TOWN OF PAONIA

WEDNESDAY, AUGUST 17, 2022
SPECIAL TOWN BOARD MEETING AGENDA
4:30 PM

VIRTUAL MEETING LINK HERE: HTTPS://US02WEB.ZOOM.US/J/83998074596

MASKS ARE RECOMMENDED BUT NOT REQUIRED

Roll Call

Approval of Agenda

Announcements

Unfinished Business

Modification of the Mountain Harvest Festival Events Scheduled for Grand Avenue

New Business

Resolution 2017-06 Rules of Conduct

Adjournment

Adjournment

AS ADOPTED BY:
TOWN OF PAONIA, COLORADO
RESOLUTION NO. 2017-10 – Amended May 22, 2018

I. RULES OF PROCEDURE

Section 1. Schedule of Meetings. Regular Board of Trustees meetings shall be held on the second and fourth Tuesdays of each month, except on legal holidays, or as re-scheduled or amended and posted on the agenda prior to the scheduled meeting.

Section 2. Officiating Officer. The meetings of the Board of Trustees shall be conducted by the Mayor or, in the Mayor's absence, the Mayor Pro-Tem. The Town Clerk or a designee of the Board shall record the minutes of the meetings.

Section 3. Time of Meetings. Regular meetings of the Board of Trustees shall begin at 6:30 p.m. or as scheduled and posted on the agenda. Board Members shall be called to order by the Mayor. The meetings shall open with the presiding officer leading the Board in the Pledge of Allegiance. The Town Clerk shall then proceed to call the roll, note the absences and announce whether a quorum is present. Regular Meetings are scheduled for three hours, and shall be adjourned at 9:30 p.m., unless a majority of the Board votes in the affirmative to extend the meeting, by a specific amount of time.

Section 4. Schedule of Business. If a quorum is present, the Board of Trustees shall proceed with the business before it, which shall be conducted in the following manner. Note that all provided times are estimated:

(a) Roll Call - (5 minutes)
(b) Approval of Agenda - (5 minutes)
(c) Announcements (5 minutes)
(d) Recognition of Visitors and Guests (10 minutes)
(e) Consent Agenda including Approval of Prior Meeting Minutes (10 minutes)
(f) Mayor's Report (10 minutes)
(g) Staff Reports: (15 minutes)
- **(1) Town Administrator's Report**
- **(2) Public Works Reports**
- **(3) Police Report**
- **(4) Treasurer Report**

(h) Unfinished Business (45 minutes)
(i) New Business (45 minutes)
(j) Disbursements (15 minutes)
(k) Committee Reports (15 minutes)
(l) Adjournment

*** This schedule of business is subject to change and amendment.**

Section 5. Priority and Order of Business. Questions relative to the priority of business and order shall be decided by the Mayor without debate, subject in all cases to an appeal to the Board of Trustees.

Section 6. Conduct of Board Members. Town Board Members shall treat other Board Members and the public in a civil and polite manner and shall comply with the Standards of Conduct for Elected Officials of the Town. Board Members shall address Town Staff and the Mayor by his/her title, other Board Members by the title of Trustee or the appropriate honorific (i.e.: Mr., Mrs. or Ms.), and members of the public by the appropriate honorific. Subject to the Mayor's discretion, Board Members shall be limited to speaking two times when debating an item on the agenda. Making a motion, asking a question or making a suggestion are not counted as speaking in a debate.

Section 7. Presentations to the Board. Items on the agenda presented by individuals, businesses or other organizations shall be given up to 5 minutes to make a presentation. On certain issues, presenters may be given more time, as determined by the Mayor and Town Staff. After the presentation, Trustees shall be given the opportunity to ask questions.

Section 8. Public Comment. After discussion of an agenda item by the Board of Trustees has concluded, the Mayor shall open the floor for comment from members of the public, who shall be allowed the opportunity to comment or ask questions on the agenda item. Each member of the public wishing to address the Town Board shall be recognized by the presiding officer before speaking. Members of the public shall speak from the podium, stating their name, the address of their residence and any group they are representing prior to making comment or asking a question. Comments shall be directed to the Mayor or presiding officer, not to an individual Trustee or Town employee. Comments or questions should be confined to the agenda item or issue(s) under discussion. The speaker should offer factual information and refrain from obscene language and personal attacks.

Section 9. Unacceptable Behavior. Disruptive behavior shall result in expulsion from the meeting.

Section 10. Posting of Rules of Procedure for Paonia Board of Trustees Meetings. These rules of procedure shall be provided in the Town Hall meeting room for each Board of Trustees meeting so that all attendees know how the meeting will be conducted.

II. CONSENT AGENDA

Section 1. Use of Consent Agenda. The Mayor, working with Town Staff, shall place items on the Consent Agenda. By using a Consent Agenda, the Board has consented to the consideration of certain items as a group under one motion. Should a Consent Agenda be used at a meeting, an appropriate amount of discussion time will be allowed to review any item upon request.
Section 2. General Guidelines. Items for consent are those which usually do not require discussion or explanation prior to action by the Board, are non-controversial and/or similar in content, or are those items which have already been discussed or explained and do not require further discussion or explanation. Such agenda items may include ministerial tasks such as, but not limited to, approval of previous meeting minutes, approval of staff reports, addressing routine correspondence, approval of liquor licenses renewals and approval or extension of other Town licenses. Minor changes in the minutes such as non-material Scribner errors may be made without removing the minutes from the Consent Agenda. Should any Trustee feel there is a material error in the minutes, they should request the minutes be removed from the Consent Agenda for Board discussion.
Section 3. Removal of Item from Consent Agenda. One or more items may be removed from the Consent Agenda by a timely request of any Trustee. A request is timely if made prior to the vote on the Consent Agenda. The request does not require a second or a vote by the Board. An item removed from the Consent Agenda will then be discussed and acted on separately either immediately following the consideration of the Consent Agenda or placed later on the agenda, at the discretion of the Board.

