



COUNCIL MINUTES

October 10, 2013

The City Council of the City of Mesa met in a Study Session in the lower level meeting room of the Council Chambers, 57 East 1st Street, on October 10, 2013 at 7:34 a.m.

COUNCIL PRESENT	COUNCIL ABSENT	OFFICERS PRESENT
Scott Smith Alex Finter Christopher Glover Dennis Kavanaugh David Luna Dave Richins Scott Somers	None	Christopher Brady Debbie Spinner Dee Ann Mickelsen

1. Hear a presentation and discuss the Open Meeting Law and Conflicts of Interest.

City Attorney Debbie Spinner introduced Andrew McGuire, an attorney with Gust Rosenfeld, P.L.C., who was prepared to address the Council regarding the Open Meeting Law and the Conflict of Interest statute. She stated that in addition to his law practice, Mr. McGuire also serves as the City Attorney for the Towns of Avondale and Fountain Hills.

Mr. McGuire displayed a PowerPoint presentation (**See Attachment 1**) and provided an overview of Arizona's Conflict of Interest law and how it applies to the Mesa City Council. He explained that if a Councilmember had a pecuniary interest in the outcome of a Council decision, that person should declare a conflict of interest and refrain from voting on the matter.

Mr. McGuire commented that a far less obvious conflict of interest could extend beyond a Councilmember to family members who might be engaged in some type of business activity with the City. He noted that the list of relatives could branch out not only from spouses, parents, grandparents and children, but also to relatives of spouses. (See Page 3 of Attachment 1) He remarked that in such cases, he would encourage the Councilmember to inform Ms. Spinner of the family member's business relationship with the City.

Mr. McGuire briefly highlighted the steps that a Councilmember must take if he or she has a conflict of interest. (See Page 4 of Attachment 1) He advised that if it was necessary for a Councilmember to declare a conflict of interest, he would urge that it be done in writing and before a meeting is convened. He also noted that it was acceptable for a Councilmember to declare a conflict of interest at a meeting if the individual was unaware of such conflict beforehand. He added that when a Councilmember declares a conflict of interest, the person

must refrain from any participation concerning the particular issue before, during or after Council consideration.

Mr. McGuire, in addition, commented that the appearance of impropriety often occurs when a citizen, who opposes a Councilmember's point of view, voices concern that the Councilmember should not vote on a specific item, for example, if the Councilmember lives in the area. He explained that such a scenario is an appearance of impropriety question rather than a true conflict and added that if the Councilmember does not have a pecuniary interest in the matter, he or she would not have a statutory conflict.

Discussion ensued relative to various scenarios in which a Councilmember or a relative "in the tree of influence" who owns property located at or near the site of a zoning case could create a possible appearance of impropriety; that it would be appropriate for the Councilmember to seek direction from Ms. Spinner; and that Sections 901 and 209 (C) of the Mesa City Charter contain provisions which address when it is appropriate to declare a conflict and the result of abstaining from a vote.

In response to a question from Mayor Smith, Ms. Spinner clarified that the City Charter states that a Councilmember cannot abstain from voting unless the person has a conflict of interest. She explained that Mesa's Ethics Code, which was adopted as part of the City Charter, indicates that a Councilmember should avoid even the appearance of impropriety. She also noted that there have been occasions when a Councilmember, from a legal perspective, might not have had a conflict of interest per State Statute, but because of the appearance of impropriety, declared a potential conflict.

Responding to a question from Councilmember Richins, Mr. McGuire indicated that with respect to conflicts of interest, the difference between a general law town or city and a charter city is typically in the restrictions upon the Council rather than in more powers upon the Council. He stated that most general law towns and cities operate under a strict conflict of interest law and do not have an individualized process for addressing this issue. He added that cities that have adopted Council rules address conflict of interest matters per those rules.

Mr. McGuire further discussed Mesa's policy with respect to the Councilmembers accepting and reporting gifts from people who conduct business with the City. (See Page 5 of Attachment 1) He said that gifts that have a face value of \$50 or more, as well as gifts related to professional or collegiate sports, athletics or entertainment with a value of \$0 or more must be reported. He pointed out that Arizona law does not make a distinction in this regard and said that State elected officials cannot accept gifts to attend sporting or athletic events. He also noted that if his law firm invited one of the Councilmembers to a baseball game, that person would be required to pay the face value of the ticket prior to attending the event.

Responding to a question from Councilmember Richins, Mr. McGuire clarified that Mesa's Code of Ethics requires that all gifts must be reported. He reiterated that Arizona law has a specific "carve out" for State legislators which prohibits them from accepting invitations to professional sporting events. He noted, however, that such a provision does not apply to the Councilmembers.

