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The Role of the City Council and Its Members

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Topics to be covered

- The Big Picture & the role of the City Council
- Conflicts of Interest
- Ex Parte Communications
- Recent cases of note
- Questions



The Big Picture

- “A power of a city is vested in the **city council** except as otherwise provided by a state law.” Iowa Code Sec. 364.2
- Iowa statutes do not vest any power in **individual** council members.
- Exception to this is for mayors as they have specific powers under Iowa law and city ordinance. Council members, however, do not.

The Big Picture

- Iowa Code Section 372.13 describes the organization of city government.
- The council may appoint city officers and employees and prescribe their powers, duties, compensation, and terms.
- The council shall determine its own rules.

The Big Picture

- Cedar Falls has done this in Chapter 2, Article III of the City Code
- **Sec. 2-174.** - City council policy guidance. The city council shall annually adopt broad goals, objectives and program performance measures to guide the city administrator in the development of an annual operating budget, capital improvements program and administration of city projects and programs.

The Big Picture

- **Sec. 2-155.** - Powers and duties [of the mayor]. He/she shall be the chief executive officer thereof. ... The mayor shall supervise all departments of the city and give direction to the department heads concerning the functions of the departments.
- **Sec. 2-176.** - Power and duties of the city administrator. The city administrator shall be the chief administrative officer (CAO) of the city, responsible to the mayor and city council for the management of all city affairs placed in the administrator's charge by city ordinance.

The Big Picture

- Under City Code **Sec. 2-175**, the city administrator is supervised by the mayor.
- The mayor is the chief executive of the city and the presiding officer of the council.
- Cedar Falls has established a framework by which the council sets policies, and the city administrator and/or mayor shall implement those policies.

The Big Picture

- Your authority and powers come from actions taken as part of the city council, not your actions as an individual.
- The council is responsible for establishing policies and direction for the city, the implementation of those policies is left to the city administrator, with direct supervision by the mayor.
- This framework comes from both state and local law.

Conflicts of Interest

- Defined in:
 - Common Law
 - Iowa Code Chapter 362
 - Iowa Code Chapter 68B
 - City Policies

Conflicts of Interest – Common Law

- The Iowa Supreme Court has stated that conflict of interest rules, “whether common law or statutory, are based on moral principles and public policy. They demand complete loyalty to the public and seek to avoid subjecting a public servant to the difficult, and often insoluble, task of deciding between public duty and private advantage.”

Conflicts of Interest – Common Law

- “It is not necessary that this advantage be a financial one. Neither is it required that there be a showing the official sought or gained such a result. It is the potential for conflict of interest that the law desires to avoid.” *Wilson v. Iowa City*, 165 NW2d 813 (Iowa 1969).

Conflicts of Interest – Common Law

- “It is generally improper and illegal for a member of a municipal council or a similar body to vote on any question in which he is personally interested or where his personal rights will be affected.” *Security Nat. Bank of Mason City v. Bagley*, 210 NW 947 (Iowa 1926).

Conflicts of Interest – Common Law

- Under the common law, a conflict of interest may also be found where a policy maker “has an unalterably closed mind on matters critical to the disposition of the proceeding.” Policymakers “are required to consider in good faith, and to objectively evaluate, arguments presented to them,” but are not expected to be “subjectively impartial.” *Iowa Farm Bureau Federation v. Environmental Protection Commission*, 850 NW2d 403, 416 (Iowa 2014).

Conflicts of Interest – Common Law

- Council members must therefore remain willing to consider opposing views on items which will come to them for consideration.

Conflicts of Interest – Iowa Code Chapter 362

- Iowa Code **Section 362.5** says that a city officer shall not have an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the officer's city. A contract entered into in violation of this section is void.
- This can be referred to as a self-dealing conflict.

Conflicts of Interest – Iowa Code Chapter 362

- Exceptions:
 - Contracts that are publicly bid
 - Contracts that predate the election of the officer, but the contract cannot be renewed
 - Contracts with a corporation in which a city officer has an interest by reason of stockholdings when less than five percent of the outstanding stock of the corporation is owned or controlled directly or indirectly by the officer or the spouse or immediate family of such officer
 - Plus others

Conflicts of Interest – Iowa Code Chapter 362

- Iowa Code **Section 362.6** gives members of the city council the ability to determine whether a conflict exists for themselves, and this determination will be considered “conclusive.”
- The council’s action will not be considered invalid due to a conflict of interest of a voting member, unless that vote is decisive to the passage of the measure.
- But remember, a contract will be considered void where a member has a prohibited interest in that contract.

Conflicts of Interest – Iowa Code Chapter 68B

- Council members are prohibited from engaging in any of the following conduct:
 1. Outside employment or activities that involve the use of the government's time or resources to give the person an advantage or benefit not available to the general public.
 2. Outside employment or activities that involve the receipt of consideration by the government official from someone other than the government for performing work that is a part of the duties and responsibilities of the person in their official role.
 3. Outside employment or activities that are subject to the official enforcement or control of the person, during the performance of their official government duties.

Conflicts of Interest – Iowa Code Chapter 68B

- Examples:

1. Using your city-provided iPad to run an online retail store (using government resources to give yourself an advantage not available to the public)
2. Accepting payment from a home builder each time you approve a residential subdivision plat (receipt of consideration from someone other than the government for work that is part of your official duties)
3. Owning and managing a bar that is within the city limits (employment that is subject to the official control of the council in the liquor license context)

Conflicts of Interest – Iowa Code Chapter 68B

- For conflicts 1 & 2, you must immediately stop the outside employment or activity
- For conflict 3, you must either stop the outside employment or activity, or publicly disclose the conflict and avoid taking action that would detrimentally affect or create a benefit for the outside employment or activity

Conflicts of Interest – Iowa Code Chapter 68B

- Iowa Code **Chapter 68B** extends certain conflicts of elected officials to their “immediate family” members. However, for conflicts purposes, an immediate family member is defined as “the spouse and dependent children of a public official or public employee.”
- If you are prohibited from doing something, so are your spouse and dependent children.

