

***City Council
Legal Review Committee
Meeting Agenda***

**January 15, 2015
City Hall – City Manager’s Office
749 Main Street
4:00 pm**

- 1. Call to Order**
- 2. Roll Call**
- 3. Approval of Agenda**
- 4. Public Comments on Items Not on the Agenda**
(Council requests that public comments be limited to 3 minutes.)
- 5. Approval of September 18, 2014 Minutes**
- 6. Designation of Posting Locations for Meeting Notices**
- 7. City Council Communication and Open Meetings Procedures**
- 8. Background on the Origin of the Legal Review Committee, Its Roles and Responsibilities, and Past Activities**
- 9. Potential 2015 Topics of Interest for Legal Review Committee**
- 10. 2015 Schedule for Legal Review Committee**
- 11. Legal and Private Property Constraints for Small Area Plans**
- 12. Lawsuit Settlements/Litigation Updates**
- 13. Potential Discussion Items for Next Meeting**
- 14. Adjourn**

City Council Legal Review Committee

Meeting Minutes

September 18, 2014

City Hall

749 Main Street

4:00 PM

Call to Order – Chairperson Sue Loo called the meeting to order at 4:05 PM.

Roll Call: The following members were present:

Committee Members: *Jeff Lipton, City Council
Sue Loo, City Council
Jayme Moss, City Council*

Absent: *None*

Staff Present: *Malcolm Fleming, City Manager
Sam Light, City Attorney
Meredyth Muth, Public Relations Manager
Scott Robinson, Planner II
Troy Russ, Planning & Building Safety Director*

Others: *None*

APPROVAL OF AGENDA

The agenda as presented was approved by all members in attendance.

APPROVAL OF MINUTES FROM AUGUST 20, 2014

The minutes as presented were approved by all members in attendance.

PUBLIC COMMENTS ON ITEMS NOT ON THE AGENDA

None

LEGAL LIABILITY AND COVERAGE FOR COUNCIL MEMBERS AND STAFF

City Attorney Light reviewed a draft ordinance for consideration that would clarify legal coverage for Council members and staff in the case of a lawsuit. He noted this coverage would be in place for actions taking place within the scope of work of the person, but would not cover someone who was being negligent. It would codify current state law.

City of Louisville

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Loo asked if this would cover board and commission members as well. Light said it would as long as they were working within their scope of work.

Loo asked if board and commission members would be covered if they were acting under their 501c3 designation. Light said no.

Light noted that the draft includes language to defend against a Code of Ethics charge.

Loo asked if there are any disadvantages to this legislation. Light replied it specifically defines the playing field so there may be less flexibility on a case-by-case basis, but codifying the rules mean everyone knows the rules in advance and how they work.

The Committee agreed to take the draft ordinance to the full City Council for consideration on October 21st with second reading on November 3.

ZONING AND VESTED LAND USE RIGHTS ON THE SMALL AREA PLANS (SOUTH BOULDER ROAD AND MCCASLIN CORRIDOR)

Lipton asked if vested rights should be considered when doing the Small Area Plans (SAP) and if/how existing entitlements might limit what the SAP can do.

Russ explained that the underlying zoning of the properties will not change with the SAP. The SAP could recommend changes but zoning changes can't be made without a separate process and approval from the City Council.

Lipton expressed concern that residents won't understand that the existing entitlements are in place and regardless of what the SAP says, those entitlements don't change without zoning changes.

Lipton asked if the Council could see the vested rights early in the process to better understand what is there now.

Russ responded that the yield study that will be done will show what is there today and what it could yield in development.

Lipton asked what is the cumulative effect on properties of zoning, General Development Plans, design standards, etc.?

Light noted that any changes to General Development Plans also require approval outside of the SAP process. He added it is hard to say exactly what development can occur on any parcel without looks at all of the development agreements and the zoning. It is more complex than just zoning.

Lipton noted that the City need be clear with residents so they understand the SAP is not a regulatory document and that other things will need to happen to make changes in the corridor. The City can't make changes unilaterally to encourage a certain development. Understanding these constraints will be really important.

2015 PROPOSED LEGAL FEES FOR CITY ATTORNEY

The Committee reviewed the proposed fees and will recommend approval to the full City Council.

UPDATE ON CONVERSATION WITH WATER COMMITTEE REGARDING WATER ATTORNEY CONTRACT

Lipton reported the Water Committee is fine with the Legal Review Committee being the body to review the water attorney contract.

LAWSUIT SETTLEMENTS/LITIGATION UPDATES

None.

