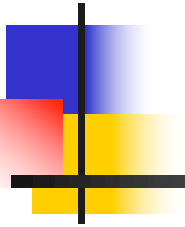


Fundamentals of Local Government



League of Arizona cities and Towns

December 16, 2022

Bill Sims



America-

A Unique Experiment in Democracy

“The people of America now had the best opportunity and the greatest trust in their hands that Providence ever ordained to a small number since Adam and Eve.”

John Adams

“I venture to assert, that there is not upon the face of the earth a body of people happier or rising into consequence with more rapid stride, than inhabitants of the United States of America. Population is increasing, new houses building, new lands clearing, new settlements forming and new manufactures establishing with a rapidity beyond conception.”

Thomas Jefferson



America-

A Unique Experiment in Democracy

“We must always consider that we shall be as a city upon a hill – the eyes of all people are upon us.”

John F. Kennedy

“America is a shining city upon a hill whose beacon light guides freedom-loving people everywhere.”

Ronald Reagan



Pillars of Government

- ❑ Open Government
- ❑ Unbiased Government
- ❑ Responsible Government
- ❑ Efficient Government



Pillars of Government

- ❑ Open Government
- ❑ Unbiased Government
- ❑ Responsible Government
- ❑ Efficient Government

-
- ❑ All tested by COVID 19



I. Open Government – The Public's Information

- ❑ Open Meeting Laws
- ❑ Public Records Laws

“A people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both.”

James Madison (drafter of the First Amendment)



Purpose of Open Meeting Law

- “It is the public policy of this state that meetings of public bodies be conducted openly and that notices and agendas for those meetings contain as such information as is reasonably necessary to inform the public of the matters to be discussed or decided.” A.R.S. § 38-431.09.



Calls to the Public

- Not required – but if you have them, the only responses allowed are:
 - Response to criticism.
 - Ask staff to review a matter.
 - Ask that a matter be placed on a future agenda.
- Can limit time.
- May request speakers on same side with no new comments to select spokesperson.
- May set ground rules for civility, language and treat everyone the same.



Current Events

- Current events must be current.
- Chief administrator, presiding officer or a member of a public body may present a brief summary of current events without listing in the agenda the specific matters to be summarized, provided that:
 - “Current events summary” is listed on the agenda; and
 - Public body does not propose, discuss, deliberate or take legal action.
- Other members of the public body should not get into a discussion about it.



New Executive Session Topics

- Security Plans
- School Safety



Open Meeting Law – Don't Overreact

- ❑ Don't stop all communication with your colleagues.
- ❑ Reach out to those you disagree with most.



Hot Topics - Public Records Act

- ❑ Not all e-mails are public records.
- ❑ You cannot avoid creating public records by using your home computer.
- ❑ Websites – unchartered territory.
- ❑ Don't have to accept overly broad request.



II. Unbiased Government – Public Service Ethics Laws

□ No Self-Dealing

- No Conflicts of Interests.
- No Extra Compensation.
- No Inappropriate Gifts.
- No Discrimination.
- No Retaliation Against Whistleblowers.



Conflicts of Interest

- Conflicts of interest are okay
- But:
 - Identify
 - Disclose
 - Disqualify

Unbiased Government



Identify a Conflict of Interest

- “Any public officer or employee who has, or who's relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.”



Who is Subject?

- ❑ All public officers and employees.
- ❑ Includes family: spouse, child, grandchild, parent, grandparent, siblings and in-laws.



Remote Interests

- ❑ Non-salaried officer of nonprofit corporation.
- ❑ Landlord/tenant of a contracting party.
- ❑ Attorney of a contracting party.
- ❑ Member of a nonprofit corporate association.
- ❑ Owner of less than 3% of a corporation.
- ❑ Reimbursement of expenses incurred when performing official duties.



Remote Interests

- ❑ Receiving municipal services on comparable terms.
- ❑ Officer/employee of another political subdivision – unless direct economic benefit.
- ❑ A member of a class of persons of at least 10 members.
- ❑ Relative who is an employee of another entity with at least 25 employees in Arizona and who does not exercise control.
- ❑ Ownership of publicly traded investments held in a fund managed by others.



What Happens if there is a Conflict?