In response to a question from Councilmember Luna, Mr. McGuire advised that if a Councilmember were invited to attend an event at which he or she served in some official

capacity, it would not be necessary for the person to report that event. He explained, on the other hand, that if a Councilmember were invited to an entertainment/sporting event for entertainment purposes, such an invitation would be considered a gift and must be reported. He added that if the Councilmembers were invited to a sporting event, per the City Code, they must declare the gift and, under State law, pay for the ticket.

Mayor Smith commented that he and his fellow Councilmembers "are fanatics" with respect to reporting gifts and doing so in a timely manner. He recognized Councilmember Kavanaugh, who served as chairman of the committee that wrote the Ethics Code, and suggested that the document should be used as a model for other Arizona communities. He added that this was the first time he has heard an interpretation that laws "designed" for the State Legislature have been extended to every elected official in the State.

Mr. McGuire clarified that was an argument raised by some individuals, although he did not agree with it.

Mr. McGuire reiterated that if the Councilmembers have questions or concerns with respect to whether they have a conflict of interest on a particular matter, he would urge that they seek legal advice from Ms. Spinner. He indicated that if a Councilmember were found to have a conflict of interest on any action, such action is voidable by the Council. He noted, however, that if the Council failed to void such action, the penalties may still apply.

Mr. McGuire further reported that a "knowing" or "intentional" violation of the Conflict of Interest statute is a Class 6 felony, while a "reckless" or "negligent" violation is a Class 1 misdemeanor. He said that if a Councilmember sought out legal advice from Ms. Spinner regarding a potential conflict of interest and she issued an incorrect legal opinion, such an opinion would be the Councilmember's "get out of jail free card."

Mr. McGuire, in addition, summarized the Open Meeting Law (OML) and its impact on the City Council. He explained that a "public body" would be defined as any official group appointed by the City Council and designated as a subcommittee or working group. He stated that the OML would apply to those entities and could pose certain problems, such as in the case of a three-member subcommittee. He noted that those members would not be permitted to discuss any issue outside of the public meeting.

Mr. McGuire also remarked that a "quasi-judicial body" is defined by the type of limited discussions it is allowed to engage in, such as the Board of Adjustment (BOA). He said that the decisions rendered by the BOA are typically reviewed by the court, as opposed to the City Council.

Additional discussion ensued relative to the fact that the OML requires that at least 24 hours in advance of a public meeting, the meeting notice must be posted and the agenda made available; that the public body may only discuss the items listed on the agenda; that any time a quorum of a public body attends a social gathering, whether at a restaurant or a private residence, the public notice must be posted; and that an electronic or telephonic meeting is allowed as long as the public can hear the discussion and the public body only discusses the agenda topics.

Ms. Spinner assured the Council that the City Manager's Office and the City Clerk's Office work diligently to track events at which a quorum of the City Council may be in attendance. She said that those events are included on the Public Notice calendar.

Mr. McGuire further commented that four members of the City Council constitute a quorum. He explained that a quorum of the members cannot communicate individually or as a group in a manner that proposes "legal action." He stated that with respect to the three-member Council subcommittees, two members constitute a quorum and added that the same provision as stated above would apply. He also stressed the fact that "legal action" includes all deliberations and not just the final vote.

Responding to comments from Mayor Smith, Mr. McGuire confirmed that any opinions or discussion by Councilmembers that may lead to the final vote would be included in the "legal action" category.

Further discussion ensued relative to potential OML pitfalls; that polling, which is a situation in which a Councilmember tries to ensure that he has four votes on an issue prior to a Council meeting, is discouraged by the Attorney General's Office; that indirect polling, or the "spokes on a wheel" concept, wherein a Councilmember is "the hub" of the wheel who receives input that is communicated to a quorum, can also create a potential problem; that the caucus process, which occurs at the State Legislature, is exempted from the OML, but local jurisdictions are not allowed to engage in such activity; and that the Councilmembers are permitted to talk to each other in order to gauge their opinions, but are prohibited from having a discussion with a quorum of the Council outside of a public meeting regarding legal action.

Ms. Spinner pointed out that traditionally, she has expressed the legal opinion that a Councilmember can speak with two other Councilmembers regarding an issue. She cautioned, however, that the person should not speak with a fourth Councilmember, which could constitute a quorum.

Responding to a question from Vice Mayor Finter, Mr. McGuire clarified that if a Councilmember did not communicate with a quorum of the Council concerning legal action, that person would not violate the OML. He stated that if the person did not speak to more than two Councilmembers about the legal action, they could engage in whatever conversation they wanted. He noted, however, that he would not recommend such a process, since the next step of who those two individuals speak with would be out of the Councilmember's control.

