

Selected Best Practices For Municipal Lawyers

(Or Things We Wish We Could Always Remember)



Best Practices
Learn from the mistakes of others!

MMAA Summer Seminar

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PUBLIC CONTRACT AND BIDDING LEGAL REQUIREMENTS

A. Indemnification By City

- NO Authority for City Indemnification of private parties.
- **Arguments to avoid Indemnification:**
 - One Argument: Violates the constitution -- Cannot pay private debts -- funds spent only for public purpose -- [Article 6, § 23; Article 6, § 25]
 - Better Argument: Agreements to indemnify are waivers of sovereign immunity and only the General Assembly may enact such waivers; **Use Op. Atty. Gen. No. 138, Webster, 12-18-1987** (“To agree to the underlined terms [defend, indemnify and hold harmless], is to waive the state’s sovereign immunity, that is, the legal prohibition against the state being sued in its own courts for damages from the torts of its officers and agents. *Only the legislature can waive this immunity.*”) (emphasis added).

B. Contracts

1. Public Contract Statute of Frauds:

- **§ 432.070 RSMo.:** “No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing.” (emphasis added).
- **What This Means:**
 - *All contracts must be:*
 - Within City powers or otherwise expressly authorized by law,
 - Consideration wholly to be performed or executed subsequent to the making of the contract,
 - In writing, including the consideration,
 - Dated when made,
 - Signed by all parties, and
 - City authority to sign the contract must also be in writing.
- These requirements “are mandatory ... and ... a contract made in violation of them is void rather than voidable.” *City of Fenton v. Executive Intern. Inn, Inc.*, 740 S.W.2d 338 (Mo. App. 1987).
- **Can be used to avoid unjust enrichment and other implied contract claims:**
 - “Without evidence of a valid written contract, recovery for unjust enrichment, an equitable remedy, is also precluded.” *Halamiczek Bros., Inc. v. St. Louis County*, 883 S.W.2d 108, 110 (Mo. App. 1994); *Mays-Maune & Associates, Inc. v. Werner Brother, Inc.*, 139 S.W.3d 201, 208 (Mo. App. 2004) (dismissing unjust enrichment claim based on § 432.070 RSMo., because “[t]his section has been interpreted by Missouri courts to preclude recovery against a school district on any theory of implied contract. The fact that the school district has received the benefit of the plaintiff’s performance does not

make it liable on the theory of implied contract.”) (emphasis added) (citations omitted); *Carter v. Reynolds County*, 288 S.W. 48, 50 (Mo. 1926) (denying claim for payment for construction work, the court held that “[t]he statute, in prescribing the mode by which alone a county can obligate itself by contract, negatives the idea of a promise on its part arising by implication of law. [County] cannot be held as on an implied contract.”).

2. Prompt Payment Act - § 34.057 RSMo.

- Generally, requires at least monthly progress payments by City to contractor.
- Authorizes attorneys’ fees to prevailing party and 1½ interest per month for failure to pay promptly.
- **SB 529 MAJOR CHANGES:**
 - Now applies in addition to any contractor, to “any professional engineer, architect, landscape architect, or land surveyor.”
 - No longer allowed to retain 10% if contractor required to obtain § 107.170 RSMo. Payment Bond.
 - Note, SB 529 also amended § 107.170 RSMo. to increase the minimum amount of a project to \$50,000 (from \$25,000).
 - If no payment bond is received, city may withhold retainage on the public works project in an amount not to exceed 10% of the value of the contract or subcontract.
 - Appears to no longer require a finding that the higher rate of retainage is required to ensure performance of the contract.
 - Note this list of changes is not exhaustive. Refer to SB 529 for all changes.

3. Federal E-Verify Law – Service Contracts Over \$5,000

- **§ 285.530 RSMo.:** “As a condition for the award of any contract or grant in excess of five thousand dollars ... by any political subdivision ... to a business entity ... the business entity shall, by sworn affidavit and provision of documentation affirm its enrollment and participation in a federal work authorization program.” (emphasis added).
- **What This Means:**
 - All City contracts over \$5,000 **must** require from the contracting entity for **services**:
 - Affirmation of enrollment in E-Verify = “federal work authorization program;” and
 - Affirmation that it does not knowingly employ any person who is an unauthorized alien in connection with the contracted services.
 - Note: for repeat entities only need this affirmation on an annual basis if maintained in City files.
 - **EXCEPTION:** Does not apply to business entities that are merely providing goods or products. 15 CSR 60-15.020(6).

4. Immigration Status - Proof of Lawful Presence

- **§ 208.009 RSMo.:** “[A]t the time of application for any state or local public benefit, an applicant who is eighteen years of age or older shall provide affirmative proof that the applicant is a citizen or a permanent resident of the United States or is lawfully present in the United States.” (emphasis added).
 - “Public Benefit” = “any grant, contract, or loan provided by an agency of state or local government; or any retirement, welfare, health, disability, housing, or food assistance benefit under which payments, assistance, credits or reduced rates, or fees are provided.”

- (emphasis added).
- “Affirmative Proof” = “documentary evidence recognized by the department of revenue when processing an application for a driver's license, a Missouri driver's license, as well as any document issued by the federal government that confirms an alien's lawful presence in the United States.”
- Applicant may submit affidavits of lawful presence allowing for “temporary benefits” for 90 days.
- **What This Means: You must require** proof of status for all contracts and “benefits” that City grants.
 - Does NOT apply to: (1) any municipal permit, including business license, (2) contract with public utility providers and their customers, (3) secondary education public benefits as defined in Section 173.1110 RSMo. or (4) unemployment benefits.
- **Best Practice:**
 - Require copy of **driver’s license** of applicant/signer in file for all contracts/benefits.
 - Use affidavit of citizenship form only when person cannot provide written proof (e.g., driver’s license).