- If not “remote,” then substantial.
- If receive direct or indirect pecuniary or proprietary interest, you must declare a conflict.



No Bribes or Extortion

- A public servant who knowingly asks for **or** receives any gratuity or reward (or promise thereof) for doing any official act is guilty of a **class 6 felony**
- Public servants may not use or attempt to use their official positions to secure any valuable thing or benefit that would not ordinarily accrue to them if the thing or benefit is of such character as to manifest a substantial and improper influence



Bribery

- Public servants who solicit, accept or agree to accept any benefit upon an agreement or understanding that it may influence their official conduct (including their vote, opinion, judgment, exercise of discretion, or other action) commit bribery, which is a **class 4 felony**.



Extortion

- A public servant commits theft by extortion – a **class 4 felony** – by knowingly obtaining or seeking to obtain property or services by means of a threat to take or withhold action as a public servant in the future.



Ban on Extra Compensation

“No public officer or employee may receive or agree to receive directly or indirectly compensation other than as provided by law for any service rendered by him personally in any case, proceeding, application, or other matter which is pending before the public agency of which her is a public officer or employee.”



Ban on Incompatible Employment

- Both during and for twelve months following a public official's service, Arizona law prohibits the official from representing another person for compensation before a public agency for which the official serves (or served) in connection with any matter in which the official was directly concerned and personally participated by a substantial and material exercise of administrative discretion.



Entertainment

- ❑ A compensated lobbyist may not offer you entertainment or a gift.
- ❑ To influence the passage or defeat of legislation.
- ❑ Check your codes.



III. Responsible Government – Public Monies

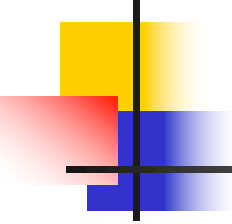
“Neither the State, nor . . . subdivision of the State shall ever . . . make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation”

- Arizona Constitution, Article 9, § 7.



How does the Gift Clause apply in COVID Environment

- ❑ Gift Clause bans any donation, grant or subsidy.
- ❑ As a result, cities, towns and counties may not “make any donations or grant by subsidy or otherwise.”
- ❑ But faced with consequences of COVID, local governments had to figure out a way to help their communities.
- ❑ The critical Question: How can you deliver grants to your citizens?



AG Opinion NO. 120-007 and Assisting the Needy

- ❑ The Gift Clause does not apply to “non-contractual public expenditures, such as direct assistance to the needy”
- ❑ No need to even measure adequacy of consideration
- ❑ The second prong of the Gift Clause test may not even apply
- ❑ But: Does this survive *Shires v. Carlat*?



“NEW” Gift Clause Restriction

- ❑ *Shires v Carlat* CV20-0027-PR established new conditions.
- ❑ Prior Law
 - ❑ Courts would defer to elected officials
 - ❑ Elected officials consider indirect benefits (e.g., jobs and sales tax)
 - ❑ Need only show that the costs of incentive for the developer does not “far exceed” the benefit to the public agency
 - ❑ Much easier to meet that test if indirect benefits can be included in the formula

Responsible Government



Shires v Carlat

- ❑ Indirect benefits are “Valueless” under the consideration of the Gift Clause test
- ❑ Noted that there was no enforceable promise to provide the City with any particular economic impact
- ❑ Simply getting a developer to agree to engage in business is not sufficient consideration



Find a Statute & Use a Contract

- ❑ *Turken v Gordon* and even *Shires v Carlat* seem to suggest yes, but only in limited circumstances.
- ❑ The relationship between a hospital and the U of A College of Medicine could count as consideration if directly contracted for and if there is statutory authority.
- ❑ *Shires v Carlat* Requires the obligations to be spelled out and documented.
- ❑ Moral of the story: have a contract and find a statutory authority,



AZ Cares Act And Stimulus Funding

- AZ Cares Act Funds
 - Flexible funding options for local governments.
 - For public health and safety expenses.
 - “Once the local jurisdiction has reimbursed the previously incurred public health and safety costs...free to deploy the local resources to any purpose decided by that jurisdiction.”
 - But does the Gift Clause apply?
 - *Navajo Tribe v. Arizona Department of Administration*, 111 AZ 279 (1974). Federal funds Apply.