Conflicts of Interest – City Policy

- Annual declaration of compliance is required.
- City prohibits its elected officials from engaging in any activity, practice, or act that unlawfully conflicts with, or appears to conflict with, the interests of the City.
- This is consistent with *Wilson v. Iowa City* case. “It is the potential for conflict of interest that the law desires to avoid.”
- When in doubt, disclose the potential conflict, and do not take action on the matter.

Ex Parte Communications

- We are really talking about due process rights when we discuss the rules regarding ex parte communications.
- The Fifth Amendment to the United States Constitution states that no person shall “be deprived of life, liberty, or property, without due process of law,” and the Fourteenth Amendment also states that no state shall “deprive any person of life, liberty, or property, without due process of law.”

Ex Parte Communications

- Article I, section 9 of the Iowa Constitution states that “no person shall be deprived of life, liberty, or property, without due process of law.”
- Due process requires fundamental fairness in a judicial proceeding, so a trial that is fundamentally unfair violates the guarantees of due process in the United States and Iowa Constitutions.

Ex Parte Communications

- “The American adjudicatory system is generally premised upon the ideal that the search for the truth and the wise interpretation and development of the law are best advanced through an adversarial process, in which each party submits evidence and presents legal argument, while simultaneously testing the evidence presented and challenging the legal arguments made by the opposing side.” 16 Iowa Practice Series Sec. 7:5(c).

Ex Parte Communications

- In the legal context, when a lawyer for one party communicates surreptitiously with a judge or juror in a manner that may influence the outcome of the adjudication, the other party has been deprived of its due process right to be heard.
- And the confidence of the public in the impartiality of the tribunal may be compromised. As the Iowa Supreme Court has explained, “[t]he purpose behind the rule prohibiting ex parte communications is to prevent ‘the effect, or even the appearance, of granting undue advantage to one party to the litigation.’” 16 Iowa Practice Series Sec. 7:5(c).

Ex Parte Communications

- These same principles apply to situations where a city council is performing a quasi-judicial function.
- A quasi-judicial function is found where the activity:
 - (1) involves proceedings in which notice and an opportunity to be heard are required, or
 - (2) “a determination of rights of parties is made which requires the exercise of discretion in finding facts and applying the law thereto.” *Buechele v. Ray*, 219 NW2d 679 (Iowa 1974).

Ex Parte Communications

- Examples of quasi-judicial proceedings:
 - Rezoning & other land use matters
 - License revocations (liquor licenses, pawn licenses)
 - Nuisance abatement/dangerous building actions
 - Any and all appeals

Ex Parte Communications

- At a minimum, due process requires that quasi-judicial proceedings involve notice, an opportunity to be heard, and an impartial decision maker.
- Ex parte communications can lead to one party being heard more than the other and/or can lead to an impartial decision maker.
- Both of which violate the due process rights of the parties to the dispute.

Ex Parte Communications

- City Attorney guidance and policy dated June 6, 2007, is an excellent summary of these concerns and issues.
- Ex parte communications should be avoided in quasi-judicial proceedings.
- If such communications occur, they should be publicly disclosed to give the parties an opportunity to respond or object.

Recent cases of note

- *Broderson v. Muscatine*, Muscatine County Court Case No. EQCV023989 (District Court, 2017).
 - Mayor of Muscatine was removed based on claims of willful misconduct and/or maladministration and willful or habitual neglect or refusal to perform duties of office under Muscatine City Code
 - Removal hearing held before the city council
 - Mayor argued the hearing did not provide adequate due process

Recent cases of note

- *Broderson* cont.
 - The Court concluded that the city violated the mayor's right to due process in two ways:
 - 1) by intermingling investigatory, prosecutorial, and adjudicative functions during the removal process; and
 - 2) by having an interest in the outcome of the removal proceeding.

Recent cases of note

- *Broderson* cont.
 - “Due process requires a fair trial before a fair tribunal, not simply the empty appearance of fairness. Upon review of the record in this case, and based on the totality of the circumstances, the Court reaches the inescapable conclusion that the City Council impermissibly intermingled investigative, prosecutorial, and adjudicative functions which rendered the Mayor’s removal proceedings fundamentally unfair, and thus violated her due process rights.”

Recent cases of note

- *Broderson* cont.
 - “When the Council made the decision to remove the Mayor from office the Councilmembers had a strong interest in shielding themselves from potential personal liability, in preventing the Council from being the focus of further accusations, and in restoring its image in the community while negatively impacting the Mayor’s image. Thus, the City Council had a personal interest in the proceeding at the time it removed the Mayor from office which rendered the removal proceedings fundamentally unfair.”

Recent cases of note

- *Burke v. City Council of City of Lansing*, 898 NW2d 204 (Iowa App. 2017).
 - Council member Burke was removed from office by remaining city council members
 - Removal related to alleged open meetings violation
 - County attorney offered to dismiss open meetings charge if Burke was removed
 - Burke alleged his removal was improper as those voting had a conflict of interest – a pecuniary interest in removing him

Recent cases of note

- *Burke* cont.
 - Court of Appeals held: Council Members' pecuniary interest in removing Burke rendered the proceeding fundamentally unfair and violated his procedural due process rights.
 - “Due process requires a fair trial in a fair tribunal.”

Questions?



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