C. Bidding Requirements

- No general statute requirement that City’s must use competitive bidding.
- **BUT some specific exceptions:**
 - Construction Management Services - § 8.679 RSMo.
 - Health and Life Insurance for Employees - § 67.150 RSMo.
 - Construction of Initial Waterworks - § 91.170 RSMo.
 - City Depository Services (3rd class cities) - § 95.280 RSMo.
 - Insurance Contracts - § 376.696 RSMo.
 - Contracts with officials and employees of political subdivision over \$500 per transaction or \$5000 per year - § 105.454/.458 RSMo.
 - Architectural, Engineering or Land Surveying Services (list of 3 on file) - §8.291 RSMo.
 - Federal and State Grants - See specific grant provisions and applicable law.
 - LOCAL ORDINANCE - governs other requirements.

ORDINANCE REQUIREMENT REMINDERS

A. Reminders and Cites

- Ayes and nays required - void if not recorded as roll call.
- Label ordinance “bill” - not necessarily required, but avoids a lawsuit.
- **Check to see if clerk:**
 - Forgot the effective date clause.
 - Changed ordaining clause from exact words of statute.
 - Failed to have signed by “presiding officer” if a 3rd class city (use two signature lines to avoid problem).
 - Failed to have attested by village clerk.

- **Cites:**
 - § 79.130 RSMo. Ordinances--procedure to enact. (4th class).
 - § 77.080 RSMo. Style of ordinances--procedure to enact (3rd class).
 - § 80.110 RSMo. Trustees--passage of ordinances (Village and Townships).

SUNSHINE LAW

A. Reminders for City Clerks

1. City Clerk does NOT have to:
 - answer questions.
 - “certify” records.
 - create records.
 § 610.023 RSMo.

2. **§ 610.015 RSMo:** A roll call vote is needed for every vote taken in closed session - including vote to adjourn.

3. Request must be communicated in language that a reasonably competent custodian of records would understand.
 - *Anderson v. Village of Jackson*, 103 S.W.3d 190 (Mo. App. 2003) (“one seeking access to public records must communicate a request in language that a *reasonably competent* custodian of the records would understand. ... **The statute does not require that the custodian of public records perform more than to provide access to records for which access is sought.**”) (emphasis added).

B. Closed Records

- We all know that **§ 610.021 RSMo.** authorizes certain records to be closed.

- **§ 610.021(14)** contains the general catchall for all other records protected from disclosure by law. Here are a few examples:
 - **HIV testing records** - § 191.656.
 - **Tax returns** - § 32.057.
 - **Qualification to carry a concealed weapon** - § 571.101.9.
 - **Many juvenile records** - § 211.321.
 - **Mental health treatment records** - § 630.140.
 - **Genetic information** - § 375.1309.
 - **Adoption records** - § 453.120 and § 453.121.

C. Notice Provisions

- § 610.020.2 - Notice “shall be given at least **twenty-four hours**, exclusive of weekends and holidays when the facility is closed ...”
- § 89.050 - **15 day** hearing notice requirement for zoning regulations, restrictions or boundary changes generally.
- § 67.2725 - **4 days’** notice for meetings:
 - When vote of the governing body is required to implement a tax increase,
 - With respect to a retail development project when the governing body votes to:
 - utilize the power of eminent domain;
 - create a transportation development district or a community improvement district; OR

- approves a redevelopment plan that pledges public funds as financing for the project or plan.
- o This does not apply to setting annual tax levy for real/personal property taxes. *See* § 67.110 RSMo. (7 days’ notice and specific notice and hearing requirements).

D. Some Best Practices

1. Have a clear, strong policy; review periodically – it is their shield:
 - § 610.028.2 RSMo.: Any member **or employee** of the public governmental body **who complies with a written policy** is not guilty of a violation of Sunshine Act or subject to civil liability for any act arising out of following the written policy. (emphasis added).
2. Policy should close the records authorized to be closed under sunshine and provide opening by board action.
3. Add DED provision to City’s Sunshine Policy:
 - 620.014: **“Records and documents submitted to the department of economic development, to the Missouri economic development, export and infrastructure board, or to a regional planning commission formed pursuant to chapter 251, relating to financial investments in a business, or sales projections or other business plan information which may endanger the competitiveness of a business, or records pertaining to a business prospect with which the department, board, or commission is currently negotiating, may be deemed a closed record as such term is defined in section 610.010.”** (emphasis added).

SOCIAL SECURITY NUMBERS

A. Sunshine Offers Support

- “personal identification numbers” (§ 610.021(22) RSMo.).
- “Records which are protected from disclosure of law” (§ 610.021(14) RSMo.).

B. 42 USC § 405

- Generally prohibits the disclosure of social security numbers:
EVIDENCE, PROCEDURE, AND CERTIFICATION FOR PAYMENTS
 - (I) *Social security account numbers and related records that are obtained or maintained by authorized persons pursuant to any provision of law enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number or related record.*
 - (II) Paragraphs (1), (2), and (3) of section 7213(a) of the Internal Revenue Code of 1986 shall apply with respect to the unauthorized willful disclosure to any person of social security account numbers and related records obtained or maintained by an authorized person pursuant to a provision of law enacted on or after October 1, 1990, in the same manner and to the same extent as such paragraphs apply with respect to unauthorized disclosures of return and return information described in such paragraphs. Paragraph (4) of section 7213(a) of such Code shall apply with respect to the willful offer of any item of material value in exchange for any such social security account number or related record in the same manner and to the same extent as such paragraph applies with respect to offers (in exchange for any return or return information) described in such paragraph.

(III) For purposes of this clause, the term “*authorized person*” means an officer or employee of the United States, an officer or employee of any State, political subdivision of a State, or agency of a State *or political subdivision of a State*, and any other person (or officer or employee thereof), who has or had access to social security account numbers or related records pursuant to any provision of law enacted on or after October 1, 1990. For purposes of this subclause, the term “officer or employee” includes a former officer or employee.