Mr. McGuire further remarked that it was always better to not engage in those conversations outside of a Council meeting, but acknowledged that it was virtually impossible not to do so. He suggested that the Councilmember be clear in those communications not to impart how he or she intends to vote and also that as the Councilmembers go forth from that conversation, that they do not ask the other members how they intend to vote.

Ms. Spinner briefly reviewed an opinion of the Attorney General's Office that interpreted the OML and discussed how to place an item on an agenda.

Councilmember Kavanaugh stated that if a Councilmember reviewed the minutes from a Council subcommittee and was aware of how the members voted on a specific item, it was his

understanding that the person could, in fact, speak with two other Councilmembers to inquire about their thoughts on the matter.

Mr. McGuire confirmed that would not be a violation of the OML due to the fact that the subcommittee members are not bound by the next vote and the Councilmember would not be certain of their action.

Extensive discussion ensued relative to potential problems that exist with the OML as it relates to social media, instant messaging, e-mail and blog meetings; that when sending an e-mail, the "reply all" button should never be used in Council communications; that instant messaging can be retrieved and should also be avoided for Council communications; that a Councilmember's one-on-one communications with a citizen might be disseminated to others and it would be appropriate for the Councilmember to request that his or her views not be communicated to the other Councilmembers; and that the Councilmembers should avoid tweeting out their views or votes on certain issues to their fellow Councilmembers prior to or at the Council meetings.

Ms. Spinner indicated that social media is an area that has gotten ahead of the law and explained that the Attorney General's Office has yet to interpret how the technology impacts the OML. She explained that the Councilmembers have the same First Amendment rights as other citizens and are allowed to speak with the media. She noted that the issue is as follows: Is social media more analogous to talking to the press or more analogous to e-mails? She added that at the present time, laws do not exist to interpret that question.

Responding to comments from Mayor Smith, Mr. McGuire cautioned that with respect to the Councilmembers posting their views on their respective Facebook pages, it is very difficult to draw a distinction between a post on Facebook or a tweet and a unilateral e-mail that proposes legal action, which the Attorney General's Office has determined is a violation of the OML.

(Councilmember Somers was excused from the meeting at 8:42 a.m.)

Further discussion ensued relative to selected legal opinions issued by the Attorney General's Office (See Page 11 of Attachment 1); the instances when the City Council can and cannot conduct an Executive Session (See Pages 12 and 13 respectively of Attachment 1); the purpose of meeting minutes; and the penalties associated with violating the OML. (See Page 15 of Attachment 1)

Mr. McGuire concluded his presentation by noting that the Councilmembers may be considered agents of the City of Mesa and said that their actions can lead to liability. He suggested that the Councilmembers take the time to review the minutes to ensure that their comments are reflected accurately. He also recommended that the Councilmembers ask liability-creating questions in private, as opposed to during a public meeting. He added that it was important for the Councilmembers to presume that everything they say or do will be distributed publicly.

Mayor Smith thanked Ms. Spinner and Mr. McGuire for the informative presentation.

2. Acknowledge receipt of minutes of various boards and committees.

- 2a. Library Advisory Board meeting held May 21, 2013.
- 2b. Judicial Advisory Board meeting held August 12, 2013.
- 2c. Community and Cultural Development Committee meeting held September 9, 2013.
- 2d. Economic Development Advisory Board meeting held September 3, 2013.

It was moved by Councilmember Glover, seconded by Councilmember Luna, that receipt of the above-listed minutes be acknowledged.

Carried unanimously.

3. Hear reports on meetings and/or conferences attended.

- Councilmember Richins: National Recreation and Park Association Conference
- Councilmember Glover: Downtown Business Roundtable Breakfast
- Councilmember Kavanaugh: Dobson Ranch Town Hall

4. Scheduling of meetings and general information.

City Manager Christopher Brady stated that the meeting schedule is as follows:

Thursday, October 10, 2013, 5:00 p.m. – Fiesta Substation Grand Opening/Public Open House

Saturday, October 12, 2013, 8:00 a.m. – ACE Express Recycling Event

Tuesday, October 15, 2013, 5:30 p.m. – Youth Pizza Town Hall

5. Adjournment.

Without objection, the Study Session adjourned at 8:56 a.m.

SCOTT SMITH, MAYOR

ATTEST:

DEE ANN MICKELSEN, CITY CLERK

I hereby certify that the foregoing minutes are a true and correct copy of the minutes of the Study Session of the City Council of Mesa, Arizona, held on the 10th day of October, 2013. I further certify that the meeting was duly called and held and that a quorum was present.

DEE ANN MICKELSEN, CITY CLERK

pag
(attachment – 1)

Results. Relationships. Reputation.

