

The following questions and answers are taken from a publication of the Arkansas Municipal League entitled, *Municipal Law in Arkansas: Questions and Answers*, (May 2007) which contains additional information of interest to city officials.

## **BOUNDARY CHANGES**

### **What are the proper procedures for reporting boundary changes in Arkansas? What state and local offices should be contacted when we have a boundary change?**

The statutes dealing with annexation, detachment and consolidation provide for filing in the county clerk's office. Ark. Code Ann. § 14-40-303, 14-40-605; 14-40-608, (14-40-605 and 14-40-608 require filing with the county clerk, who is required to notify the Tax Division of the Public Service Commission). These statutes require the filing of a map and other listed documents.

Note that it is no longer required to send an updated map of boundary changes and a certified ordinance annexing or detaching territory to the director of the Department of Finance and Administration. Ark. Code Ann. § 26-75-211(b), as amended by Act 303 of 2003.

## **BUILDING AND CONSTRUCTION**

### **Is the city required to use an architect or engineer on building or other construction projects?**

The answer depends on the type and cost of the project. The general rule is that the assistance and supervision of a registered professional engineer or architect are required. Ark. Code Ann. § 22-9-101. However, this rule does not apply to:

- a) engineering projects that do not exceed \$25,000
- b) architectural projects that do not exceed \$100,000
- c) municipal projects planned and executed according to plans and specifications furnished by an authorized state agency.

These amounts apply to the fair market value of the capital improvement. Ark. Code Ann. 17-15-302, 17-15-307. The law sets forth criminal penalties and civil remedies for violations in Ark. Code Ann. 17-15-103 and 105.

### **Must a contractor working on a city construction project be licensed?**

Ark. Code Ann. §§ 17-25-101 and 17-25-103 require a contractor to be licensed in order to work on projects costing \$20,000 or more, including but not limited to labor and materials. Act 275 of 2007 amended these statutes to include demolition.

### **Can we hire non-licensed contractors by dividing the project into segments costing less than \$20,000?**

The law forbids dividing projects up in this manner with the intent to avoid the licensing requirements. Ark. Code Ann. § 17-25-101(b). However, situations may arise in which the city is not trying to avoid the law, but it may need to do a project in stages over time for other reasons, such as budget limitations. If you find yourself in this or a similar situation, seek the advice of an attorney before proceeding.

**If a city does not hire a contractor for a construction project but does its own contracting, must the city or one of its employees acquire a contractor's license?**

No. Cities that do their own contracting are not required to have a contractor's license. Ark. Code Ann. § 17-25-102.

**Does the state building code regulate the siting of Manufactured Homes?**

Yes. The Arkansas Fire Prevention Code, Volume III, adopts the International Residential Code. Refer to Appendix E, "Manufactured Housing Used as Dwellings." This regulates subjects such as permitting, inspection, foundations, skirting, structural additions, fees and other matters.

## **ELECTED OFFICIALS**

**Who is the recorder-treasurer's supervisor?**

The recorder-treasurer is an elected official and therefore is not supervised in the sense of an employee. However, the council may prescribe additional duties, see ACA 14-44-109. The recorder-treasurer should in general perform his or her duties in cooperation with other elected officials.

**May the treasurer's duties be assigned to someone else?**

The duties of the treasurer found in the Municipal Accounting Law, sections 14-59-101 through 118, may be assigned to another employee or contractor if (1) the treasurer requests the reassignment or (2) the treasurer fails to perform those duties. Ark. Code Ann. § 14-59-115. Note however, that the law forbids contracting out the receipt or disbursing of funds. Those duties must always be performed by an employee of the city or town.

**Is there a conflict of interest if a mayor or alderman is married to another council member or a city employee?**

Arkansas has no laws prohibiting a mayor or council member from holding office in these situations. Nor would the employee-spouse be prohibited from holding a city job. The law does, however, prohibit a public official from using or disclosing confidential information for the benefit of the official or his or her family members. Ark. Code Ann. § 21-8-801.

In addition, an alderman should abstain from voting where his or her public duty conflicts with his or her personal interests. *Van Hovenberg v. Holeman*, 201 Ark. 370, 144 S.W.2d 718 (1940); Atty. Gen. Op. No. 2000-278. For example, an alderman should not vote on personnel matters involving the alderman's spouse. Not every issue affecting an alderman's family member will require that he or she abstain, however. For example, a council member may vote on issues pertaining to the fire department, notwithstanding the fact that an immediate family member works for the department. Atty. Gen. Op. No. 95-099.