(IV) For purposes of this clause, the term “related record” means any record, list, or compilation that indicates, directly or indirectly, the identity of any individual with respect to whom a social security account number or a request for a social security account number is maintained pursuant to this clause.

TAX PROTESTS

A. No Authority Absent Express Statute To Refund Taxes

- *See Mo.-Am. Water Co. v. Collector of St. Charles County*, 103 S.W.3d 266, 270 (Mo. App. 2003) (“Taxes voluntarily although erroneously paid ... cannot be refunded absent statutory authority.”) (emphasis added).

B. Must Pay Under Protest Or No Refund Of Taxes

- *Adams v. Friganza*, 344 S.W.3d 240, 248 (Mo. App. 2011) (“Taxpayers who fail to protest property taxes under Section 139.031 providing for payment of taxes under protest cannot obtain refunds.”) (emphasis added).
- Procedure:
 - **Section 139.031 RSMo.:**
 - The tax protester is not allowed to simply forego payment of the taxes; he or she must first pay the tax, indicating thereon that the payment is being made “under protest.”
 - Then, within 90 days of payment, the tax protester must file a lawsuit in the county in which the tax was paid.
 - If this procedure is not followed, the tax payment may be used by the taxing jurisdiction after the expiration of the 90-day period.

C. Exception

- This statutory procedure does not apply to refund of sales tax.
 - § 144.190 RSMo. (Generally, can file refund claim to Director of Revenue within 3 years from the date of overpayment).

COURT COSTS

COURTESY OF FRANK VATTEROTT:

<u>Court Cost: Cases Filed in a Municipal Division</u>	<u>RSMo.</u>	<u>Amount</u>
Clerk Fee.....	479.260 & 488.012.3.6.....	\$12.00
Court Automation Fund Surcharge (JIS Courts only)..... (Requires an agreement with the State Courts Administrator & a city Ordinance)	COR 21.01(a)(4) & 476.056.....	7.00
Peace Officers Standards and Training Fund Surcharge	488.5336.1.....	1.00
Crime Victim’s Compensation Surcharge.....	595.045.6.....	7.50
Total Non JIS Courts / JIS Courts.....		20.50 / 27.50

Possible Additions

Domestic Violence Shelter Fund Surcharge..... (Requires a city ordinance)	488.607.....	2.00
Inmate Security Fund Surcharge..... (Requires a city ordinance)	488.506.....	2.00
Law Enforcement Training Fund Surcharge..... (Requires a city ordinance)	590.140.....	up to 2.00
Law Enforcement Arrest/Recoupment Arrest Costs..... (Alcohol and drug related traffic offenses)	488.5334.....	Variable
Judicial Education Fund/Appointed Counsel Fund..... (Requires a judicial order)	479.260.....	1.00*

* The \$1.00 is not an additional amount collected but is retained by the court from the \$12.00 clerk fee.

BOARD OF ADJUSTMENT NOTES

A. The Record

- Admit entire zoning code, application, and zoning official’s denial/report into the record.

B. Section 89.110 RSMo. Petition

- Must be duly **verified** (§ 89.110 RSMo.).
- Appeal **must name all parties** of record. *Wolfner v. Board of Zoning Adjustment of the City of Warson Woods*, 39 S.W.3d 76 (Mo. App. 2001).
- **Cannot be awarded damages** - *Donelson v. Bd. of Zoning Adjustment of the City of St. Joseph*, 368 S.W.2d 728, 731 (Mo. App. 1963) (“These provisions limit the authority of the circuit court to the correction of illegality in orders made by the Board of Adjustment.”); *see also*

Deffenbaugh Indus., Inc. v. Potts, et al., 802 S.W.2d 520, 524 (Mo. App. W.D. 1990).

- **Costs only if** “it shall appear to the court that it acted with gross negligence, or in bad faith, or with malice...” § 89.110 RSMo.
- **Cannot be brought with any other claim – jurisdictional bar.** *Deffenbaugh Indus., Inc. v. Potts, et al.*, 802 S.W.2d 520, 524 (Mo. App. 1990) (“§ 89.110, and ... that special procedure is exclusive and must be used, or a court acts without jurisdiction.”) (emphasis added).

C. Appeal Notes

1. **Section 89.100 RSMo.:** appeal of decision of officer must be “within a reasonable time.”
 - There is no set rule as to what “reasonable time” is.
 - Best Practice: Ensure that your City Code states what a reasonable time is so there is no debate. If not, establish what “reasonable time” means.
2. **Section 89.110 RSMo.:** appeal from BZA must be filed within 30 days after “the filing of the decision in the office of the board.”
 - There is no set procedure or definition as to what “filed with the office of the board” means.
 - Best Practice: Define in your code what procedure must be accomplished for the decision to be deemed “filed” so the 30-day appeal time starts as soon as possible.

D. Parties

1. Is Petitioner a Corporation?
 - The Missouri Supreme Court recently reiterated that statutory entities—corporations, LLCs, limited partnerships, etc. – must be represented by licensed attorneys in judicial proceedings. *Naylor Senior Citizens Housing, LP v. Side Construction Co., Inc.*, 423 S.W.3d 238 (Mo. 2014).
 - Accordingly, you may wish to explore options to ensure that such entities are represented by counsel in adjudicatory municipal proceedings (such as appeals to the board of adjustment) where appropriate and necessary.
 - City Prosecutors may also want to raise and preserve unauthorized practice of law issues in municipal court proceedings.
2. Individual Board Members NOT necessary parties
 - *Reifschneider v. City of Des Peres Public Safety Commission*, 776 S.W.2d 1 (Mo. 1989) (Finding Court was not deprived of jurisdiction because the individual members of the Commission were not named in the petition.).
 - *Hubbard v. Board of Adjustment of the City of St. Louis*, 779 S.W.2d 26 (Mo. App. 1989) (“Because this proceeding is in the nature of administrative review, and not an independent action originating in the trial court, there is no requirement that individual members of the board be named as parties.”).

