Public Officials Liability Handbook

2007 Edition

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Public Officials Liability Handbook

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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.

[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.