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**TOWN OF FOXFIELD**  
**MEMORANDUM**

**TO: MAYOR AND BOARD OF TRUSTEES**

**FROM: COREY Y. HOFFMANN, TOWN ATTORNEY** 

**DATE: MAY 7, 2020**

**RE: BOARD OF TRUSTEES' ORIENTATION**

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The purpose of this Memorandum is to provide an introduction for some members of the Board, and a review for others, of the various legal issues associated with the Town's structure as a statutory town.

1. Form of Government

The Town of Foxfield is a statutory town within the meaning of C.R.S. § 31-4-301, *et seq.* As such, the "legislative and corporate authority" of the Town is vested in the Board of Trustees. The Board of Trustees is then required pursuant to C.R.S. § 31-4-304 to:

... appoint a clerk, treasurer, and town attorney, or shall provide by ordinance for the election of such officers, and may appoint such other officers, including a town administrator, as it deems necessary for the good government of the corporation...

In addition, the Town has a contract Town Administrator, and thus much of the discussion will address the effect of that decision on the operations of the Town as a legal entity as described below.

Statutory municipalities such as the Town of Foxfield derive their authority from state law and they are creatures of statute. The powers of a statutory municipality are generally described by C.R.S. § 31-15-103(2) as follows:

**(2) All such municipalities shall have the powers, authority and privileges granted by this title and any other law of this state together with such *implied and incidental powers, authority and privileges as may be reasonably necessary, proper, convenient, or useful to the exercise thereof.* All such powers, authority and privileges are subject to the restrictions and limitations provided for in this title and in any other law of this state.**

Title 31 then contains grants of various powers and functions to a municipality including, by way of example, grants of administrative powers [C.R.S. § 31-15-201, *et seq.*], financial powers [C.R.S. § 31-15-301, *et seq.*], police powers [C.R.S. § 31-15-401, *et seq.*], authority to regulate businesses [C.R.S. § 31-15-501], authority to adopt building and fire codes [C.R.S. § 31-15-601, *et seq.*], authority regarding public buildings and property [C.R.S. § 31-15-701, *et seq.*], and authority regarding zoning and subdivision [C.R.S. § 31-23-101, *et seq.*].

The other laws of the State of Colorado that apply to the Town in addition to those in Title 31 are of course many and varied, and include by way of example, the Colorado Open Meetings Law, C.R.S. § 24-6-401, *et seq.* ["political subdivision of the state" defined by C.R.S. § 24-6-402(1)(c) to include a "town"], the Colorado Open Records Act, C.R.S. § 24-72-200.1, *et seq.* ["political subdivision" defined by C.R.S. § 24-72-202(5) to include a "town"], and the Colorado Code of Ethics, C.R.S. § 24-18-101, *et seq.* ["local government" defined by C.R.S. § 24-18-102(5) to include a "town"] to name a few.

The framework above is outlined because the laws regulating municipalities also serve to provide the parameters for municipal liability and governmental immunity. To greatly oversimplify, so long as the Town and its elected and appointed officials are acting within the general parameters of the scope of corporate authority set forth in Colorado law, the Town is generally immune from liability in tort, subject to a very few statutory exceptions applicable to the Town. In addition, so long as the individual board members and Town employees are acting within the scope of their respective positions, such individuals are protected from individual liability. C.R.S. § 24-10-110.

Moreover, as it relates to the relationship between the Board of Trustees and the Town Administrator, having a contract Town Administrator provides that the administrative functions and duties of the Town are vested in the Town Administrator including generally the following: (1) responsibility for the efficient administration of the town; (2) supervision of the enforcement of all laws and ordinances; and (3) responsibility for recommending an annual budget and keeping the Board of Trustees apprised of the financial condition of the Town. This delegation of the administrative functions of the Town to a Town Administrator allows the Board of Trustees to focus on the "bigger picture" legislative and quasi-judicial activities defined below.

While I will discuss these issues in more detail at the June 4, 2020 meeting, what follows is an outline of the difference between quasi-judicial versus legislative functions of the Board of Trustees. This discussion will further act as the "backdrop" for the discussion at the June 4, 2020 meeting.

## 2. Decision Making Process – Quasi Judicial Versus Legislative Functions

The operation of the Board of Trustees can generally be broken up into two functions, one is a legislative function, and the other is a quasi-judicial function.

The Board of Trustees is acting in a legislative capacity or exercising legislative authority when it acts upon a general rule or policy which is applicable to an open class of individuals, interests or situations. *Snyder v. Lakewood*, 189 Colo. 421, 542 P.2d 371 (1975). The Board of Trustees is acting in a legislative capacity when it acts, for example, on budget and finance; or the adoption of general ordinances, such as smoking, nuisances or signs. Generally, any ordinance of general application that will be incorporated into the Town of Foxfield Municipal Code is legislative in nature.

However, when a general rule is applied to specific individuals, interests, or situations, this is an exercise of quasi-judicial authority. The Board of Trustees (and a Planning Commission or the Board of Adjustment) is acting in a quasi-judicial capacity when they act upon a rezone, variance, subdivision, or site plan.

The earmarks of quasi-judicial action are well established in numerous Colorado appellate decisions, an example of which is as follows:

*Snyder v. City of Lakewood*, 189 Colo. 421, 542 P.2d 371 (1975) sets out a test for determining when an agency action is "judicial or quasi-judicial" and subject to certiorari review.