E. Review of Board Decisions

1. If substantial evidence exists, any substantial contrary evidence is immaterial.
 - *City of Lake Lotawana v. Lehr*, 529 S.W.2d 445, 452 (Mo. App. 1975) (Stating that “the test is whether the Board’s finding is supported by competent and substantial evidence; if it is, then the substantially of contrary evidence is immaterial.”).
2. **No findings of fact** on appeal? That’s ok – use these cases holding such is not required:
 - *State ex rel. Co-op. Ass’n No. 86 of Aurora v. Bd. of Zoning Adj. of the City of Aurora*, 977 S.W.2d 79 (Mo. App. 1998) (Holding that § 536.090 RSMo. [requiring findings of fact in

contested cases under Chapter 536] does not apply to municipal zoning decisions under Chapter 89).

- *Ogawa v. City of Des Peres*, 745 S.W.2d 238, 241-42[1] (Mo. App. 1987) (Finding that a municipality's board of adjustment is not required to make written findings of fact and conclusions of law in denying a zoning variance).
- *Mullen v. City of Kansas City*, 557 S.W.2d 652, 654 (Mo. App. 1977) (Holding that Chapter 89 did not require a board of adjustment to make written findings, and Chapter 536 did not apply to municipal zoning board decisions).

3. Res Judicata can apply to Board of Adjustment decisions.

- *Veal v. City of St. Louis*, 289 S.W.2d 7, 10-11 (Mo. 1956) (Holding that the decision of the board of adjustment, as affirmed on appeal, was conclusive on the landowner.); *Elam v. City of St. Ann*, 784 S.W.2d 330, 334 (Finding res judicata for claims made in 1985, the Court found that it "must, however, consider the [] current claim on its merits to the extent that facts relevant to the reasonableness of their property's zoning changed between November 1985, the date of the former trial, and the date of the trial below").

CONFLICTS OF INTEREST

A. Prohibited Conflicts

- There are 3 main statutes describing prohibited transactions:
 - § 105.452; § 105.454; § 105.458 RSMo.
 - Generally, the statutes apply to an "elected or appointed official or employee" and members of any "governing body."
- Generally, no appointed or elected official or employee shall:
 - Sell, rent or lease any property, or provide services, to the City in excess of \$500 per transaction or \$5,000 per year unless competitively bid and provided the bid is the lowest received;
 - Use or disclose confidential information in any manner with intent to result in financial gain for himself, his spouse, his dependent child, or any business within which he is associated;
 - Use decision making authority for the purpose of obtaining financial gain which materially enriches himself, his spouse or dependent children;
 - Perform any service, act or refrain from acting or attempt to influence a decision by reason of any payment, offer to pay, promise to pay or receipt of anything of actual pecuniary value;
 - Favorably act on any matter that is so specifically designed so as to provide a special monetary benefit; or
 - Offer, promote, or advocate for a political appointment in exchange for anything of value to any political subdivision.

B. Financial Statements

- § 105.461. Interest in measure, bill, or ordinance to be recorded—financial interest statement.
 1. The governor, lieutenant governor, any member of the general assembly, **or any member of the governing body of a political subdivision who has a substantial personal or private interest in any measure, bill, order or ordinance proposed or pending** before the general assembly or such governing body, **shall, before such official passes on the measure, bill, order or ordinance, file a written report of the nature of the interest** with the chief clerk of the house of representatives or the

secretary of the senate or clerk of such governing body and such statement shall be recorded in the appropriate journal or other record of proceedings of the governing body. The governor shall make the governor's written report along with the governor's approval or disapproval of any bill or act of the general assembly describing the nature of the interest and such report shall be recorded in the journal of the house of representatives or of the senate.

2. The governor, lieutenant governor, any member of the general assembly, or any member of the governing body of a political subdivision shall be deemed to have complied with the requirements of this section **if such official has filed, at any time before the official passes on such measure, bill, order or ordinance, a financial interest statement pursuant to sections 105.483 to 105.492 which discloses the basis for the official's substantial personal or private interest or interests that the official may have therein.** Any such person may amend the person's financial interest statement to disclose any subsequently acquired substantial interest at any time before the person passes on any measure, bill, order or ordinance, and shall be relieved of the provisions of subsection 1 of this section.

- Do not forget to check § 105.485 RSMo.:
 - Provides a procedure for filing financial disclosure statement.
 - Authorizes city to adopt its own procedures for filing.
 - If city passes its own requirements for filing disclosure statements per § 105.485.4 RSMo., the city is required to readopt such ordinance creating the policy at least biennially.

C. **TIP: WHEN IN DOUBT - OFFICIALS SHOULD DISCLOSE AND RECUSE.**

NEPOTISM

A. **Art. VII, § 6 Mo. Const.**

- “Any public officer or employee in this state who *by virtue of his office or employment names or appoints* to public office or employment any relative within the fourth degree, by consanguinity or affinity, **shall thereby forfeit his office or employment.**” (emphasis added).

B. **Generally:**

- Applies equally to officers AND employees.
- Does not have to be a paid appointment.
 - *State ex rel. Attorney Gen. v. Shull*, 887 S.W.2d 397 (Mo. 1994) (overturned on other grounds).
- Even if the vote was unnecessary in order to make the appointment, if the official takes any action to make the appointment, it's a forfeiture.
 - *State ex rel. Attorney Gen. v. Shull*, 887 S.W.2d 397 (Mo. 1994).
- You cannot retroactively “fix” the violation.
 - Rescinding the appointment does not cure the violation.
 - Cannot resign and be reappointed either.
 - *State ex rel. Nixon v. Wakeman*, 271 S.W.3d 28 (Mo. App. 2008).
- Intent (or ignorance) is irrelevant.
 - *State ex rel. Attorney Gen. v. Shull*, 887 S.W.2d 397 (Mo. 1994).