POTENTIAL DISCUSSION ITEMS FOR NEXT MEETING

The Committee will meet again at some time in January.

ADJOURN

The meeting adjourned at 6:05 PM.

**SUBJECT: DESIGNATION OF PLACES FOR POSTING NOTICES FOR
MEETING NOTICES**

DATE: JANUARY 15, 2015

PRESENTED BY: MEREDYTH MUTH, PUBLIC RELATIONS MANAGER

SUMMARY:

Section 24-6-402(2)(c) of the Colorado Open Meetings Law requires that all public bodies of the City designate the public place or places for posting of notices of public meetings. The designation must be made at the local body's first regular meeting of each calendar year. Staff requests the Committee approve the following locations for the posting of meeting notices for 2015:

- City Hall, 749 Main Street
- Police Department/Municipal Court, 992 West Via Appia
- Recreation/Senior Center, 900 West Via Appia
- Louisville Public Library, 951 Spruce Street

Pursuant to the Home Rule Charter, meeting notices and agendas are also published on the City's web site at www.LouisvilleCO.gov.

FISCAL IMPACT:

N/A

RECOMMENDATION:

Approve designation of posting locations as listed above.

ATTACHMENTS:

N/A

**SUBJECT: CITY COUNCIL COMMUNICATION AND OPEN MEETINGS
PROCEDURE**

DATE: JANUARY 15, 2015

PRESENTED BY: MEREDYTH MUTH, PUBLIC RELATIONS MANAGER

SUMMARY:

Attached is a memo from the City Attorney discussing the rules pertaining to open meetings and the use of email. Also attached is the Elected Official Email Policy from the City of Cherry Hills Village as an example of something the City Council could adopt if so desired. Feel free to bring any questions or specific examples to the meeting for further discussion.

FISCAL IMPACT:

N/A

RECOMMENDATION:

Discussion

ATTACHMENTS:

N/A

OPEN MEETINGS & E-MAIL
Louisville Legal Review Committee
January 15, 2015
Prepared by LIGHT | KELLY, P.C.

I. INTRODUCTION

The following provides a brief overview of provisions of the Colorado Open Meetings Law, C.R.S. §24-6-401 et seq. (which is a portion of the Colorado Sunshine Act) of specific interest to City Councilmembers. Particular emphasis is placed on the meeting notice requirements and the use and handling of e-mail.

II. OVERVIEW OF THE OPEN MEETINGS LAW

1. Applicability. The Open Meetings Law (“OML”) applies to any “local public body,” which includes the City Council, City boards, committees and commissions, and other formal bodies that perform an advisory, policy-making or rule-making role. It does not apply to the administrative staff.
2. Basic Open Meeting Rules. There are two critical rules regarding open meetings:
 - All meetings of a quorum or three or more members of a local public body (whichever is fewer) at which any public business is discussed or at which any formal action may be taken are public meetings open to public.
 - Any meetings at which the adoption of any proposed policy, position, resolution, rule, regulation or formal action occurs or at which a majority or quorum of the body is in attendance, or is expended to be in attendance, shall be held only after full and timely notice to the public.

A “meeting” is defined by the OML as “any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication.” In construing these provisions, the Colorado Supreme Court has held that if the meeting is rationally connected to the policy-making responsibilities of the public body holding or attending the meeting, then the meeting is subject to the OML. Bd. of Cnty. Comm’rs, Costilla Cnty. v. Costilla Cnty. Conservancy Dist., 88 P.3d 1188 (Colo. 2004).

3. Specific Louisville Rules. The Louisville Municipal Code is more comprehensive than the OML. City Code section 2.90.030 states: All meetings of three or more members of the City Council, or of three or more members of the same board or commission, at which any public business is discussed, at which any presentation pertaining to public business is made, or at which any official action may be taken, shall be public meetings open to the public at all times. Further, while the OML has a 24-hour notice posting requirement, the City Charter provides for posting of meeting agendas and agenda-related materials 72 hours in advance of the meeting.

EXAMPLES:

- A discussion among three Councilmembers about public business is an open meeting. Thus, a citizen may listen in on even an impromptu discussion of public business by three Councilmembers.
- If three Councilmembers show up at the coffee shop purely by chance, this is not an open meeting. More particularly, the OML does not apply to “any chance meeting or social gathering at which discussion of public business is not the central purpose.”
- A meeting of two Councilmembers is not subject to the OML and therefore need not be open and requires no notice. The threshold number for the City Council is three members. However, the threshold number for a smaller committee, such as the three-member finance committee, is two members.