Whether or not the council member has a conflict of interest in a particular case will depend on the facts. For example, is there a financial benefit to the council member? Does the council member's loyalty to a family member outweigh his sense of duty to the public? These are questions that will have to be considered on a case-by-case basis.

**Does a conflict of interest exist if the mayor or an alderman works at the bank where the city's money is deposited?**

Ark. Code Ann. § 14-42-107 provides that no alderman may have an interest, directly or indirectly in the profits of any contract with the city. Banking services would undoubtedly fall into this category. See Atty. Gen. Op. No. 2000-276. There are two exceptions: (1) the

city may pass an ordinance permitting aldermen to conduct business with the city and prescribing the extent of this authority and (2) the law does not apply to a business in which the alderman does not hold an executive or managerial office. (Note that in *Thompson v. Roberts*, 970 S.W.2d 239 (1998), the Arkansas Supreme Court held that 14-42-107 applies to mayors.)

**Can the city council members vote to decrease their own salaries or the salaries of other elected officials?**

Generally, a city may not decrease officials' salaries during the term for which the officials have been elected or appointed. Ark. Code Ann. § 14-42-113.

Act 563 of 2001 amended 14-42-113 to allow a salary to be decreased during an official's term of office at the official's request. Once the official's term expires, the salary for the office is restored to what it was before the decrease.

**How long can a municipal elected official serve in an office when he or she does not run for reelection and no one else runs for the position?**

A person serves in his or her elected position until another individual is duly qualified and elected. Article 19, Section 5, Arkansas Constitution, states: "All officers shall continue in office after the expiration of their official terms until their successors are elected and qualified." This means that if no one is elected to the position, or there is some problem with the person starting his or her term of office, i.e., he or she is disqualified before taking office, then the incumbent remains in office until his or her successor is elected and qualified. *Justice v. Campbell*, 241 Ark. 802, 410 S.W.2d 601 (1967); Atty. Gen. Op. Nos. 2000-138, 96-011, 94-303, 95-401, 94-303. Thus, if a successor is not elected, the incumbent would hold the office throughout the new term. Atty. Gen. Op. No. 88-353; *McCraw v. Pate*, 254 Ark. 357, 373, 494 S.W.2d 94, 103 (1973).

## **ELECTIONS**

What filing deadlines apply to independent candidates for municipal offices?

Act 149 of 2007 amended Ark. Code Ann. 14-42-206 to provide that "Any person desiring to become an independent candidate for municipal office in cities and towns with the mayor-council form of government shall file not more than eighty (80) days nor less than sixty (60) days prior to the general election by 12:00 noon with the county clerk the petition of nomination ... ."

**In mayor-council cities, are city elections nonpartisan and, if so, are they required to stay non-partisan?**

Generally, city elections in mayor-council cities are nonpartisan. However, the city may elect to hold party primaries by resolution. See Ark. Code Ann. § 14-42-206. To proceed with party primaries, on or before January 1 of the year of the election, the governing body must pass a resolution requesting that the legally recognized political parties of the state conduct such primaries. After passage of the resolution, the clerk or recorder must mail certified copies of the resolution to the chairmen of the county and state parties.

Once the city passes a resolution, does it stay in effect for future elections?

Previously, it did not, but now it does. Act 1165 of 2003, Section 10, changed 14-42-206 to provide that such resolution shall remain in effect for the subsequent elections unless revoked by the city or town council. However, resolutions from prior years would probably

be ineffective. In other words, if the council wishes to have primaries, it should pass another resolution to comply with the new statute, and then the new resolution would stay in effect for future elections.

## **EMPLOYMENT LAW**

### **Why are certain employees subject to random drug testing under the League Non-CDL policy while other employees and city council members are not?**

First, bear in mind that all city employees may be tested if a trained observer (such as a supervisor) has reasonable suspicion that the employee is under the influence of drugs or alcohol. However, when it comes to random drug testing, the courts make a distinction between safety or security sensitive employees on the one hand and “run of the mill” employees on the other.

This distinction is based on the fourth amendment of the U.S. Constitution, which forbids unreasonable searches by the government (including local governments). The Supreme Court has ruled that a drug test is a “search” of the person’s body under the fourth amendment. Therefore, it must be reasonable in order to be constitutional. *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989). (Please note that the fourth amendment only applies to governments and their agents, not to private industry, which is why random drug testing is allowed in the private sector).

The Supreme Court has held that a drug test can be a reasonable search only under the following circumstances:

- 1) There is a reasonable, individualized suspicion to believe that the employee is under the influence;
- 2) The employee performs a safety-sensitive job;
- 3) The employee performs a security sensitive job (normally law enforcement).