- Self-executing v. self-enforcing.
 - Only self-enforcing if voluntarily resign.
 - Otherwise entitled to due process thru judicial determination (quo warranto).
 - Cases say “automatically lose right to hold office” and constitution itself says it is “forfeited” – but Supreme Court has said if they don’t voluntarily resign, they have be judicially removed.
 - *State ex rel. Nixon v. Wakeman*, 271 S.W.3d 28 (Mo. App. 2008).
 - *State ex rel. Attorney Gen. v. Shull*, 887 S.W.2d 397 (Mo. 1994).

C. Degrees Of Family Relation Explanation

- A husband is related by marriage (affinity) to his wife’s relatives in the same way that she is related to them by blood (consanguinity) and she to his family in the same way, but the kindred of the spouses are not related to one another (*e.g.*, a brother of the husband is **not** related to a brother of the wife).
- Half relationship is the same as a whole relationship.
- Step relationship is the same as a blood relationship.
- A relationship by marriage (affinity) terminates if death or divorce occurs.

First Degree

Child Parents

Second Degree

Grandchild Brother/Sister Grandparents

Third Degree

Great Grandchild Niece/Nephew Aunt/Uncle
Great Grandparents

Fourth Degree

Great Great Grandchild Grand Niece/Nephew
First Cousin Great Aunt/Uncle
Great Great Grandparents

INCOMPATIBLE OFFICES

A. Two-Prong Test

1. Must be a public office:

- Office must have some degree of permanency and continuity (not occasional or temporal);
- Officeholder must take an official oath of office;
- Created by constitution, legislature, or by a municipality or other body through authority conferred by the legislature; and
- Must possess a delegation of a portion of the sovereign power of government, exercised for the benefit of the public.
 - *State w. Hawkins*, 257 P. 411 (Mont. 1927) *cited by State ex rel. Pickett v. Truman*, 64 S.W.2d 105 (Mo. 1933).

2. If both public offices, are they incompatible? –

- Turns on whether duties are “inconsistent, antagonistic, repugnant or conflicting.” *State ex rel. McGaughey v. Grayston*, 163 S.W.2d 335 (Mo. 1942).

- Primary test: whether one office is subordinate to the other in some aspect of performing its functions or duties, as where one has some supervision of the others, is required to deal with, control, or assist him. *State ex rel. Walker v. Bus*, 36 S.W. 636, 639 (Mo. 1896).

B. See Missouri Examples of Compatible and Incompatible Offices (P. 19 of Handout)

ELECTIONS

A. Law Before HB 1136:

- **§ 115.305. Exempt Candidates –exception–certain fourth class cities–when.**

This subchapter shall not apply to candidates for special district offices, township offices in township organization counties, or city, town and village offices; provided that, cities of the fourth class, except those in a county of the first class with a charter form of government and which adjoins a city not within a county, may elect, only by ordinance, to hold primary elections in accordance with the provisions of sections 115.305 to 115.405 or in accordance with the provisions of sections 78.470, 78.480 and 78.510, and the ordinance shall state which of these provisions of law are being adopted.

- **§ 115.342. Disqualification for delinquent taxes–affidavit, form–complaints, investigations, notice, payment of taxes.**

1. Any person who files as a candidate for election to a public office shall be disqualified from participation in the election for which the candidate has filed if such person is delinquent in the payment of any state income taxes, personal property taxes, real property taxes on the place of residence, as stated on the declaration of candidacy, or if the person is a past or present corporate officer of any fee office that owes any taxes to the state.

- **§ 115.346. Persons in arrears for municipal taxes or fees shall not be candidates for municipal office, when.**

Notwithstanding any other provisions of law to the contrary, no person shall be certified as a candidate for a municipal office, nor shall such person's name appear on the ballot as a candidate for such office, who shall be in arrears for any unpaid city taxes or municipal user fees on the last day to file a declaration of candidacy for the office.

- **§ 71.005. Candidates for municipal office, no arrearage for municipal taxes or user fees permitted.**

No person shall be a candidate for municipal office unless such person complies with the provisions of section 115.346, RSMo, regarding payment of municipal taxes or user fees.

- **§ 77.380. Officers to be voters and residents of city, exceptions, appointed officers.**

All officers elected to offices or appointed to fill a vacancy in any elective office under the city government shall be voters under the laws and constitution of this state and, except appointed officers, must be residents of the city. No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office.

- **§ 79.250. Officers to be voters and residents–exceptions, appointed officers.**

All officers elected to offices or appointed to fill a vacancy in any elective office under the city government shall be voters under the laws and constitution of this state and the ordinances of the city except that appointed officers need not be voters of the city. No person shall be elected or appointed to any office who shall at the time be in arrears for any unpaid city taxes, or forfeiture or defalcation in office. All officers, except appointed officers, shall be residents of the city.

B. Many Changes in HB 1136:

- Repeals § 115.346 RSMo.
- Repeals § 115.305 RSMo.– arguably requiring that all candidates for elective officer be nominated at a primary election.

- Amends § 115.342 RSMo. to add “municipal taxes” to the list of taxes a candidate cannot be “delinquent.”
 - However, other municipal user fees, such as utility payments, arguably are no longer covered.
- With the repeal of § 115.346, § 71.005 has no cross-reference - maybe removed bar against disqualified candidates running as write-ins.
- Many other possible ramifications.