III. E-MAIL

1. E-Mail Meetings. A meeting subject to the OML can be convened by e-mail or telephone. The OML states that if elected officials use e-mail to discuss pending legislation or other public business among themselves, the e-mail shall be subject to the requirements of the OML.

In a 2012 case, the Colorado Court of Appeals ruled that the PUC did not violate the OML during an e-mail exchange in which Commissioners suggested edits to language proposed for inclusion in a legislative bill. The court determined the e-mail exchanges were not part of the PUC’s policy-making function, as the PUC does not create law, and therefore commenting on and editing the bill was not a formal action. Intermountain Rural Elec. Ass'n v. Colorado Pub. Utilities Comm'n, 298 P.3d 1027, 1031 (Colo. App. 2012).

Even though Councilmember e-mail exchanges may not be contemplating policy-making action, they may still violate the City Code, which states that any “discussion” or “presentation” of public business must be in a meeting open to public.

2. E-Mail Suggestions. While e-mail is convenient, it can become a significant source of OML issues. A few suggestions to head off problems:
 - Conduct and discuss public business at duly-called and noticed regular and special meetings.
 - Do not use e-mail policy discussions and limit its use to non-policy discussions, or otherwise establish an open e-mail system which is readily accessible.
 - Further, do not use one-on-one e-mails (or meetings) to determine policy. As noted in the policy statement of the OML, its purpose is that the formation of public policy

is public business.¹

3. E-mail Risks. E-mail carries with it the risk of inadvertent or unintended “discussion” of public business. Though an e-mail may be sent from only one Councilmember to another, the sender cannot be certain that it will not be forwarded.
4. E-Mail Correspondence. E-mail to or from a constituent does not trigger the OML, but is subject to certain provisions of the Open Records Law. However, e-mail on quasi-judicial matters does implicate due process rights and therefore requires special attention.

EXAMPLES:

- An e-mail is sent to a Councilmember about a decision on a special use permit request. That e-mail should be made a part of the record and available for review, so that interested parties can review it as decisions on special use permits must be made based on the evidence presented at a hearing.
- A constituent e-mails a Councilmember, who replies, copying the other Ward Councilmember and the City Manager. This correspondence complies with OML, as the City Manager is not an elected official, but part of the administrative staff.
- A Councilmember replies to a constituent’s question, and copies all of the other Councilmembers, all of whom respond to Councilmembers with their own comments about what the City’s policy should be on the matter raised by the citizen. This type of exchange would violate OML to the extent three or more members are discussing/debating public policy outside of a public meeting.
- A Councilmember sends an e-mail to the other Councilmembers with a copy of an article from the CML magazine on a topic of current interest. That distribution itself does not implicate the OML. However, if there then ensues an e-mail discussion of what the City’s policy should be, the same issue as the above example arises.

¹ While “serial meetings” have not been directly addressed by the Colorado appellate courts, one recent case demonstrates the legal ramifications of public body members using e-mail and telephone to discuss policy changes. In Colorado Off-Highway Vehicle Coal. v. Colorado Bd. of Parks & Outdoor Recreation, 292 P.3d 1132, 1137-38 (Colo. App. 2012), the Board admitted that it violated the OML when Board members (i) discussed program changes via e-mail; (ii) held a closed phone conference followed by e-mails; and (iii) held a noticed meeting that was open to some persons but not all citizens. While the Court held the Board was able to “cure” the violations by holding additional open meetings at which all parties could testify on the substantive policy change being made, the Court emphasized that the focus of the OML is openness in the decision-making process.

Elected Official Email Policy

BACKGROUND

Elected officials of the City of Cherry Hills Village each have a City email account with which to conduct City business, including correspondence with other elected officials, residents, staff, and the City Attorney. Use of email communications has implications under both the Colorado Open Meetings Law and the Colorado Open Records Act. This policy has been established in order to ensure that the management of elected officials' email communications complies with the statutory requirements of the Colorado Open Meetings Law and the Colorado Open Records Act, as well as the City's Records Retention Schedule.

ADMINISTRATIVE POLICY

All emails related to City business should be addressed to elected officials' City email accounts. Personal email accounts may be included in addition to City email accounts if requested, but no emails related to City business should be addressed solely to personal email accounts.

Permitted Email Communications

Email deliberation between three or more elected officials concerning public business and/or pending legislation are declared to be a public meeting under the Colorado Open Meetings Law and are prohibited.