The general rule is that there must be reasonable suspicion. This is similar to the “probable cause” standard police must satisfy in order to conduct a search, although it is an easier standard to meet. Random testing is done without any individualized suspicion whatsoever, and therefore it would violate an employee’s constitutional rights.

However, the Supreme Court found that in certain cases, government has a “special need” to conduct drug testing, and so created the safety and security sensitive exceptions to the reasonable suspicion requirement. *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

The safety sensitive category is not easy to define, but basically involves employees who, if they have a momentary lapse of attention, could create a danger of physical harm or death to themselves or the public. This has been developed on a case-by-case basis by courts around the country, and the results are not always consistent. (There are no published cases from Arkansas or the federal Eighth Circuit, where Arkansas is located). Thus, we have taken our “best guess” of what the courts in our jurisdiction might uphold. The “security sensitive” category applies to law enforcement officers and police department employees who might have access to confidential information that could jeopardize criminal investigations.

Thus, the categories permitted in the League policy are those which have been upheld by the courts. Council members are not randomly tested because, again, their jobs are not safety or security sensitive. The Supreme Court has specifically ruled that candidates for state office were not subject to drug testing, and the same reasoning would apply to city officials. *Chandler v. Miller*, 117 S.Ct. 1295 (1997).

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### **Who hires and fires department heads such as police and fire chiefs?**

Mayors have the exclusive right to appoint and remove any and all department heads subject to a two-thirds override by the city council. At no time can a city council initiate the appointment or removal of a department head under this statute. See Ark. Code Ann. § 14-42-110. The same rules apply to the building inspector. See Ark. Code Ann. 14-56-202. The statute does not apply to city administrator forms of government.

**Who hires and fires non-department head employees?**

State law is silent on this issue. As noted above, department heads are the exclusive purview of the mayor, with the council's having the ability to override either a hiring or firing decision by a two-thirds (2/3) vote. *Id.* There is no such statute with regard to non-department head employees, so presumably this is a matter of local option. It may be that your city has an ordinance, resolution, or handbook that delineates who has the authority to hire and fire non-department head employees. Without such a writing, one could look at your previous history to determine who has this authority. It could be that the council has the authority, the mayor does, the department head does, or some combination of the three. Further, the council would have the authority to draft policy on this issue, regardless of how it may have been handled in the past.

**Are cities required to advertise city employment or appointment opportunities?**

No state statute specifically requires this. However, if citizens are not informed of job opportunities, they might argue that they were unfairly or discriminatorily denied access to city employment or appointment. Openly advertising such positions will help prevent these types of claims and lawsuits. In addition, it will give the city a broader pool of qualified applicants from which to make a selection.

**What authority do individual council members have to supervise personnel matters and other day-to-day operations of the city?**

The council may set policy on employment matters, departmental operations, and so forth. However, the law gives power to the council as a body. As such, the council has no power to act until a majority of council members have voted to take an action. See Ark. Code Ann. § 14-55-203. Thus, individual council members are without authority to act on their own in the absence of a vote directing a particular action. (For example, a committee including an alderman could be directed to perform research on certain items, but an individual council member does not alone have authority to direct an employee to perform a task in a certain way).

Council members should also be aware that they are not individually immune from lawsuits arising from personnel issues. Individual aldermen are immune from liability for action that is "legislative," such as passing ordinances or resolutions. This immunity does not apply, however, to administrative or executive action such as making individual personnel decisions or supervising city employees or department heads. Although a council as a whole is not prohibited from making hiring and firing decisions, for example, the council should weigh the risk of personal liability against the perceived need to make individual personnel decisions.

**FINANCIAL AFFAIRS**

**Must a city adopt a budget and, if so, how does that occur?**

Yes. Before December 1 of each year, mayors of all cities and incorporated towns with a mayor-council form of government must submit to the governing body of those cities a

proposed budget. That proposed budget should be for January 1 through December 31 of the following year. Ark. Code Ann. § 14-58-201.

Further, it is mandatory for the governing body of the municipality to adopt a budget for the operation of the city on or before February 1 of each year. See Ark. Code Ann. § 14-58-202.

The statutes contemplate that the mayor will present the council with a proposed budget as noted above, before December 1 of each year. This will enable the council to study the document, make any proposed changes and get the budget adopted before February 1 of the following year.

### **Can the budget be altered periodically?**

Yes. Under Ark. Code Ann. § 14-58-203, the governing body of the city, from time to time, may alter or revise the budget to better suit city governmental needs. There are two exceptions: Taxes that are levied for specific purposes may not be diverted for other purposes and creditors may not be prejudiced by the diversion of funds. Note that the budget need not be in the form of an ordinance, but may be established by resolution, according to Arkansas Attorney General Opinion No. 2001-230.