ACQUIRE LAND FOR FREE

- A. Landowners can take a tax deduction for the donation of land to a City under 26 U.S. Code Section 170(c)(1).
- B. “(c) Charitable contribution defined For purposes of this section, the term “charitable contribution” means a contribution or gift to or for the use of—
- A State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.”
- C. Donations can be combined with purchase transactions - Part Sale/Part Gift - If there is conflict in appraisal values, or City is short funds of the seller’s asking price, one negotiation option is suggesting the landowner take a tax deduction for the difference. This provides some benefit for the landowner by virtue of the City’s tax-exempt status.
- D. Donor will need City cooperation to take a tax deduction in completing IRS Form 8283 as the donee.
- E. <http://www.irs.gov/pub/irs-pdf/f8283.pdf>.
- F. City acknowledgment on IRS Form 8283 states:
- “The charitable organization acknowledges that it is a qualified organization under 170(c) and that it received the donated property as described in Section B, Part I, above on the following date...This acknowledgement does not represent agreement with the claimed fair market value.”
- G. *Do not advise on value. Do not advise on tax consequences.* On tax benefits, tell landowner to consult with their tax professional on the benefit to them - disclaim any tax or valuation advice in writing in an acquisition contract.
- H. In a purchase negotiation, also remember there are added tax benefits to seller if money is paid and the sale is under IRC Section 1033, threat of condemnation. See 26 U.S. Code § 1033 (*emphasis added below*).
- “26 U.S. CODE § 1033 - INVOLUNTARY CONVERSIONS
 - (a) **General rule**
If property (as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof) is compulsorily or involuntarily converted—
 - (1) **Conversion into similar property**
Into property similar or related in service or use to the property so converted, no gain shall be recognized.

(2) Conversion into money

Into money or into property not similar or related in service or use to the converted property, the gain (if any) shall be recognized except to the extent hereinafter provided in this paragraph:

(A) Nonrecognition of gain

If the taxpayer during the period specified in subparagraph (B), for the purpose of replacing the property so converted, purchases other property similar or related in service or use to the property so converted, or purchases stock in the acquisition of control of a corporation owning such other property, at the election of the taxpayer the gain shall be recognized only to the extent that the amount realized upon such conversion (regardless of whether such amount is received in one or more taxable years) exceeds the cost of such other property or such stock. Such election shall be made at such time and in such manner as the Secretary may by regulations prescribe. For purposes of this paragraph—

(i) no property or stock acquired before the disposition of the converted property shall be considered to have been acquired for the purpose of replacing such converted property unless held by the taxpayer on the date of such disposition; and

(ii) the taxpayer shall be considered to have purchased property or stock only if, but for the provisions of subsection (b) of this section, the unadjusted basis of such property or stock would be its cost within the meaning of section [1012](#).

(B) Period within which property must be replaced

The period referred to in subparagraph (A) shall be the period beginning with the date of the disposition of the converted property, or the earliest date of the threat or imminence of requisition or condemnation of the converted property, whichever is the earlier, and ending—

(i) 2 years after the close of the first taxable year in which any part of the gain upon the conversion is realized, or

(ii) subject to such terms and conditions as may be specified by the Secretary, at the close of such later date as the Secretary may designate on application by the taxpayer. Such application shall be made at such time and in such manner as the Secretary may by regulations prescribe.

(C) Time for assessment of deficiency attributable to gain upon conversion

If a taxpayer has made the election provided in subparagraph (A), then—

(i) the statutory period for the assessment of any deficiency, for any taxable year in which any part of the gain on such conversion is realized, attributable to such gain shall not expire prior to the expiration of 3 years from the date the Secretary is notified by the taxpayer (in such manner as the Secretary may by regulations prescribe) of the replacement of the converted property or of an intention not to replace, and

(ii) such deficiency may be assessed before the expiration of such 3-year period notwithstanding the provisions of section [6212 \(c\)](#) or the provisions of any other law or rule of law which would otherwise prevent such assessment.

(D) Time for assessment of other deficiencies attributable to election

If the election provided in subparagraph (A) is made by the taxpayer and such other property or such stock was purchased before the beginning of the last taxable year in which any part of the gain upon such conversion is realized, any deficiency, to the extent resulting from such election, for any taxable year ending before such last taxable year may be assessed (notwithstanding the provisions of section [6212 \(c\)](#) or [6501](#) or the provisions of any other law or rule of law which would otherwise prevent such assessment) at any time before the expiration of the period within which a deficiency for such last taxable year may be assessed.

(E) Definitions

For purposes of this paragraph—

(i) **Control** The term “control” means the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of the corporation.

(ii) **Disposition of the converted property** The term “*disposition of the converted property*” means *the destruction, theft, seizure, requisition, or condemnation of the converted property, or the sale or exchange of such property under threat or imminence of requisition or condemnation.* “

TITLE COMMITMENT

- A. **ALWAYS** order a title commitment or purchase a title policy when acquiring land – even for less than fee interests or donations.
- B. Most of us would recommend purchasing a title policy for fee acquisitions for money paid.
- C. What about acquisitions of less than fee or donations? When should you use the services of a title company? **ALWAYS!**
- D. It is not advisable to rely on the property owner for ownership and legal description, even if they produce a recorded deed. Other than researching title yourself, a title commitment is the best way to verify ownership.
- E. A title commitment provides necessary real estate information:
- Current ownership;
 - A legal description; and
 - Existing liens.
- F. Here is a helpful site to answer many questions about title insurance commitments: [Citizens Title and Closing | Questions And Answers; www.citizenstitle.net/questions.html](http://www.citizenstitle.net/questions.html).
- G. You can order a commitment all types of real estate interests:
- Right of way
 - Easements
 - Leases
 - Donated property
- H. Do not need to purchase a title policy to get a title commitment. *A title commitment is better than nothing*, but the title company’s liability is limited to the cost of the commitment – usually less than \$200.
- I. Use a local title insurance company if possible; cost is usually less.
- J. A title commitment will verify the title owner of the property, the legal description used to vest title in the present owner and exceptions to clear title, for example liens.
- It is technically an offer to provide a title insurance policy on certain terms.
- K. *To fully cover the investment in real estate, purchase a title insurance policy* – this will cover defense and loss relating to many things, from failure of the proper party to execute a document to a defect in the rights of the grantor, or the existence of rights in a third party not disclosed as an exception.
- City can be liable for inverse condemnation for use of property that it does not have title to, even if City acts under color of title. No reported cases in Missouri; however, the Montana Supreme Court has found a city liable for inverse condemnation under these facts. *Wohl v. City of Missoula*, 369 Mont. 108 (2013).
 - Property owner could bring an inverse condemnation action under the Missouri Constitution and United States Constitution under similar facts. The statute of limitations for such an action is ten years.