Navajo Tribe v AZDOA

- “Only monies raised by operation of some general law become public funds.”
- The term “public funds” refers to funds belonging to the state and does not apply to funds for the benefit of contributors for which the state is a **mere custodian or conduit.**”



American Rescue Plan Act (ARPA)

- ❑ Different rules for “metropolitan cities” and “non-entitlement cities.”
- ❑ Metropolitan cities get federal funds directly
- ❑ “Non-entitlement cities” receive their funds through the State.
- ❑ First and Foremost: Preserve the “conduit” status of the funds under the Navajo Tribe case.
- ❑ ARPA bars the State from imposing conditions and refusing to fund.



Pandemic has been a Crucible

- ❑ The pandemic has allowed local governments, local elected officials and local attorneys to show that the government does work.
- ❑ Counties, Cities and Towns have worked together.
- ❑ Risk Pools have pitched in.
- ❑ Communities can be protected.



Public Procurement

- ❑ Quotes
- ❑ Design – Bid – Build
- ❑ CM@RISK
- ❑ Job Order Contracting
- ❑ Design - Build
- ❑ Cooperative Purchase

Responsible Government



Violations of State Law and Loss of State Shared Revenue

- Any legislator need only allege that a local government violated state law
- AG must investigate within 30 days
 - If determines state law violated, the local government must cure in 30 days
 - If not cured in 30 days, Treasurer will withhold state shared revenue until violation cured.
 - If determines that a violation may have occurred, AG submits to Supreme Court.



Cities and Towns that Have Been the Target

- ❑ Snowflake – Medical Marijuana Cultivation Facility.
- ❑ Bisbee – Plastic bag ban.
- ❑ Tucson – Destruction of forfeited firearms.
- ❑ Tucson – Mask Mandates.
- ❑ Phoenix – Violations of Immigration law information sharing.
- ❑ Somerton – CUP for religious activity.



Cities and Towns that Have Been the Target

- ❑ Phoenix – Release of Critical Incident Information
- ❑ Tempe – GPLET
- ❑ Sedona – Licensing of Vacation Rentals
- ❑ Sedona – Support of Chamber of Commerce
- ❑ Patagonia – Truck Restrictions
- ❑ Tempe – Campaign Finance Disclosures
- ❑ Phoenix – Sky Harbor Fees
- ❑ Tucson – Off Cycle Elections
- ❑ Tucson – Tenant Payments

Responsible Government



IV. Efficient Government – Role of Mayor and Council

Mayor is the chief executive officer.

A.R.S. § 9-236

“A simple, perfect democracy had never yet existed. The whole people were incapable of deciding much of anything, even on the small scale of a village. He had had enough experience with town meetings at home to know that in order for anything to be done certain powers and responsibilities had to be delegated to a moderator, a town clerk, a constable, and, at times, to special committees.”

John Adams, by David McCullough



Role of Mayor and Council

“The duty of the chief magistrate is to unite in himself the confidence of the whole people” to “produce a union of the powers of the whole, and point them in a single direction, as if all constituted but one body and one mind.”

Thomas Jefferson

Efficient Government



Council-Manager Form of Governance

- ❑ City Manager serves at the pleasure of the Council and can be terminated for any reason and without cause.
- ❑ City Manager may have employment contract with severance and other stipulations.
- ❑ Oversees the entire municipal operations, all departments, hiring of staff, the budget and implementation of the Council's goals.
- ❑ Council member may make inquiries of staff, but what does "inquiry" mean.



Interference in Administrative Service

- “Except as otherwise provided in this Charter, neither the Mayor nor any Council member shall interfere with the execution by the City Manager of the powers and duties, or order, directly or indirectly, the appointment by the City Manager of any person to an office or employment or the removal there from. Except for purposes of inquiry, the Mayor and Council members shall deal with the administrative service under the City Manager solely through the City Manager, and neither the Mayor nor Council member shall give orders to any subordinate of the City Manager, either publicly or privately.”



Why Preserve Council-Manager Form of Government?

- ❑ Legislative immunity
- ❑ Accountability
- ❑ Violate city/town code
- ❑ Confuse staff
- ❑ Deniability



Land Use Claims Competing Objectives

Police
Power
Needs



CITY/TOWN
COUNCIL



Private
Property
Rights

Efficient Government



General Plan Complexities

“The process for adopting or amending the general plan of a municipality or a county is more comprehensive than the zoning amendment process in terms of involvement of the community and other municipal, county and state agencies. Thus, there are more opportunities for the land use lawyer to create a favorable record on which to base future litigation.”