### **When must a city take bids in order to purchase goods or services?**

The answer depends on the class of the city affected and what ordinances the city has in effect regarding bids for purchasing. With the exception of public improvements, state law in Arkansas requires only that bids be taken for purchases in cities of the first class.

Ark. Code Ann. §14-58-303 provides that the mayor or his authorized representative has the power and responsibility to make purchases and must take bids for purchases that exceed the sum of twenty thousand dollars (\$20,000).

On the other hand, the council may waive bidding by ordinance in “exceptional cases where this procedure is deemed not feasible or practical.” Ark. Code Ann. 14-58-303 (b)(1)(B).

Note that if a city’s ordinance limits the amount of purchase to an amount less than \$20,000 before bids must be taken, the city is bound by its ordinance. In other words, a city of the first class may have an ordinance that requires the mayor to take bids if a purchase is more than \$5,000 or \$7,000. The process for this bidding is also found in this statute. Further, the purchase of insurance requires competitive bidding. See Ark. Code Ann. 14-58-304.

Cities of the second class and incorporated towns have no requirement for bidding for these kinds of purchases, although a city could pass an ordinance to require it.

Here is an exception to this rule: Cities of the first class, second class and incorporated towns must take bids for any public improvements, which include the major repair or alteration or the erection of buildings or other structures or other permanent improvements, exceeding \$20,000 in costs. This law is found at Ark. Code Ann. § 22-9-203, which also contains the procedure for taking bids for contracts for public improvements which exceed \$20,000.

### **Should we take bids for professional services?**

No city or town may use competitive bidding to procure professional services. This prohibition applies to professions such as legal, architectural, engineering and surveying, as well as other consulting services. The law containing this prohibition is found in Ark. Code Ann. §19-11-801. The procedure by which cities and towns must procure these kinds of professional services is set out in the statutes following that law. Id.

### **Can a city or town borrow money for operating purposes?**

Generally speaking, no. See Article 12, Section 4 as amended by Amendment 10 of the Arkansas Constitution. The Constitution prohibits municipalities from deficit spending or entering into any interest-bearing indebtedness. Any city official violating these constitutional prohibitions may face criminal charges. The penalties are a fine of not less than \$500 nor more than \$10,000 and the official “shall be removed from office.”

A big exception to this rule was enacted in November 2000. Arkansas voters approved amendment 78 to the state constitution, which allows for short-term financing. The amendment permits municipalities to enter into short-term financing obligations “for the purpose of acquiring, constructing, installing or renting real property or tangible personal property having an expected useful life of more than one (1) year ... ”

The financing may extend for up to five years. There is a dollar limit on the amount a city may finance: a city’s total amount of short-term obligations under the amendment may not exceed five percent of the assessed value of taxable property within the municipality. Amendment 78, along with the entire Arkansas Constitution, has a Web site, <http://www.accessarkansas.org/bank/formularate.html>.

Other statutory provisions will allow municipalities to “borrow money” via non-interest bearing “evidences of indebtedness” for ordinary operating expenses in anticipation of the collection of property tax monies. Ark. Code Ann. § 14-58-401 to 403. The uncollected property taxes serve as security for the loan and are assigned as a method of repaying the indebtedness. A second loan provision is found in Ark. Code Ann. § 19-3-401 to 403, which allows for temporary loans from the State Board of Finance which must be paid back within the calendar year.

**Can the city, using city funds, purchase employees Christmas gifts such as cash, fruit baskets, gift certificates, etc.?**

Generally speaking, no. The Attorney General has issued a series of opinions on this and other related expenditures. See Attorney General Opinion Nos. 91-410, 91-411, 93-416, 94-298, 94-317 and 94-397.

The Attorney General has pointed out that analyzing these types of situations requires very careful factual scrutiny. Because of this, if your city is facing any such issue, you should immediately contact your city attorney, or if you are a member of the Municipal Legal Defense Program, contact the League for assistance.

The law in this area is fairly well settled. Article 12, Section V of the Arkansas Constitution prevents municipalities from donating or appropriating money to private corporations, associations, institutions, or individuals.

Further, the public purpose doctrine as recognized by general case law is also applicable. It states that monies may only be spent on items that will benefit the entire public. Pursuant to these principles, the Attorney General has found that the expenditure of such monies is unconstitutional as a donation and does not serve the general public purpose.

In Attorney General Opinion No. 94-397, the Attorney General reviewed those expenditures which he believes are unlawful. They include:

Expenditures for Christmas, birthday or other parties for city employees and family members; traveling expenses of municipal officials’ spouses, flowers, gifts and cards for city employees and families; Christmas presents (hams) for employees; employee picnics; and monetary payments to employees for long, faithful service. Id. See also Attorney General Opinion Nos. 94-410 and 94-317.