- Missouri Constitutional Provisions: “§ 26. Compensation for property taken by eminent domain—condemnation juries—payment—railroad property:
That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad purposes without consent of the owner thereof shall remain in such owner subject to the use for which it is taken.” Mo. Const. art. I, § 26.
- Case: “There are two situations, however, in which a public entity's conduct may have the effect of taking or damaging a person's property even where the entity has not intended to exercise its power of eminent domain, and in both situations the landowner is entitled to compensation for property taken or damaged. ‘One situation is where the authority, having condemnation power, does not condemn a parcel of property but, nevertheless, through mistake or design, actually appropriates the property to public use.’ *State ex rel. State Highway Comm. v. Swink*, 537 S.W.2d 556, 558 (Mo. 1976). This occurs, for example, when a sovereign accidentally takes more land than it condemned because it mistook the property line. It has inversely condemned the extra property it took.” *State ex rel. City of Blue Springs v. Nixon*, 250 S.W.3d 365, 371 (Mo. 2008).
- “The Missouri constitution protects the landowner against both types of conduct by a condemning authority. Art. I, sec. 26, Mo.Const., provides in part: ‘That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested.’ This constitutional provision is self-enforcing.” *State ex rel. State Highway Comm'n v. Swink*, 537 S.W.2d 556, 558 (Mo. 1976) (quoting *McGrew v. Granite Bituminous Paving Co.*, 247 Mo. 549, 564, 155 S.W. 411, 415 (1912); *Wells v. State Highway Commission*, 503 S.W.2d 689, 693 (Mo. 1973)).

L. Policy premium will be based on cost of real estate interest.

M. The American Land Title Association promulgates title insurance forms used by most title companies. Most of those forms are available for reference at [ALTA® - Policy Forms Online; www.alta.org/forms](http://www.alta.org/forms).

FINANCIAL ADVISOR

A. Get an independent financial advisor when issuing debt.

B. One role of the financial advisor is to give the City advice about feasibility of the issuance, including the value of revenue sources and the cost of debt.

C. Financial advice is essential to the City's evaluation of debt issuance; *however*, those who provide financial advice are regulated by the SEC generally under the Investment Advisers Act of 1940 and by the Securities Division of the Missouri Secretary of State.

- D. Attorneys usually are neither qualified nor licensed to provide regulated investment advice.
- E. The line between legal and financial advice can be blurry and is fact specific. It is best to avoid any possibility of rendering financial advice.
- F. If advice given by an attorney is determined to be non-legal, the communication can be unprotected from attorney/client privilege and any liability for it may be excluded from malpractice coverage.
- G. Recommend the City hire an independent financial advisor to provide financial advice.
- H. Other helpful things a financial advisor can do:
 - Assist the City in obtaining a bond rating.
 - Assist in collection of information for an offering document.
 - Solicit competitive proposals from bond underwriters to get the best terms of sale.
- I. Negotiate the scope and cost of the financial advisor's work up front.

MUNICIPAL DEBT:
POST-CLOSING REQUIREMENTS ARE SERIOUS BUSINESS

- A. The IRS has become more stringent about cities meeting post-closing requirements to maintain federal tax-exemption by adding questions on Form 8038-G Information return for Tax-Exempt Obligations [in excess of \$100,000] - indicating whether the municipality has adopted post-closing policies to monitor post-closing matters that ensure the use of proceeds meets the tax-exemption requirements.
- B. Establish a policy with a lead responsible person, such as the City Administrator/Manager or Finance Director.
- C. Post-closing policy should identify:
 - All post-closing requirements contained in debt instruments;
 - Deadlines; and,
 - Completion steps - annual checklist and dates to calendar are also helpful.
- D. What happens if you don't meet post-closing requirements?
 - Worst case: lose tax-exemption for bond interest paid to bond holders. This usually is a bond default, and has definite, measurable damage to bond holders.
 - Other consequence is inability to obtain competitive rates on debt in the future.
 - Not a good representation of public trust.
- E. ANY PUBLIC OFFICIAL LIABILITY? If post-closing requirements are mandatory or ministerial in nature, failure to do them *could* result in public official liability. [No reported cases found in MO.]
- F. The IRS has a tax-exempt bond website with extensive information and links to relevant laws and regulations regarding tax-exempt bonds: www.irs.gov/pub/irs-pdf/f8038g.pdf.

RETAIN OVERSIGHT AND ADMINISTRATION OF ECONOMIC DEVELOPMENT ENTITIES

- A. Legal Entities separate from City.
 - CIDs - community improvement districts (§§ 67.1401 to 67.1571, RSMo.)
 - TDDs - transportation development districts (§§ 238.200-238.275, RSMo.)
 - SBDs - special business districts (§§ 71.790-71.808, RSMo.)

- B. Retain oversight.
 - Make sure incentives administered according to agreements.
 - Ensure statutory compliance.

- C. Methods:
 - Covenant running with the land included in the project that City officers will hold a majority position on the governing board.
 - Address potential of incompatible offices in Oath: (a) statement that officer is not resigning City position; and (b) if a Court finds the offices incompatible, deem resign entity office not City office.
 - Intergovernmental agreement between City and entity that City provides administration.

MAINTAIN ENTITIES FOR ECONOMIC DEVELOPMENT (CIDS, TDDS, ETC.)

- A. SBDs, CIDs and TDDs are created through the municipality, BUT have a governing body that is separate from the City's governing body.

- B. If the District designates the City to handle administration, then the City must ensure that the entity complies with governing statutes and bylaws.