CLE International

Efficient Government



Land Use Claims

- ❑ Equitable Estoppel
- ❑ Violation of Constitutional Rights
- ❑ Breach of Contract
- ❑ Tortious Interference with Contract
- ❑ Misrepresentation
- ❑ Extortion
- ❑ Breach of Fiduciary Duty
- ❑ Takings

Efficient Government



Equitable Estoppel

- ❑ Historically, governments could not be “estopped”.
- ❑ Detrimental reliance could not be relied upon to create liability.
- ❑ Governments can be liable for actions that induce detrimental reliance.

Efficient Government



To Avoid Detrimental Reliance Claims

- ❑ Clearly identify “chain of command”.
- ❑ Periodic review of communications/correspondence concerning key project.



Cases Cutting Government's Way

- ❑ Cannot use estoppel to enforce a contract that is against public policy. *Western collections, Inc. v Tierney*, 96 P.3d 1070 (Ariz. App. 2004).
- ❑ Governments are entitled to some leeway as to how its employees conduct government business.
- ❑ A government is not estopped by casual acts, advice or instructions of non-supervisory employees.
- ❑ Government may correct a mistake of law. *Thomas King, Inc. v City of Phoenix*, 92P.3d 429 (Ariz. App. 2004).



Constitutional Claims

- ❑ Federal and State Constitutions: “No person shall ... be deprived of life, liberty or property without due process of law”.
- ❑ Due process
 - ❑ Procedural
 - ❑ Substantive
- Equal protection – must treat similar property owners similarly.



Due Process and Equal Protection

- ❑ Entitled to a hearing.
- ❑ Health, safety, morals and welfare.
- ❑ Zoning ordinance must bear a reasonable relationship to these goals.
- ❑ “Rational basis” – “fairly debatable” test.
- ❑ “Shocks the conscience”.
- ❑ Must be rational basis for treating classes differently.



Ways Property Rights Can Be Taken

- ❑ Explicit taking/Condemnation
- ❑ Regulatory taking/inverse condemnation, but must deprive property owner of “all economically viable use of land”
- ❑ Exaction-rough proportionality and legitimate government interest.

Efficient Government



Common Law Vested Rights

- ❑ Historically, Arizona courts have adopted a “building permit” rule.
- ❑ Special use permit and reliance in the form of substantial monetary expenses may be enough.



Development Agreements

- ❑ Contractually Vest Rights
- ❑ Creates Value
- ❑ Get Consideration

Efficient Government



Damages and 42 USC Section 1983

- ❑ Create a right
- ❑ Create damages
- ❑ If constitutional right denied under color of state law:

\$1.00
Damages



\$1.2 Million
Attorney Fees

Efficient Government



Dispute Resolution

- ❑ Arbitrate factual disputes
- ❑ Mediate all disputes?
 - ❑ Give parties “day in court”.
 - ❑ Litigation: zero sum game.
 - ❑ Mediation: problem resolution.
 - ❑ Avoid recovery of attorneys’ fees.
 - ❑ Leaves the parties (not the lawyers) in control.



Contractually Required Mediation

- If a dispute arises out of or relates to this Agreement, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try to settle the dispute through mediation before resorting to arbitration, litigation or some other dispute resolution procedure. In the event that the parties cannot agree upon the selection of a mediator within 7 days, either party may request the presiding judge of the Superior Court to assign a mediator from a list of mediators maintained by [the Arizona Municipal Risk Retention Pool].

IGA Risk



Efficient Government



Yarnell

- ❑ AZ Republic headline “New Yarnell Records Depict Non-Stop Chaos.”
- ❑ Mutual aid agreement included indemnity.
- ❑ Prescott required to indemnify State for Prescott’s negligence.
- ❑ If indemnity had been a general indemnity, Prescott might have had to indemnify State for passive negligence.
- ❑ Risk of losing immunity under workers’ compensation statutes if indemnity not written correctly.