**May the city donate money to private non-profit charitable organizations such as a senior citizen’s center, or boys/girls clubs?**

Recreational and youth programs are a public purpose and thus are a proper subject for municipal expenditures. See Ark. Code Ann. § 14-54-1301 (cities may operate recreational programs); Atty. Gen. Op. Nos. 96-358 (statute authorizing counties to operate recreational programs establishes them as a public purpose) and 2001-135 (providing youth recreational services is a laudable goal well within the city's discretion.)

However, the city may not donate or directly appropriate funds to a private organization, even one that is charitable or non-profit, without violating Article 12 sec. 5 of the Arkansas Constitution. That provision prohibits the appropriation of public funds to private individuals or corporations.

On the other hand, a city may enter into a contract with a private charitable organization to provide services that the city itself could provide. See Atty. Gen. Op. No. 2001-135 (Fayetteville could contract with Boy's and Girl's Club).

One factor a court might examine would be whether the city actually receives some consideration for its money. In other words, the nonprofit organization should in fact provide a service that would not exist (or would be less extensive) but for the funds received by the city. Consult with your city attorney about drafting a suitable contract.

### **Must city officials be bonded? If so, where do we purchase the bonds?**

Various statutes require city officials to be bonded. However, the legislature has established a fidelity bond program in Ark. Code Ann. §§ 21-2-701 and following. This is administered by the Arkansas Insurance Department's Risk Management Division. Premiums are deducted from state turnback funds and a certificate is sent to each mayor. Therefore, there is no need to purchase bonds from another source.

### **When may a city impose fees or taxes without an election?**

The general rule is that a city may not levy a tax without approval by the voters. Ark. Code Ann. 26-73-103. On the other hand, a city may impose a fee without an election. Telling the difference between a tax and a fee is not always easy. The Arkansas Supreme Court has stated that "a 'tax' is imposed to raise general revenue, while a 'fee' is imposed in the exercise of the city's police power." *City of Marion v. Baioni*, 312 Ark. 423, 850 S.W.2d 1 (1993). This means that a charge for a specific service or benefit is likely to be considered a fee rather than a tax.

Thus in *Barnhart v. City of Fayetteville*, 321 Ark. 197, 900 S.W.2d 539 (1995) the court held that a sanitation fee was really a tax because it was not designed to provide sanitation services within the city, but rather was dedicated to paying off the debt of another governmental entity, a waste disposal authority. In another case, the court held that a "public safety fee" designed to raise the salaries of police and firefighters was actually a tax. The court stated that this was "a payment exacted by the municipality as a contribution toward the cost of maintaining the traditional governmental functions of police and fire protection." As such, it was an invalid tax, as the voters had not approved it. *City of North Little Rock v. Graham*, 278 Ark. 547, 647 S.W.2d 452 (1983).

The Arkansas Attorney General has addressed the question of whether "municipalities, counties, or airport commissions have the power or authority to impose a gross receipts fee or tax upon the gross receipts received by a vehicle rental company operating upon airport property." The fee would vary according to the vehicle's rental rate, but "the benefit would be the same on a per-vehicle basis regardless of the amount of money charged to the customer." Therefore, the Attorney General determined that this would be a tax rather than a fee, as it was not directly related to conferring a specific benefit. Atty. Gen. Op. No. 95-100.

On the other hand, the court has upheld the validity of fees when they are charged in exchange for a specific benefit. In *Holman v. City of Dierks*, 217 Ark. 677, 233 S.W.2d 392 (1950), the court held that an annual sanitation charge of \$4 for fogging the city with an

insecticide three times a year was a fee and not a tax. The court reasoned that this was “a charge for services to be rendered. The city proposes to spray the property of its citizens and to charge the cost of this operation against those who receive its benefits.”

In the Baioni case the city was allowed to impose tapping fees that exceeded the actual cost of connecting to the water and sewer system. The city intended to use the excess funds to expand the sewer system to new users. The court stated, raising such expansion capital by setting connection charges, which do not exceed a pro rata share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, if the use of the money is limited to meeting the cost of that extension. In addition, the city was able to prove that the cost per housing unit of expanding the system was less than the total fee charged and thus reasonably related to the benefits conferred. But see Ark. Code Ann. sec. 14-56-102 (development impact fee statute enacted in 2003).

Note that some fees are specifically provided by statute. For example, the court has held that utility franchise fees, authorized by 14-200-101, are not an unlawful tax. *City of Little Rock v. AT&T Communications of the Southwest, Inc.*, 318 Ark. 616, 888 S.W.2d 290 (1994).