- C. Depending on the type of entity, this can include:
 - Annual election or appointment of the governing body.
 - Annual report preparation and filing with State auditor and, for CIDs, MO DED.
 - Budget preparation.
 - Financial administration: Collection of tax, payment of bills, etc....
 - Record keeping.

- D. Industrial Development Authorities and other entities such as Urban Redevelopment Corporations, Economic Development Corporations and Municipal Assistance Corporations are slightly different, but still require oversight:
 - Formed through the Missouri Secretary of State.
 - Completely separate entities from the municipality, although the municipality maintains some control.
 - Must comply with applicable corporate and tax laws, in addition to enabling legislation.

- E. The City should know what role it plays in annual maintenance of development entities, and meet any obligations it has for maintenance.

MISSOURI EXAMPLES - COMPATIBLE AND INCOMPATIBLE OFFICES

Compatible When Same Person in Same Municipality:

- City Counselor and City Judge - Op. Attorney General No. 85, 1977
- City Marshal and Commissioner of Water and Sewer Department - Op. Attorney General No. 241, 1973
- City Collector and City Assessor - Op. Attorney General No. 323, 1970 (Danforth)
- Marshal and Deputy Constable - Op. Attorney General No. 349, 1967
- City Assessor and City Clerk - Op. Attorney General No. 38, 1960

Compatible When Same Individual in Two Different Corporations:

- County Commissioner and Member of School District Board - Op. Attorney General No. 118-2004 (Nixon)
- Circuit Clerk and Member of School Board - Op. Attorney General No. 84-2001 (Nixon)
- Treasurer of County Ambulance District and County Public Administrator - Op. Attorney General No. 108-92 (Webster)
- Supervisor of a Levee District organized by Circuit Court and County Commissioner in the same County - Op. Attorney General No. 145-91 (Webster)
- Superintendent of school and office in a political party - Op. Attorney General No. 29-79 (Ashcroft)
- Chairman of a Village Board of Trustees and office in a political party - Op. Attorney General No. 29-79 (Ashcroft)
- County Clerk and Superintendent of Schools - Op. Attorney General No. 337-66
- County Administrator and Member of School Board - Op. Attorney General No. 397-64
- City Assessor and Township Clerk - Op. Attorney General No. 188, 1963
- Mayor and Trustee of County Hospital - Op. Attorney General No. 2, 1961
- City Clerk and Trustee of County Hospital - Op. Attorney General No. 2, 1961
- Mayor of Third Class City and County Collector - Op. Attorney General No. 33, 1958
- Township and City Collector- Op. Attorney General No. 53, 1957 (Dalton)
- Water, Street, and Sewer Commissioner and City Collector - Op. Attorney General No. 24, 1955 (Dalton)
- Special Road Commissioner of County not under township organization and City Councilman or Alderman - Op. Attorney General No. 40, 1952 (Taylor)
- Party Central Committee Member and County or Municipal Office UNLESS specifically prohibited by statute - Op. Attorney General No. 40, 1952 (Taylor)
- Clerk of Board of Public Works and Deputy Sherriff - *State ex rel. Langford v. Kansas City*, 261 S.W. 115 (Mo. 1924)
- Member of Board of Education and Deputy Sheriff - *State ex rel. Walker v. Bus*, 36 S.W. 636 (Mo. 1896)
- Circuit Court and County Clerk - *State ex rel. Moore v. Lusk*, 48 Mo. 242 (1871)

Incompatible Same Individual in Same Corp:

- Member of Emergency Service Board and Employee of that Board - Op. Attorney General No. 109-99 (Nixon)
- Alderman and Special Police Officer - Op. Attorney General No. 404, 1967 (Anderson)
- Alderman and City Collector - Op. Attorney General No. 167, 1963 (Eagleton)
- City Councilman and City Assessor - Op. Attorney General No. 188, 1963
- Any two of City Clerk, City Treasurer, and City Collector - Op. Attorney General No. 24, 1955 (Dalton)
- County Deputy Collector and County Treasurer - *State ex rel. McAllister v. Dunn*, 209 S.W. 110, (Mo. 1919)
- Councilman and City Clerk when Council responsible for appointing City Clerk - *State Ex Rel. Smith v. Bowman*, 170 S.W. 700 (Mo. App. 1914) (cannot appoint self to paid position)

Incompatible Same Individual in Different Corp:

- County Auditor of 1st class county and City Council Member within that county - Op. Attorney General No. 63-2002 (Nixon)
- County Emergency Planning Coordinator and City Council - Op. Attorney General No. 84-2001 (Nixon)
- County Emergency Planning Coordinator and Member of School Board - Op. Attorney General No. 84-2001 (Nixon)
- County Emergency Planning Coordinator and City Clerk - Op. Attorney General No. 84-2001 (Nixon)
- County Commissioner and School Board Member - Op. Attorney General No. 84-2001 (Nixon)
- Director of Fire Protection District and Trustee of Village located in same District - Op. Attorney General No. 42-90 (Webster)
- Presiding Commissioner of County and Alderman of City within said County - Op. Attorney General No. 121-88 (Webster)
- Clark County Elected Official and Clark County Ambulance District - Op. Attorney General No. 25-88 (Webster)
- Public Employee and Fire Protection District Director - *State ex inf. Gavin v. Gill*, 688 S.W.2d 370 (Mo. 1985)(Prohibition by statute - court found statute not in violation of 1st Amendment nor Equal Protection)
- Presiding Judge of County Court of Third Class County and Mayor of Fourth Class City within the same County - Op. Attorney General No. 64-76 (Danforth)
- County Court Judge and Mayor - Op. Attorney General No. 64, 1976
- County Deputy Sherriff and County Coroner - Op. Attorney General No. 104-68 (Anderson)
- Police Judge and Deputy Sherriff - Op. Attorney General No. 46, 1955
- State legislature and Judge - *State Ex Rel. Owens v. Draper*, 45 Mo. 355 (Mo. 1870) (when judge took state legislature seat, impliedly vacated his judge position)

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