

# Selected Best Practices for Municipal Lawyers

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# City Indemnification of Private Parties?

- Violate the constitution?
  - Cannot pay private debts – funds spent only for public purpose – [Article 6, § 23; Article 6, § 25]
- Use Attorney General Opinion **138-87** – to indemnify would improperly waive sovereign immunity:
  - “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.***”

# Contract Reminders

- § 432.070 RSMo. Compliance Required
  - Avoid unjust enrichment claims
- Prompt Payment Act – § 34.057 RSMo.
  - SB 529 CHANGES:
    - ❑ No longer just applies to contractors;
    - ❑ Allows 10% retainage only if contractor is not required to obtain § 107.170 RSMo. payment bond
- E-Verify - § 285.530 RSMo.
  - Required for City contracts over \$5000 for services
- Proof of Lawful Presence - § 208.009 RSMo.
  - Required at the time of application for any “local public benefit”
  - Best Practice – require copy of driver’s license

# When MUST City Competitively Bid?

- No general statute requirement, but there are 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 City Officials and Employees over \$500/transaction or \$5000/year – §§ 105.454/.458 RSMo.
  - Architectural, Engineering or Land Surveying Services (list of 3 on file) – § 8.291 RSMo.
  - Federal and State Grants – specific grant provisions and applicable law
- Local ordinance dictates other situations

# Ordinance Requirement Reminders

- Ayes and nays required
- Label ordinance “bill”
- Check to see if clerk:
  - Forgot the effective date
  - Changed ordaining clause from exact words of statute
  - Failed to have signed by “presiding officer” if a 3<sup>rd</sup> class city (use two signature lines to avoid problem)
  - Failed to have attested by village clerk

# Sunshine Reminders

- Ensure strong City policy – review periodically
- Add DED provision to City’s Sunshine Policy.
- Remind your clerk:
  - Sunshine does not require:
    - ❑ Answering questions
    - ❑ “Certification” of records; or
    - ❑ Creating a new record.
  - “reasonable clerk standard” *Anderson v. Jacksonville*, 103 S.W.3d 190 (Mo. App. 2003)
  - Roll call vote required for every vote in closed session. § 610.015 RSMo.
- Don’t forget other notice provisions outside sunshine -- §§ 67.2725, 89.050 RSMo.

# What Requires Redaction of Social Security Numbers?

- **Sunshine offers support:**
  - “[P]ersonal identification numbers” (§ 610.021(22) RSMo.)
  - “Records which are protected from disclosure of law” (§ 610.021(14) RSMo.)
- **42 USC § 405 prohibits disclosure:**
  - “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”

# Refund of Taxes Paid to City?

- City has no authority absent express statute
  - 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)
- 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); See § 139.031 RSMo. for procedure.
- Protest payment does not apply to refund of sales tax.
  - See § 144.190 RSMo. (Generally, can file refund claim to Director of Revenue within 3 years from date of overpayment)



# Permissible Court Costs?

<u>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 amount is not an additional amount collected but is retained by the court from the \$12.00 clerk fee.

# Board of Adjustment Reminders

- Admit entire zoning code, application, and any denial/staff report into record
- § 89.110 RSMo. petition:
  - Must be duly **verified**
  - Must name **all parties** of record
  - **Cannot be brought with any other claim** – jurisdictional bar
  - **Cannot be awarded damages**
  - **Costs only** if Board “acted with gross negligence, or in bad faith, or with malice.”
- Individual members are not necessary parties
- If substantial evidence exists, substantial contrary evidence can be ignored.
  - *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.”).
- No findings of fact on appeal? That’s ok.
  - *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. S.D. 1998); *Ogawa v. City of Des Peres*, 745 S.W.2d 238, 241-42[1] (Mo. App. E.D. 1987); *Mullen v. City of Kansas City*, 557 S.W.2d 652, 654 (Mo. App. 1977).

# Municipal Official Ethics Reminders

## 1. Statutory Restrictions

- There are 3 main statutes describing prohibited transactions:
- 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 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.

# Municipal Official Ethics Reminders

## 2. Constitutional Restrictions (Nepotism)

- Art VII, Section 6 of the Mo. Constitution prohibits any public officer or employee from hiring or naming any relative (of the 4<sup>th</sup> degree) to any public office, board or employment
  - Penalty is forfeiture of office
  - Does not have to be a paid appointment
  - Does not matter if the vote was needed
  - Intent (or ignorance) is irrelevant
  - You cannot retroactively “fix” the violation
- Self-executing v. self-enforcing

# Municipal Official Ethics Reminders

## 3. Common Law (Incompatible Offices)

- **2-Prong Test – case by case determination:**
  - **1. Are they both public offices?**
    - ❑ Office must have some degree of permanency and continuity;
    - ❑ 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
  - **2. Are the offices Incompatible:**
    - ❑ Turns on whether duties are “inconsistent, antagonistic, repugnant or conflicting”
    - ❑ Primary test: whether one office is subordinate to the other in some aspect of performing its duties – supervision authority, hiring, firing, setting salary, etc.
- **If the offices are incompatible, taking oath of the 2<sup>nd</sup> office acts as an implied resignation from the 1<sup>st</sup>**