Mutual Aid Agreements

- Regional issues are common and impact multiple jurisdictions.
 - Fire suppression
 - Joint law enforcement events
 - Emergency responses
 - Drug task force
 - Public transit
 - Regional parks
 - Dispatch IGAs
 - Risk Pool IGA Review Program

Efficient Government



Imbalance of Negotiating Leverage

- ❑ ADOT pass-through of federal funds.
- ❑ ADOT gives cities and towns a “take it or leave it” proposition:
 - ❑ To receive federal funds, city must indemnify ADOT for ADOT’s negligence.
- ❑ State Forestry
 - ❑ Risk of wildland fire exposure.
 - ❑ Indemnity Risk.



Imbalance of Consideration

- ❑ Six armored vests in return for broad indemnity of Department of Motor Vehicles by city.
- ❑ Indemnify Department of Homeland Security in return for funds to provide ambulance to support Katrina response.



IGAs Crucial

- ❑ IGAs govern these relationships.
- ❑ Indemnities allocate risks.
- ❑ The Yarnell IGA might have been drafted differently, exposing Prescott to significant liability.
- ❑ Don't stumble into liability.
- ❑ Agree on risk-sharing language in contract before liability causing events.
 - ❑ ADOT
 - ❑ State forestry



SWAT Team

- ❑ Three risk pool members and county participate in SWAT team.
- ❑ County is directing the team.
- ❑ SWAT team injures target of operation as a result of negligent discharge of firearms.
- ❑ All agree to indemnify the others.
- ❑ The three risk pool members each have their own attorney.
- ❑ Attorneys obligated to shift liability to other defendants.
- ❑ Risk pool pays nearly as much in defense costs as it does for indemnity obligation.



Lessons Learned

- ❑ Don't shock the conscience.
- ❑ Avoid "over my dead body".
- ❑ Get data to support your views.
- ❑ Get on the same planet.
- ❑ Marriage counseling not divorce court.



Lessons Learned

- ❑ Open meeting/public records law:
 - ❑ Government in the open
- ❑ Conflict of interest:
 - ❑ Remove/limit improper personal influence
- ❑ Public money – be accountable
- ❑ Council-manager form of government:
 - ❑ Allow elected officials to provide vision; require manager to implement
- ❑ Try to avoid extremes
- ❑ Don't be afraid to mediate
- ❑ Check your IGAs



City/Town Councils

- ❑ Closest to the governed.
- ❑ Power to take property.
- ❑ Immediately accountable.
 - ❑ Open meeting law
 - ❑ Recall
- ❑ Non-partisan deliberation.
- ❑ Inaction and failure not an option.
- ❑ COVID 19 – Local governments have shown they can carry out the dream of our founding fathers.



You Stand on Broad Shoulders

“All . . . will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression. Let us, then, fellow-citizens, unite with one heart and one mind. Let us restore to social intercourse that harmony and affection without which liberty and even life itself are but dreary things”

Thomas Jefferson
Inaugural Address, 1801



You Stand on Broad Shoulders

“The whole art of government consists in the art of being honest. Only aim to do your duty, and mankind will give you credit where you fail. This is the important post in which fortune has placed you, holding the balance of a great, if a well poised empire.”

Thomas Jefferson

A Summary of the Rights of British America, 1774



Senator McCain – *The Restless Wave*

Before I leave, I'd like to see our politics begin to return to the purposes and practices that distinguish our history from the history of other nations. I'd like to see us recover our sense that we are more alike than different. We're citizens of a republic made of shared ideals forged in a new world to replace the tribal enmities that tormented the old one. Even in times of political turmoil such as these, we share that awesome heritage and the responsibility to embrace it.

Senator John McCain
May 3, 2018



Senator McCain – *The Restless Wave*

Whether we think each other right or wrong in our views on the issues of the day, we owe each other our respect, as so long as our character merits respect, and as long as we share for all our differences for all the rancorous debates that enliven and sometimes demean our politics, a mutual devotion to the ideals our nation was conceived to uphold that all are created equal and liberty and equal justice are the natural rights of all. I want to urge Americans for as long as I can to remember that this shared devotion to human rights is our truest heritage and our most important loyalty.

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We the People

Of the United State, in Order to form a more perfect Union, establish Justice, ensure domestic Tranquility, provide for the common defense. Promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.



Questions

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