The following email communications from or to an elected official or officials are permitted:

1. Communication or deliberation from or to a staff person, the City Attorney, residents or community members.
2. Deliberation between fewer than three elected officials in which other elected officials are not copied and which are not forwarded to other elected officials.
3. Communication between elected officials that does not include deliberation related to pending legislation or other public business.

As used in this policy, “deliberation” means the discussion and/or exchange of viewpoints and opinions on a subject. It specifically does not include the distribution, but not discussion, of information.

Retention Policies Applicable to Email Communications

1. Email communications of elected officials may be considered public records under the Colorado Open Records Act. The City’s Records Retention Schedule applies to email communications in the same manner as other records.
2. Certain types of correspondence are expressly not a public record, including that which is a “work product,” as well as correspondence that is “without a demonstrable connection to the exercise of functions required or authorized by law or administrative rule and does not involve the receipt or expenditure of public funds”. Examples include drafts and worksheets, desk notes, copies of materials circulated for informational “read-only” purposes, and other records with preliminary or short-term informational value. These emails should be deleted as soon as they are read and are no longer useful.
3. Correspondence of elected officials designated as a public record fall into one of two categories:
 - a. Enduring Long-Term Value: Documentation or correspondence with enduring and long-term administrative, policy, legal, fiscal, historical or research value; records that relate to policy issues and actions or activities in which an important precedent is set; records of historic events relating to the municipality or the community; and other similar records and documentation. The retention period for these records is permanent.
 - b. Routine Value: Operating documentation that is routine and contains no significant administrative, legal, fiscal, historical, information or statistical value. Includes routine communications sent and received, communications containing duplicates of information that is filed elsewhere, routine requests for information, transmittal documents, etc. The retention period for these records is two years.

Email Management Policy

In order to ensure that the emails of elected officials are properly managed, the following email management policy should be followed:

1. All emails sent to or from an elected officials' email account will be automatically archived.
2. Archived emails will be managed according to the City's retention policy by the City Clerk
3. Original emails in the elected officials' email accounts may be saved or deleted as the elected official finds most useful.

SUBJECT: BACKGROUND AND ORIGIN OF THE LEGAL REVIEW COMMITTEE, ITS ROLES AND RESPONSIBILITIES, AND PAST ACTIVITIES

DATE: JANUARY 15, 2015

PRESENTED BY: MEREDYTH MUTH, PUBLIC RELATIONS MANAGER

SUMMARY:

A search of City Council minutes shows the Legal Review Committee has been a standing committee of the City Council since at least 1996. The Committee has only met as needed. Existing records for the Committee go back to 2006. In that time, the Committee has met five times and discussed the following topics:

- Review of Fees for City Attorney Fees
- Review of Water Attorney Fees
- Consideration of Increase for Salary for Municipal Judge, Associate Judge
- Review of Candidates for Judge or Association Judge
- Litigation Status Updates
- Legal Liability for Council Members and Staff

FISCAL IMPACT:

N/A

RECOMMENDATION:

Discussion

ATTACHMENTS:

N/A

SUBJECT: POTENTIAL 2015 TOPICS OF INTEREST FOR LEGAL REVIEW COMMITTEE

DATE: JANUARY 15, 2015

PRESENTED BY: MEREDYTH MUTH, PUBLIC RELATIONS MANAGER

SUMMARY:

Chairperson Loo provided staff the following list of possible topics for the Committee to review in 2015:

- 501(c)(3) organizations and their relationship to City
- Selected human resources policies, including public records training
- Risk management issues
- Treatment of pending litigation
- Procedures regarding real estate acquisition
- Other items

FISCAL IMPACT:

N/A

RECOMMENDATION:

Discussion

ATTACHMENTS:

N/A

**SUBJECT: LEGAL AND PRIVATE PROPERTY CONSTRAINTS FOR SMALL
 AREA PLANS**

DATE: JANUARY 15, 2015

PRESENTED BY: MEREDYTH MUTH, PUBLIC RELATIONS MANAGER

SUMMARY:

Attached is a memo from the City Attorney which provides a brief overview of some legal principals related to the status and enforcement of Master Plans, also known as Comprehensive Plans.

FISCAL IMPACT:

N/A

RECOMMENDATION:

Discussion

ATTACHMENTS:

N/A

COMPREHENSIVE PLANNING

Louisville Legal Review Committee

January 15, 2015

Prepared by LIGHT | KELLY, P.C.

I. INTRODUCTION

The following provides a brief overview of some legal principles related to the status and enforcement of Master Plans, also known as Comprehensive Plans.