### **May we charge a license fee or tax on businesses from out of town doing business in our city?**

Business licenses and fees are authorized by Ark. Code Ann. § 26-77-102. However, that law does not permit the city to charge a license fee or tax if the business has a license from another Arkansas city, unless it has a place of business in more than one city.

In addition, the U.S. Supreme Court has held that a city may not charge a business license fee or tax on a person who is soliciting orders that are solely in interstate commerce. The court has held that the Commerce Clause of the Constitution prohibits a “flat sum privilege tax on an interstate enterprise whose only contact with the taxing State is the solicitation of orders and the subsequent delivery of merchandise within the taxing State. Such taxes have a substantial inhibitory effect on commerce which is essentially interstate.” *Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969) (citing *West Point Wholesale Grocery Co. v. City of Opelika*, 354 U.S. 390, (1957); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952); *Nippert v. City of Richmond*, 327 U.S. 416 (1946).

On the other hand, the Court held that the Commerce Clause did not prohibit a tax on photographers who took pictures in stores and transmitted exposed film out of state for developing, with finished pictures mailed to stores for delivery to customers. The Court found that this was not purely interstate commerce since the act of photographing the customers took place locally. *Dunbar-Stanley Studios, Inc.*, supra.

### **Must our city or town pay sales tax?**

Yes, with a few exceptions. Cities and towns are exempt from sales tax on motor vehicles, Ark. Code Ann. § 26-52-410; and on motor fuels used in municipal buses, 26-52-417. In addition, admission tickets sold by municipalities are not subject to sales tax. Ark. Code Ann. § 26-52-411.

## **FREEDOM OF INFORMATION ACT**

### **Does the Freedom of Information Act require the city to allow a citizen to inspect and copy documents showing the salaries of city employees and officials?**

Yes. Atty. Gen. Op. No. 95-070. However, certain private information such as social security numbers and payroll deductions should not be disclosed. For more information, refer to the Arkansas Freedom of Information Handbook.

**Do documents pertaining to investigation of employee misconduct have to be disclosed if requested under the Freedom of Information Act?**

Only if there has been a “final administrative resolution of any suspension or termination proceeding at which the records form a basis for the decision to suspend or terminate the employee and if there is a compelling public interest in their disclosure.” Ark. Code Ann. § 25-19-105(c). Otherwise, employee evaluation or job performance records, including preliminary notes and other materials, are not subject to disclosure. Documents involved in disciplinary proceedings are considered employee evaluation or job performance records. Atty. Gen. Op. No. 99-289.

On receiving such a request, the custodian of the records must make a decision within 24 hours whether the records should be disclosed. The requester and subject of the request must then be notified of the decision. Ark. Code Ann. § 25-19-105(c)(2). Note that the law gives the employer, the requester, or the employee the opportunity to have the attorney general review a request for personnel evaluation or job performance records. The attorney general will issue an opinion within three days of receiving the request, during which time, the records shall not be disclosed. 25-19-105(c)(3).

## **GOVERNING BODIES**

**How are city council meetings organized, and who is responsible for such organization?**

At the first council meeting of every new year, it is incumbent upon the council to organize for the following year. Ark. Code Ann. § 14-43-501. Such organization should determine how the meetings will be run, dates, times and places of meetings, how the agenda is to be set, who will set the agenda and any other procedural matters which will make the remaining meetings run more smoothly (see next question).

**Do we have to follow Roberts Rules of Order for our council meetings?**

Not necessarily. The League suggests avoiding complex rules of parliamentary procedure. The League publishes a pamphlet of suggested, simplified rules entitled Procedural Rules for Municipal Officials. The council may adopt these rules as written or modify them to meet local needs.

**We have several citizens who come to our meetings and want to address the council. They want to stand up at any time during the meeting and talk for as long as they want. They ask questions of all the council members and generally cause the meeting to go on much longer than necessary. Do we have to let citizens address the city council? Can we set up rules about how such public commentary will be taken?**

The answer to the first question is no. You do not have to allow public commentary at all. The answer to your second question is yes. The city council may establish a set of rules or otherwise structure public comments.

The law is fairly clear that a city or town council may completely prohibit public commentary during its meetings. Such commentary is considered a privilege, not a right. (For a more detailed review of the case law on this matter, see Tom Carpenter’s article,

Opening the Forum: The First Amendment and City Council Meetings, City & Town Magazine, July 1997, p. 32-33.)