Under the *Snyder* test, the action of an agency will be deemed quasi-judicial for 106(a)(4) purposes if:

- (1) A state or local law requires that the body give adequate notice to the community before acting;
- (2) A state or local law requires that the body conduct a public hearing pursuant to notice at which time concerned citizens must be given an opportunity to be heard and present evidence; and
- (3) A state or local law requires the body to make a determination by applying the facts of a specific case to certain criteria established by law.

*See also, City and County v. Eggert*, 647 P.2d 216, 221 (Colo. 1982); *Cherry Hills Resort Development Co. v. City of Cherry Hills Village*, 757 P.2d 622, 626-628 (Colo. 1988).

The important distinction between legislative action and quasi-judicial action is that the courts apply a more lenient or "hands off" approach in their review of legislative decisions. The court's hands off approach to review legislative actions stems from a concern for the separation of powers between what is a judicial action which the courts are capable of reviewing, versus legislative action, which the courts are neither capable or equipped to review. This concern for separation of powers has manifested itself into what has become a traditional rule – a court will not inquire into legislators' motives in making a decision.

On the other hand, the courts have shown a willingness to inquire into motives where the court felt the action taken was quasi-judicial in nature. *See, City of Colorado Springs v. District Court In and For El Paso County*, 184 Colo. 177, 519 P.2d 98 (1973) (Court held that the City Council in denying a requested zoning change was acting in a quasi-judicial capacity and therefore the District Court had jurisdiction to decide whether the City Council acted arbitrarily and capriciously, or abused its discretion, or failed to pursue its authority in a regular way). Therefore, where the action to be taken by the Board of Trustees is quasi-judicial in nature, as set out above, the courts will inquire into the motives of the decision maker. As a result the matters discussed below should be considered for quasi-judicial proceedings.

A. *Ex Parte* Contacts

The members of the Board of Trustees may use their own personal knowledge in deciding a specific matter before the Board of Trustees. Whenever personal knowledge is relied upon in deciding a specific case, e.g., the facts known to the Board Members and not otherwise disclosed, it should be recited in and made a part of the record. The reasons for requiring that personal knowledge be disclosed on the record are two-fold: (1) a reviewing court will not consider a Board's alleged special knowledge used in making its decision where neither the facts the Board relied on, nor the nature of the special information appears in the record; and (2) it has been held that due process is denied unless the Board's knowledge is disclosed in time to afford an opportunity for an applicant or other interested party to challenge their personal knowledge.

Although it is not improper for a Board Member to have personal knowledge of a specific property as a resident of the Town, it is not proper to discuss with someone not a member of the Board or staff the merits of an application which is to be the subject matter of a quasi-judicial proceeding. It is most strenuously recommended that as a Board Member, you do not discuss with any person outside the confines of the public hearing (staff excluded) the subject matter of a quasi-judicial proceeding.

This type of contact is improper because you are sitting in the role of a judge in a quasi-judicial proceeding. As you are aware, judges may only make decisions based upon the evidence that is presented at trial. This requirement is based upon the fundamental need for fairness and the constitutional right to due process. For the reason that you are adjudicating the rights of others in a quasi-judicial proceeding, you may only consider the evidence that is represented at the public hearing in making a decision. Some of the exceptions to this rule were discussed above.

#### B. Conflicts of Interest

There are many possible conflicts of interest in quasi-judicial matters which make it impossible to establish any definitive rule as to whether an interest is improper. Therefore, a determination of whether an interest is improper must be based on the factual circumstances of each case. As a consequence, only guidelines can be provided that will aid in the avoidance of conflicts of interest.

Associational ties, personal interest or financial interests may create a real or perceived conflict of interest. One test, used by the courts in determining if there was an improper conflict of interest, is to base their decision not on whether the decision maker was in fact influenced by a relationship, but whether such a relationship would appear to a disinterested observer to have compromised the decision maker's impartiality. *See, Save a Valuable Environment v. City of Bothell*, 89 Wash.2d 862, 576 P.2d 401, 407-08 (1978).

As a general rule of thumb, any time a Board Member has any potential conflict of interest, whether it is a personal interest, financial interest, family or business relationship, with respect to a quasi-judicial proceeding, such potential conflict of interest should be made a part of the record. Once the potential conflict of interest is made a part of the record, the Board Member should not vote on the matter or try to influence the vote of the other members unless a majority of the Board Members determine that there is no conflict of interest.

In the event the Board Member personally feels that this potential conflict of interest will substantially influence his decision in a quasi-judicial matter, he should disqualify himself. In addition, if the Board of Trustees decides that it appears that a potential conflict of interest will substantially influence the decision of the Board Member, then official action should be taken to disqualify that person.

#### C. Prejudgment

In quasi-judicial proceedings, the role of the Board of Trustees is analogous to that of a judge who is required to hear facts and objectively apply pre-established standards such as statutes, ordinances, or other applicable law. However, in the realm of land use decision making, it is unlikely that Board Members will be totally without opinions concerning the development of their community. Therefore, to avoid the appearance of pre-judgment, it is recommended that the Board

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of Trustees allow all testimony and evidence to be presented. In addition, Board Members should avoid making statements which indicate that they are operating under pre-judgment; for example, "informing opposing speakers that they are just wasting their time in testifying."

3. Conclusion

The above is intended to provide a framework for our discussion scheduled for June 4, 2020. I am also happy to address any other questions the Board may have. If you have any questions in advance, please do not hesitate to contact me.