# Election Law

- **Many Changes in HB 1136:**
  - Repeals Section 115.346
  - Repeals Section 115.305
  - Amends Section 115.342 to add “municipal taxes” in the list of taxes that a candidate cannot be “delinquent.”
  - Possibly removed bar against disqualified candidates running as write-ins
  - Many other possible ramifications
- **Best Practice: Ask Kevin O’Keefe or Steve Garrett**
  - Steve Garrett will be presenting on Elections for the Municipal Officials Training Academy on December 4<sup>th</sup>

# Acquire Land for Free

- Landowners can take a tax deduction for the donation of land to a City under 26 U.S. Code Section 170(c)(1).
  - “(c) **Charitable contribution defined** For purposes of this section, the term “charitable contribution” means a contribution or gift to or for the use of—
  - (1) 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.” (emphasis added)
- Donor will need City cooperation to take a tax deduction in completing IRS Form 8283 as the donee. <http://www.irs.gov/pub/irs-pdf/f8283.pdf>
  - Donee (City) acknowledgment, “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.”
- 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.
- ***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.

# **ALWAYS Order a Title Commitment or Purchase a Title Policy When Acquiring Land**

- When should you use the services of a title company? **ALWAYS!**
- ***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.
- A title commitment provides necessary real estate information:
  - current ownership
  - a legal description
  - existing liens
- You can order a commitment all types of real estate interests:
  - right of way
  - easements
  - leases
- You can order a commitment for donated property.
- ***You do not need to purchase a title policy to get a title commitment.***
- Use a local title insurance company if possible; cost is usually less.
- ***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.



# Get an Independent Financial Advisor When Issuing Debt.

- 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.
- 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.
- New SEC rules effective July 1, 2014 requiring registration of anyone providing or soliciting to provide financial advice to a municipality under the Dodd-Frank Wall Street Reform and Consumer Protection Act, July 2010. Final rules are available at [www.sec.gov/rules/final/2013/34-70462.pdf](http://www.sec.gov/rules/final/2013/34-70462.pdf)
- Attorneys usually are neither qualified nor registered to provide regulated investment advice.
- There is an exemption in new RMA rules for attorneys providing "traditional" legal advice to municipal clients. Exchange Act Section 15B(e)(4)(C). Consider disclosure to clients in bond or note transactions: Attorney is not a registered municipal advisor and not providing financial advice.
- 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.
- Recommend the City hire an independent registered municipal advisor to provide financial advice.
- Other helpful things about RMA:
  - 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.
  - OWES A FIDUCIARY DUTY TO THE MUNICIPALITY UNDER SECURITIES LAW AND SEC RULES THAT BECAME FINAL ON JULY 1, 2014
- Negotiate the scope and cost of the financial advisor's work up front.

# Municipal Debt: Post-Closing Requirements are Serious Business

- The IRS has become more stringent about cities meeting post-closing requirements to maintain federal tax-exemption.
- Information return for tax exempt issuances in excess of \$100,000 now require disclosure of whether a municipality has adopted a procedure to ensure Code requirements underlying tax exemption are met.
- Establish a policy with a lead responsible person, such as the City Administrator/Manager or Finance Director.
- 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.
- 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.
- 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.]

# Retain Oversight and Administration of Economic Development Entities

- 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.)
- **Why Retain oversight:**
  - Make sure incentives administered according to development agreements
  - Ensure statutory compliance
  - Meet bond or other debt covenants
- **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

# Don't Forget to Maintain Entities Created for Economic Development

- CIDs, TDDs and SBD's are created through the municipality, BUT are separate legal entities.
- Special Business Districts ("SBD") in cities with 350,000 or more people are operated by the city as a separate political subdivision; if fewer than 350,000 people, SBD operated as a board of commission of a city.
- CID, TDD and SBD boards should hold meetings and take legislative actions **separately** from the city's governing body.
- Note: Neighborhood Improvement Districts are **NOT** separate legal entities from the city.
- ***City should be cognizant of the role it plays in CIDs, TDDs and SBDs within the city; State does audit***
- 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.
- Note: Section 105.145, RSMo., authorizes a \$500 per day fine against a TDD for failing to file an annual registration report with the State Auditor.
- Note other types of economic development entities: Industrial Development Authorities, Urban Redevelopment Corporations, Economic Development Corporations and Municipal Assistance Corporations:
  - Formed through the Missouri Secretary of State
  - Completely separate entities from the municipality, although the municipality can maintain some control
  - Must comply with applicable corporate and tax laws, in addition to enabling legislation

# Questions/Suggestions



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