

PUBLIC OFFICIAL LIABILITY

Liability under State law -- Governmental Immunity Act

Colorado is fortunate in having governmental immunity laws that help protect municipalities and public officials from liability. It is not an absolute immunity, however, and can be waived in many instances. As a State protection, it may not be applicable in federal court, where much of litigation against municipalities can occur.

The Governmental Immunity Act ("GIA") provides important protections for claims based on tort (wrongdoing or injury). The GIA sets forth procedural requirements and limitations on monetary damages. Basically, the GIA (1) requires advance notice of claim (180-day notice requirement must be made after discovery of injury); (2) provides complete immunity from liability for municipalities and municipal employees in actions under state law which lie in tort, with some exceptions;¹ and (3) establishes monetary limits of \$150,000 per person / \$600,000 per aggregate. The immunity does not exist for employees who are acting outside of their scope of employment, or whose actions are willful and wanton. Bear in mind that if an employees' actions are found to be willful and wanton, the employee may be personally liable for punitive and exemplary damages.²

Liability under Federal Law

Potential liability exists for violations of federal law, particularly in the area of civil rights under 42 USC §1983. This area of federal law provides the basis for a very broad array claims brought for violations of rights, including lack of due process. §1983 does not create any independent rights, but rather provides a mechanism to enforce substantive rights created by the U.S. Constitution and certain federal statutes. For example, a landowner whose property has been negatively affected by a land use decision might assert that the decision has effectively made the property unavailable for any reasonable use and, therefore, constitutes a takings under the Fifth Amendment. The landowner could file suit under §1983 alleging that the decision deprived the landowner of his Constitutional rights. Individual liability can also occur under § 1983 if the employee or official was not acting pursuant to official policy or custom. State governmental immunity is generally not a defense to §1983 actions.

Primary areas where liability can occur include violations of due process; acting outside of authority, and conflicts of interest. The following are brief descriptions of due process and *ultra vires* – acting outside of authority.

Due Process

Violation of "due process" in a notice or hearing is a frequent federal civil rights complaint against municipalities and officials. Deciding when and what "process" is "due" requires legal advice from the municipal attorney, and it needs to be followed. Whenever a municipal board or commission takes action in a quasi-judicial capacity, procedural due process is required. Most actions taken by the Planning & Zoning Commission and Town Council involving land use decisions can be characterized as quasi-judicial. Due process means that the adequate notice and an opportunity to be heard is afforded to the applicant and all interested parties; it also means that there will be basic fairness in the procedure, including a neutral and impartial decision maker. The following is a hit list of items that trigger due process concerns.

(1) Ex Parte Contact

Any written or verbal communication initiated outside of a regularly noticed public hearing between an official and a party, but not all of the parties, about a particular matter which is either under or about to be under consideration by the official, and which seeks him to influence, or present information relating to, that matter.

Ex parte contacts are prohibited because all parties are entitled to a fair and impartial hearing. Whether the contacting person is an applicant or objector, the impartiality of the decision maker can be questioned. Furthermore, the ultimate decision must be supported by the findings of fact based upon the evidence on the record. Anything outside of the record cannot be considered in reaching a decision.

(2) Not Following Hearing Procedure

There are written rules for review procedure within the Town Code³, and they are fairly straightforward and offer some flexibility (there are no rigid rules of evidence). Periodic in-house training will occur for both the Planning & Zoning Commission and Council with regard to quasi-judicial hearings, and members may also be encouraged to participate in occasional out-of-house training on this subject matter when it is offered in conference curricula and seminars.

(3) Acting Outside Scope of Authority (*Ultra Vires*)

While it may appear to be a simple matter in adhering within one's scope of authority, all too often we tend to stray into areas that do not concern us, and areas of which we are not authorized to act upon.

Examples of *ultra vires* claims include (1) speaking to the public media about personnel matters; (2) making personal promises or threats based upon your

authority; (3) discussing confidential information publicly; (4) making decisions based upon personal motives; and (5) entering into unauthorized agreements or settlements.

In Summary

- **Avoid ex parte communications; maintain boundaries.**
- **Never prejudge or predetermine a matter before the hearing is concluded.**
- **Keep the hearings orderly, allow for all to be heard, and make a good record to support your decisions.**
- **Follow procedure, and apply the relevant laws and policies in your decisions.**
- **Act within your scope of authority. If in doubt, seek counsel before taking an action on a given subject matter.**

¹ CRS §§ 24-10-108, -110.

² CRS § 24-10-118(1)(C)

³ See, for example, §7-3-18 for zoning review procedure.