Recognizing, however, that it might be politically treacherous to forbid public comments, you may wish to establish some rules. Otherwise, the formal structure of the council meeting will collapse, and the meeting will last much longer than necessary. A city or town council may establish reasonable time, place and manner restrictions on citizen comments. For example, you can set aside, either at the beginning or end of the meeting, a limited time for public commentary, allow citizens to speak for two or three minutes (keeping a timer to keep this fair and equitable is a good idea), limit the number of comments on the pro or con side of a given issue and so forth. Some cities and towns require citizens to place themselves on the agenda in order to address the council, and that requirement must be met a set number of days in advance of the meeting. Again, these are local decisions that can be made by the council in light of the needs in your particular community.

Finally, a few words of caution. First, you should never regulate the content of a citizen's speech, except to the extent that it is disorderly or does not relate to the particular issue before the council. This means, for example, that the council may not forbid someone to speak solely because of the views that person wishes to express. If you allow public comments, you may not choose which comments you are willing to hear based on the speaker's viewpoint. To do so would violate the constitutional right to freedom of speech.

In addition, make sure that you are consistent in the way that you apply your rules. In other words, apply the rules to everyone in the same manner. By establishing fair and impartial rules and applying them consistently, you will enhance the value of public comments while minimizing potential disruption and unreasonably lengthy meetings.

#### **What is the proper procedure for setting the agenda?**

This is not governed by state law. The city council may establish its own procedures or follow customary practices previously used by the city. Atty. Gen. Op. No. 96-328 (stating opinion that in absence of ordinance establishing rules on setting agenda, an ordinance or resolution need not be submitted to mayor or city attorney for advance review and approval).

#### **How many votes are needed to pass an item by a city commission? Is it a majority of the whole number or a majority of those present?**

First, look to the statute setting up the particular commission. For example, Ark. Code Ann. section 14-56-422 provides that certain votes of a municipal planning commission must pass by a majority vote of the entire commission.

Sometimes, however, the statute does not state what constitutes an acceptable majority for passage of a measure. For example, the statutes governing Advertising and Promotion Commissions or do not state what constitutes a majority. In such cases, the Arkansas Supreme Court has held:

Where no statute has required a contrary result, the courts have applied the common law rule that action may be taken by a majority of the members present, provided, of course, that they are sufficient in number to constitute a quorum of the body. *Benton County Taxpayers Assn., Inc., v. Bolain*, 252 Ark. 472, 473, 479 S.W.2d 566, 567 (1972)(quoting 45 A.L.R. 2d 716); see also Atty. Gen. Op. Nos. 2001-326, 87-273.

If a city has created a board or commission that is not governed by state statute, then the answer may be found in the ordinance creating the body. If not, the common law rule referenced in the preceding paragraph will prevail.

#### **How many votes does it take to fill a vacancy on a six-member council?**

Three. Ark. Code Ann. § 14-42-103 provides that vacancies shall be filled by a majority of the remaining members. (Emphasis added). A majority of a quorum is also required. Three votes satisfies both these requirements, see Atty. Gen. Op. No. 97-265.

**What is the difference between an ordinance and a resolution?**

An ordinance is a permanent law. A resolution is temporary in nature, and for that reason, it is more appropriately used when a city wants to make known its intent on certain matters. *Kruzich v. West Memphis Util. Comm'n.*, 257 Ark. 187, 189, 515 S.W.2d 71, 72 (1974).

Proper subjects of an ordinance would include zoning, animal control, building codes, the setting of salaries and juvenile curfews, just to name a few. Resolutions are commonly used to approve specific expenditures and contracts or to recognize an employee or citizen for distinguished service to the city.

**How many votes are needed to pass an ordinance or resolution?**

Ordinarily, a majority of the entire council is required to pass any bylaw, ordinance, resolution or order.” Ark. Code Ann. § 14-55-203. A majority is whatever number it takes to have more than half. On a five-member council, this would be three, a six-member council would require four and so forth.

Some actions require a two-thirds (2/3) vote to pass. See, for example, Ark. Const. amend. 7 (enactment of emergency clause); Ark. Code Ann. § 14-40-302 (annexation of lands contiguous to the municipality); 14-42-304 (amendments to city charter); 14-43-504; 14-44-107; 14-45-105 (override of mayor’s veto); 14-55-202 (suspending the reading requirement for ordinances); 14-55-301 (referral of ordinances to voters); 14-58-401 (borrowing against property tax in first class city); 14-164-329 (industrial development bonds not to be issued); 19-11-801 (designation of professional services); 26-77-102 (establishment of license fees and taxes).

Other statutes require a two-thirds (2/3) vote to override mayoral appointments and removals: 14-42-110 (department heads); 14-42-422 (director of department of public safety); 14-44-111 (marshal in second class city).

