philosophy, the Colorado law contains no criminal sanctions for noncompliance.

Although members of governing bodies do not risk criminal punishment for transgressions, there are other consequences:

- Any action taken at a meeting that does not comply with the Open Meetings Law requirements is void.[35]
- If the court finds that a public body has violated the Open Meetings Law, it must award the prevailing citizen or citizens costs and reasonable attorney fees.[36]
- There is also the potential for a serious loss of confidence in the government when official actions are invalidated because laws aimed at assuring open government are violated.

32 C.R.S. § 24-6-402(2)(d.5)(II)(A).
33 C.R.S. § 24-6-402(2)(d.5)(II)(B). There is also an exception for electronic recordings of executive sessions discussing individual students. C.R.S. § 24-6-402(2)(d.5)(II)(A), C.R.S. § 24-6-402(4)(h).
34 C.R.S. § 24-6-402(2)(d.5)(II)(E).
35 C.R.S. § 24-6-402(8); *See Gray v. City of Manitou Springs*, 598 P.2d 527, 529 (Colo. App. 1979).
36 C.R.S. § 24-72-204(5.5). Furthermore, this award does not require that the violation be "knowing and intentional." *Zubeck v. El Paso Cty. Retirement Plan*, 961 P.2d 597, 601-602 (Colo. App. 1998).

ETHICS AND LOCAL OFFICIALS

Overview of state laws

The Colorado Constitution, state statutes, and oftentimes local charters and ordinances have provisions relating to ethical principles and conflicts of interest. While this section provides an orientation to laws governing ethics, the state conflict of interest statutes are subject to varied interpretations and particular applications, depending on the facts of the situation. For home-rule municipalities with local provisions that may conflict with state provisions, a legal question may arise over which law controls. If you believe your conduct may be affected by any of the state laws we describe, your best course of action is to seek the guidance of your municipal attorney.

Ethics laws that apply to local government officials, including members of boards and commissions, can be found in three separate sections of the Colorado Revised Statutes[37] as well in Article 29 of the State Constitution (sometimes referred to as Amendment 41).

Colorado "Code of Ethics"

The Colorado Code of Ethics[38] identifies several rules of conduct for local government officials, which includes boards and commissions, as well as local government employees.

The following are explicitly prohibited:

- using confidential information for personal benefit;
- accepting gifts or economic benefits as rewards or inducements;
- transacting business with those one supervises or inspects;
- acting to benefit one's business or client; and
- taking a personal or business interest in municipal contracts.

Exclusions from the Colorado "Code of Ethics"

The code provides that it is not a breach of fiduciary duty or the public trust for a local government official or employee to:

- use local government facilities or equipment to communicate with constituents, family members or business associates, (as long as the use of these facilities is not otherwise prohibited, such as for campaign purposes), or
- accept or receive benefits as an indirect consequence of transacting local government business.[39]

37 C.R.S. §24-18-101, et seq.; C.R.S. § 31-4-404; C.R.S. § 18-8-308.
38 C.R.S. § 24-18-101, et seq.
39 C.R.S. § 24-18-109(4).

The municipal "disclosure and abstention" statute

The disclosure of conflicts of interest and abstention from voting rules are found at C.R.S. § 31-4-404(2) and (3). These statutory provisions require that a member of the governing body of a 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,
- not vote, and
- not attempt to influence the votes of other members of the governing body.[40]

However, a member of the governing body may vote notwithstanding his or her personal or private interest if:

- the member's participation is necessary to achieve a quorum or otherwise enable the body to act, and
- disclosure prior to official activity is made pursuant to the voluntary disclosure provision of the Code of Ethics.[41]

Board and commission members should avoid voting on matters in which they may have a conflict of interest, as well as avoid attempting to influence other members on those matters. Such conflicts should be properly disclosed. If a situation like this arises, consult with your municipal attorney.

Colorado Criminal Code

The Colorado Criminal Code contains additional disclosure requirements affecting local government officials and employees.

The disclosure requirement is triggered when a local government official has a "known potential conflicting interest" affected by an impending exercise of a "substantially discretionary function with respect to a government contract, purchase, payment, or other pecuniary transaction."[42] The code provision requires disclosure in writing to the Secretary of State 72 hours *before* any action is taken.

Voluntary disclosure

Section 24-18-110 provides for voluntary disclosure by a local government official or employee of the "nature of his private interest" prior to acting in a manner that may impinge upon fiduciary duty and the public trust. The statute provides that such disclosure will be a defense for the local official in any civil or criminal action, or against "any sanction." Note that this defense is for the individual; it does not protect the official action tainted by a conflict from being voided, if otherwise voidable.

40 C.R.S. § 31-4-404(2).
41 C.R.S. § 31-4-404(3).
42 C.R.S. § 18-8-308.

Proper disclosure requires the disclosure to be in writing and delivered to the Secretary of State. Disclosure should include the following elements:

- amount of financial interest, if any;
- purpose and duration of services rendered, if any;
- compensation received for services; or
- "such other information as is necessary to describe" the interest.

If the act is then performed, the official or employee shall state for the record the fact and nature of the interest involved.

Amendment 41

At the statewide general election in November 2006, the voters of Colorado adopted Amendment 41, which added a new Article (XXIX) to the state Constitution. The amendment's language, which is couched in very broad terms, limits receipt of gifts exceeding $50 (subject to inflation; the 2018 amount is $59)[43] from any particular donor in a given year by municipal municipal employees and officials, among others. This broad language has spawned efforts within the legislature and the courts to define the practical reach of Amendment 41.