Open Meetings and
Conflicts of Interest

Andrew J. McGuire

Gust Rosenfeld, P.L.C.

Agenda/Topics to Be Covered

- Conflicts of Interest
- Open Meeting Law

Conflicts of Interest

- **Conflicts Overview**
 - Substantial Interest
 - Pecuniary
 - Not Remote – Defined in Statute
 - Relatives
 - Spouse
 - Parents & Grandparents
 - Children & Grandchildren
 - Brother/Sister (whole or 1/2 blood)
 - Spouses and relatives of spouses (parent, brother, sister or child)

Conflicts of Interest (continued)

- **What Officials Must Do**
 - Declare conflict; best before meeting; best in writing; verbally at meeting OK as well
 - Appearance of impropriety
 - Refrain from Any Participation
 - Applies before, during and after Council consideration
 - Effect on Voting
 - Covered by Section 901 of the Charter / State Law
 - Charter Section 209 (C) - Voting

Conflicts of Interest (continued)

- Ethics Handbook – must report gifts from people doing business with City
 - When:
 - 2 days after receipt if in town
 - 2 days after returning if out of town
 - What:
 - Gifts related to professional or collegiate sports, athletics or entertainment; State Law counterpart
 - Face value of \$50 or more

Conflicts of Interest (continued)

- Actions Voidable
- Penalties
 - “Knowing” or “Intentional” = Class 6 Felony
 - “Reckless” or “Negligent” = Class 1 Misdemeanor
 - PLUS, Forfeit Office
- Bottom Line - If doubts, call Attorney; opinion = “get out of jail free card”

Open Meeting Law

- “Public Body” defined
- “Quasi-Judicial Body” defined
- Meeting Notice
 - Posted 24 hours in advance
 - Contain an agenda with the specific matters to be discussed

Open Meeting Law (continued)

- Meeting must be open to public
 - Serious concerns with meetings at non-public locations
 - Electronic/Telephonic “Meeting” allowed as long as public can follow the discussion
 - Stay on agenda topics

Open Meeting Law (continued)

- Cannot communicate with a quorum of the members individually or as a group in a manner that proposes “legal action”
 - Quorum = 4/7 for full Council; 2/3 for subcommittee
 - Staff does not count, but don’t use them to sidestep OML
 - “Legal Action” = all deliberations, not just final vote
- Pitfalls: what constitutes a “meeting”
 - Subcommittees
 - Polling
 - Email

Open Meeting Law (continued)

- Obvious potential problems
 - Social media; chat rooms
 - “Reply all”
 - Instant messaging
 - Blogs (w/o notice, agenda, minutes)
- Not-so-obvious potential problems
 - “Spokes on a wheel”; don’t be the hub
 - Circulation by citizen

Open Meeting Law (continued)

- Selected AG opinions
 - Unilateral email that proposes legal action
= BAD
 - Communicating through media = OK
 - “Blog” meeting = OK

Open Meeting Law (continued)

- Executive sessions - only for seven reasons
 - Employment of those you appoint
 - Records exempt by law from disclosure
 - Legal advice
 - Contract negotiations; litigation
 - Labor union discussions with designated reps of City
 - International/interstate or tribal matters
 - Real estate

Open Meeting Law (continued)

- Cannot use executive session for issues that are simply embarrassing, uncomfortable or messy
- Discussion must be confined to the specific agenda matter
- Only those parties necessary for the executive session discussion may attend
- Private, not secret
- Don't hold session without Attorney
- Serious penalties for disclosure of E-session materials

Open Meeting Law (continued)

- Meeting Minutes
 - Summary of actions
 - Required, even for subcommittees
 - Posted on website

Open Meeting Law (continued)

- **Violations**
 - Action is **VOID**
 - \$500 Civil Penalty; limitations on defense
 - If knowingly violated, may be removed from office
- **Enforced by O.M.L.E.T.**

Liability

- You may be considered an agent of City
 - Your Actions can Lead to Liability
 - Don't Assume Immunity
- MINUTES = PUBLIC RECORDS
 - What you say/mean may be different
 - Review for accuracy

Liability (continued)

- Ask liability-creating questions in private, **before** the meeting
 - Public Meeting is not best time to receive legal advice
 - “Time Out” signal from attorney/staff

Liability (continued)

- Contact with press and attorneys
 - Comments through Staff Liaison
 - Consistency
 - The Whole Picture
 - May only speak for self, not City
 - Best Bet – Just Say No

Summary

- Don't get cute with conflicts; the penalties are too severe
- Presume everything you say/do will be distributed publicly
- O.M.L.E.T.S are not for breakfast

QUESTIONS?

Results. Relationships. Reputation.

Thank you!

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