The two-thirds (2/3) requirement also applies to the council’s power to remove various commission and board members: 14-49-211, 14-50-210, 14-51-210 (civil service commissioner); 14-88-305 (board of improvement or member); 14-122-106 (drainage improvement district board members); 14-141-106 (auditorium commissioner); 14-184-111 (business district board members); 14-201-108 (utility commissioners); 14-234-305 (waterworks commissioners); 14-264-103 (hospital commissioners); 14-269-202 and 302 (parks commissioners);

In some cases, the law requires confirmation by a two-thirds (2/3) vote of the council for commissioners appointed by the mayor. Ark. Code Ann. § 14-201-105 (utility commissioners of first class cities); 14-234-304 (waterworks commissioners).

Note that on a six member council, a two-thirds (2/3) vote is the same as a majority: four. On other councils, a two-thirds (2/3) vote should be calculated by rounding up to the next number needed to constitute two-thirds (2/3). For example, two-thirds (2/3) of eight is 5.33, so it would take six members of an eight-member council to constitute a two-thirds (2/3) vote. See Atty. Gen. Op. No. 94-128.

**What if some members are absent. Does it then take fewer votes to pass?**

No. You still must have a majority (or in some cases, two-thirds [2/3]) of the entire council. For example, if two members of a six-member council are absent or abstain, a three-to-one vote would not be sufficient, as three is not a majority of six.

**When can the mayor vote?**

Whenever the mayor's vote is needed to pass an ordinance, bylaw, order or resolution. Ark. Code Ann. §§ 14-43-501 (first class cities); 14-44-107 (second class cities); 14-45-105 (incorporated town); see also *Gibson v. City of Trumann*, 311 Ark. 561, 845 S.W.2d 515 (1993). An obvious example is when the vote is tied, for example, three-to-three on a six-member council. The mayor could cast the fourth vote needed for passage.

A tie is not the only situation in which a mayor's vote might be needed to pass, however. For example, in question 2 we had a 3-1 vote on a six-member council. This could be the result of absence and/or abstention of two council members. We don't have a tie, but three votes is not enough for passage. The mayor may cast the fourth vote in order to pass the item.

Suppose the vote in the foregoing scenario is 2-2. The mayor cannot vote to "break the tie" because his vote would only create three in favor, again not enough on a six-member council.

There are two exceptions to the mayor's right to vote for passage of an item. The Arkansas Supreme Court has ruled that a mayor may not vote to amend or repeal an initiative measure enacted by a vote of the people. *Thompson v. Younts*, 282 Ark. 524, 669 S.W.2d 471 (1984). In addition, the mayor may not vote to enact an emergency clause. *Ops. Atty. Gen. No. 96-155; 85-174*.

### **When does an ordinance without an emergency clause go into effect?**

An ordinance with an emergency clause goes into effect immediately upon its passage. When an ordinance is passed without an emergency clause, then it will go into effect after the last day allowed for the filing of a referendum petition on the ordinance.

The time allowed for filing a referendum petition on a municipal ordinance is customarily set by a city ordinance and can be not less than 30 days nor more than 90 days after the passage of any ordinance. If the city does not have an ordinance setting the time limit for filing a referendum petition, any ordinance passed without an emergency clause will go into effect after 90 days is allowed for filing a referendum petition, or on the 91st day. Ark. Const. amend. 7; Act 1187 of 2001 (amending 14-55-203); *Clark v. Mahan*, 268 Ark. 37, 594 S.W.2d 7 (1980); *Paving Dist. No. 36 v. Little*, 170 Ark. 1160, 282 S.W. 971 (1926).

## **UTILITIES**

### **What happens to our utility deposits that go unclaimed by customers who move away?**

They need to be turned over to the state under the Unclaimed Property Act, Ark. Code Ann. §§ 18-28-201– 230. Utility deposits are presumed abandoned if unclaimed within year after the deposit becomes payable. Ark. Code Ann. § 18-28-202(12). The city must make a report of and deliver any unclaimed property to the Auditor of State before November 1 of each year for the 12 months preceding July 1 of that year. 18-28-207. However, the city may charge a reasonable "dormancy charge" from deposits that are presumed abandoned if there is a written contract between the city and customer so providing and if the city "regularly imposes the charge, which is not regularly reversed or cancelled." Ark. Code Ann. § 18-28-205.

Note that the unclaimed property law only applies only to refundable deposits. It does not apply to any connection or startup fees that a city may impose on new service. An ordinance creating a connection fee could state that it is nonrefundable so that there will not be any misunderstanding by the customer. However, any such fee would not apply retroactively to customers who are already online.