Amendment 41 provides for creation of an Independent Ethics Commission (IEC) and empowers the IEC to issue "advisory opinions" on ethics issues arising under the Amendment. The Commission has provided guidance on gifts that would not qualify as having substantial value, including:

- Unsolicited gifts of trivial value;
- Gifts valued less than $59 (and not given by a lobbyist);
- Gifts from relatives and friends for special occasions;
- Inheritances;
- Expense reimbursements;
- Campaign contributions;
- Scholarships;
- Honoraria for public speaking engagements; and
- Prizes, raffles, lotteries, etc.

The IEC's position statement clarifying acceptable gifts is available on the its website at *www.colorado.gov/pacific/sites/default/files/PositionStatement_08-01_IEC.pdf*.

As a reminder, the guidelines presented here are those declared by the IEC; your municipality may have local regulations prohibiting certain gifts for board and commission members.

43 The gift limit was originally $50, adjusted every four years for inflation and is $59 as of the date of this publication. However, $53 is the amount listed in the implementing statute because it has not yet been updated. See Colorado Independent Ethics Commission, Ethics Handbook (2016), *www.colorado.gov/pacific/sites/default/files/IEC_Ethics_Handbook_2016.pdf*.

Other issues and considerations regarding ethics

In addition to legal requirements, a number of other laws, principles, and related issues involve ethics for municipal officials.

Nonbinding ethical "principles" in the Colorado State Statutes

Colorado statute[44] provides "ethical principles" that are intended to provide supplemental guidance for ethical behavior. The statute provides:

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."

While neither cronyism nor nepotism is specifically prohibited by Colorado law, 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, municipal 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.

Board and commission 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.

44 C.R.S. § 24-18-105.

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 may not be 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; and
- personal character and lawful personal behavior.

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 governing body?*
   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.

QUASI-JUDICIAL DECISIONS AND *EX PARTE* CONTACT

A quasi-judicial decision occurs when a non-judicial body interprets the law to make a decision. Boards and commissions do not always make quasi-judicial decisions, but in certain circumstances they may. Quasi-judicial decisions involve the implementation of a previously adopted policy, rather than the declaration of new policy. When a board acts as a quasi-judicial body, it is important for the board's members to avoid *ex parte* contact.

What is an *ex parte* contact?

Broadly defined, an *ex parte* contact is any written or verbal communication initiated outside of a regularly noticed public hearing between an official with decision-making authority and one or more of the parties, but not all of the parties, concerning a particular subject matter that is under, or that is about to become under, consideration by that official, and that seeks either to influence, or present information relating to, that matter which is the subject of the decision. The term is usually used in a courtroom context: the judge cannot discuss a case with either party or their attorney without the other party and the attorney being present. The term is equally applicable to any quasi-judicial matter pending before a local governmental body; including a board or commission with quasi-judicial authority. An *ex parte* contact includes discussing an upcoming hearing or decision with the applicant or the party protesting the application.

Why are ex parte *contacts before making a quasi-judicial decision improper?*

- All parties are entitled to have the matter heard by an impartial person or body. At the very least, *ex parte* contacts, whether the contacting person is an applicant or a protestant, call into question the impartiality of the decision maker.
- Every quasi-judicial decision must be supported by findings of fact, and the findings of fact must be based solely upon the evidence as it appears in the record of the proceeding. The record of the proceedings consists only of matters presented at the hearing, not anything presented before or after the hearing. Therefore, to have a defensible record, only evidence presented during the hearing, on the record of the hearing, may be relied upon in reaching the body's decision.
- In some instances, the parties have the right of cross-examination of the opposing side. They cannot cross-examine an *ex parte* contact.
- In the event one party challenges the final decision, you can be sure any *ex parte* communications will be included as one of the grounds for reversing the decision.

What do I do if someone attempts to contact me before a hearing?

- Stop the person. If it is a verbal contact, advise the person that you are sitting as a judge in the matter and you cannot listen to or review anything about the issue prior to the hearing.

- Disclose the contact. At the next public meeting or prior to the hearing on the public record, advise the remaining members of the board and the parties regarding the contact, your response, and whether or not you think you can make an impartial decision based on the evidence presented at the hearing despite the contact.
- Consider whether the *ex parte* contact requires abstention. An *ex parte* contact, by itself, is usually not enough to reverse the final decision or require you to abstain from voting on the issue. Each individual contact must be reviewed to determine whether it affects your impartiality or ability to consider the matter fairly, whether it creates an appearance of impropriety, whether it creates a conflict such that you cannot participate in the decision-making process, or whether it otherwise affects the rights of the parties seeking the decision to "fundamental fairness" or due process in the decision-making proceedings.
- Consider adopting formal procedures. It is difficult to tell a neighbor or a constituent that you cannot talk to them about an issue that may be very important to them. Very often constituents are unable to understand why they cannot speak about particular issues to those that have been elected or appointed to represent those constituents. It may help to have specific procedures that the governing body or the planning commission has adopted that you can point to as the reason you cannot handle a quasi-judicial issue in the same manner as you do other legislative or administrative issues. This will also help to make sure all board members handle *ex parte* contacts in the same manner.

At the very least, *ex parte* contact can give the appearance of impropriety. At worst, *ex parte* contact may be grounds for reversal of a decision, a lawsuit, charges of undue influence or coercion, or bribery.

SOME FINAL GUIDEPOSTS

Municipal government is a team operation.

There are many sources of information about municipal government available to members of boards and commissions. The publications, information, and 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.

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 board or commission member.

No state law, handbook or any other guide can adequately outline the board or commission member's role in the governmental process. Yet, members of boards and commissions have a real responsibility to the citizens. Members of boards and commissions 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.

Resources

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Related CML publications

Colorado Municipal Government: An Introduction

Open Meetings, Open Records

Ethics Handbook

Handbook for Municipal Elected Officials

Municipal Candidates Guide

Public Officials Liability Handbook

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