II. OVERVIEW OF COMPREHENSIVE PLAN

Counties and municipalities are authorized and, in most cases, required to prepare a master plan or comprehensive plan. Generally the planning commission (rather than the governing body) is primarily responsible to prepare and adopt the comprehensive plan. For example, state law provides it is “the duty of the [planning] commission to make and adopt a master plan for the physical development of the municipality, including any areas outside its boundaries, subject to the approval of the governmental body having jurisdiction thereof.” C.R.S. §31-23-206. The Louisville Municipal Code (LMC) provides that amendments to the comprehensive plan be approved by both the Planning Commission and City Council after notice public hearings.

The master plan is the “planning commission's recommendation of the most desirable use of land... [c]onceptually, a master plan is *a guide to development* rather than an instrument to control land use.” Theobald v. Bd. of Cnty. Comm’rs of Summit Cnty., 644 P.2d 942, 948 (Colo. 1982)(emphasis added). The Colorado Supreme Court has recognized two means by which the master plan may become enforceable. First, in Theobald, the Court stated that “[i]n order to have a direct effect on property rights, the master plan must be further implemented through zoning, with proper notice and hearing.” Id. at 950. After Theobald, the Court recognized that provisions of a master plan adopted in a Planned Unit Development (PUD) plan are enforceable because the general assembly “*required* that a PUD plan *must be* in general conformity with the county's master plan or comprehensive plan.” Beaver Meadows v. Bd. of Cnty. Comm’rs, 709 P.2d 928, at 936 n. 6 (Colo.1985). In such a case, plan provisions, if specific, become “regulatory” by virtue of their incorporation into the PUD.

III. EFFECTS ON PROPERTY RIGHTS

Increased reliance on comprehensive planning across the nation has led many to question whether planning can effect a taking. “The issue is whether planning may give rise to a successful challenge under the Fifth Amendment of the United States Constitution (applicable to the states through the Fourteenth Amendment), or under similar provisions in state constitutions, that ‘private property has been taken for public use’ and, thus, compensation must be required.” Edward H. Ziegler, THE LAW OF ZONING AND PLANNING, § 14:25. (2011).

In one of the leading cases in Colorado, a sand and gravel company sued La Plata County regarding provisions of the county’s land use plan, which the company claimed amounted to an inverse condemnation. Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm’rs of Cnty. of La Plata, 38 P.3d 59 (Colo. 2001). In this case, the Court noted that the county’s plan provisions

were regulatory via their proper adoption after public hearings, and as such then looked at the claim under traditional principles of takings law, holding that: (i) a taking could occur under a fact-specific inquiry even if the property retained some economically viable use; (ii) appropriate focus in taking inquiry was the entire bundle of property rights related to the claimant's property, rather than on solely the effect of the plan on the mineral estate; and (iii) similarly, the economic impact of the plan on entire parcel had to be examined, not just the impact on portion on which sand and gravel operation was prohibited. Id.

IV. THE REGULATORY PROCESS

Although master plans are generally only advisory documents, a government has the authority to require master plan compliance when it includes master plan compliance provisions in its legislatively adopted regulations. However, in requiring master plan compliance, the master plan provisions at issue must be drafted with sufficient exactitude so that applicants are afforded due process, the county does not retain unfettered discretion, and the basis for the county's decision is clear for purposes of reasoned judicial review. Bd. of Cnty. Comm'rs of Larimer Cnty. v. Conder, 927 P.2d 1339, 1350-51 (Colo. 1996).

There has been an evolution in the status of master plans through Colorado courts. Thirty years ago, the decision in Theobald, stated a master plan adopted by a county planning commission is merely advisory and is not a legislative action. In Conder, the Court stated that a master plan is no longer advisory where there has been either: (1) formal inclusion of sufficiently specific master plan provisions in a duly-adopted land use regulation, or (2) a statutory directive from the General Assembly that landowners must comply with master plan provisions in pursuing land use development proposals.

In an additional La Plata County case, the Court of Appeals has also held that plan provisions can be made regulatory when the plan itself is adopted through a legislative process with the intent that provisions become regulatory; however, this remains subject to the Conder requirements for enforceability (adopted via due process, sufficiently specific and capable of judicial review). Condiotti v. Bd. of Cnty. Comm'rs of Cnty. of La Plata, 983 P.2d 184, 186-87 (Colo. Ct. App. 1999). The practical upshot of these cases is that if there is a desire to make comprehensive plan provisions enforceable, those provisions should be sufficiently specific to be regulatory and compliance with them should be expressly provided for in regulatory ordinances.