III. EXECUTIVE SESSION

Section 1. An executive session may only be called at a regular or special Board meeting where official action may be taken by the Board, not at a work session of the Board. To convene an executive session, the Board shall announce to the public in the open meeting the topic to be discussed in the executive session, including specific citation to the statute authorizing the Board to meet in an executive session and identifying the particular matter to be discussed "in as much detail as possible without compromising the purpose for which the executive session is authorized." In the even the Board plans to discuss more than one of the authorized topics in the executive session, each should be announced, cited and described. Following the announcement of the intent to convene an executive session, a motion must then be made and seconded. In order to go into executive session, there must be the affirmative vote of two thirds (2/3) of Members of the Board.

Section 2. During executive session, minutes or notes of the deliberations should not be taken. Since meeting minutes are subject to inspection under the Colorado Open Records Act, the keeping of minutes would defeat the private nature of executive session. In addition, the deliberations carried out during executive session should not be discussed outside of that session or with individuals not participating in the session. The contexts of an executive session are to remain confidential unless a majority of the Trustees vote to disclose the contents of the executive session.

Section 3. Once the deliberations have taken place in executive session, the Board should reconvene in regular session to take any formal action decided upon during the executive session. If you have questions regarding the wording of the motion or whether any other information should be disclosed on the record, it is essential for you to consult with the Town Attorney on these matters.

IV. SUBJECT TO AMENDMENT

Section 1. Deviations. The Board may deviate from the procedures set forth in this Resolution, if, in its sole discretion, such deviation is necessary under the circumstances.
Section 2. Amendment. The Board may amend these Rules of Procedures Policy from time to time.

File Attachments for Item:

Roll Call

AGENDA SUMMARY FORM

PAONIA COLORADO	Roll Call
Summary:	
Notes:	
Possible Motions: Motion by: _____ 2nd: _____vote: _____	

Vote:	Mayor Bachran	Trustee Knutson	Trustee Valentine
Trustee Stelter	Trustee Smith	Trustee Markle	Trustee Weber

File Attachments for Item:

Agenda Approval

AGENDA SUMMARY FORM

PAONIA COLORADO	Agenda Approval
Summary:	
Notes:	
Possible Motions: Motion by: _____ 2nd: _____vote: _____	

Vote:	Mayor Bachran	Trustee Knutson	Trustee Valentine
Trustee Stelter	Trustee Smith	Trustee Markle	Trustee Weber

File Attachments for Item:

Announcements

AGENDA SUMMARY FORM

PAONIA COLORADO	Announcements
Summary:	
Notes:	
Possible Motions: Motion by: _____ 2nd: _____vote: _____	

Vote:	Mayor Bachran	Trustee Knutson	Trustee Valentine
Trustee Stelter	Trustee Smith	Trustee Markle	Trustee Weber

File Attachments for Item:

Modification of the Mountain Harvest Festival Events Scheduled for Grand Avenue

AGENDA SUMMARY FORM

Modification of the Mountain Harvest Festival Events Scheduled for Grand Avenue

Summary:
Agenda posted review of modification of changes made to Mountain Harvest Festival at the August 11, 2022 Regula Meeting under Consent Agenda.

As provided by Mayor Bachran:
Section 39:5

"...Likewise, apart from motions to *Rescind* or to *Amend Something Previously Adopted*, motions are not in order if they conflict with one or more motions previously adopted at any time and still in force. Such conflicting motions, if adopted, are null and void unless adopted by the vote required to rescind or amend the motion previously adopted."

Roberts Rules of Order, 12th Edition

Administrator Comments:

Please find included in the packet the following documents:

- Updated Mountain Harvest Festival maps
- MHF email regarding street closure & updates
- Copy of the Street Closure Application
- CIRSA opinion on Open Meetings Law (OML)
- CML Opinion of OML
- B&C Handbook Excerpt
- Legal Opinion of OML and Case Law Examples
- As provided by Trustee Weber: Ordinance 2002-06

Municipal Code Section 2-9-20 states that "All executive and *administrative* powers and duties of the Town government, except those which have been delegated to the Town *Administrator* pursuant to this Section, are vested with the Board of Trustees; provided also, that all powers and duties which have been delegated to the Town *Administrator* shall also be vested in the Board during a vacancy in the office of the Town *Administrator*."

Ordinance 2002-06 delegates power to the Administrator (Manager) to approve and issue a street closure permit within certain listed parameters, which includes no more than 5 hours. It has been the practice of Town staff, as stated on the permit application, to take any street closure outside the delegated parameters granted to the Town Administrator, to the Board of Trustees who hold all other legislative and judicial powers and duties of the Town. Although heavily debated at previous meetings, it is my opinion that the Board or Trustees has the power and ability under state Statute, Model Traffic Code Section 106(6)(b), and Town Municipal Code to hear, grant, or deny a street closure outside the parameters enumerated in Ordinance 2002-06.

AGENDA SUMMARY FORM

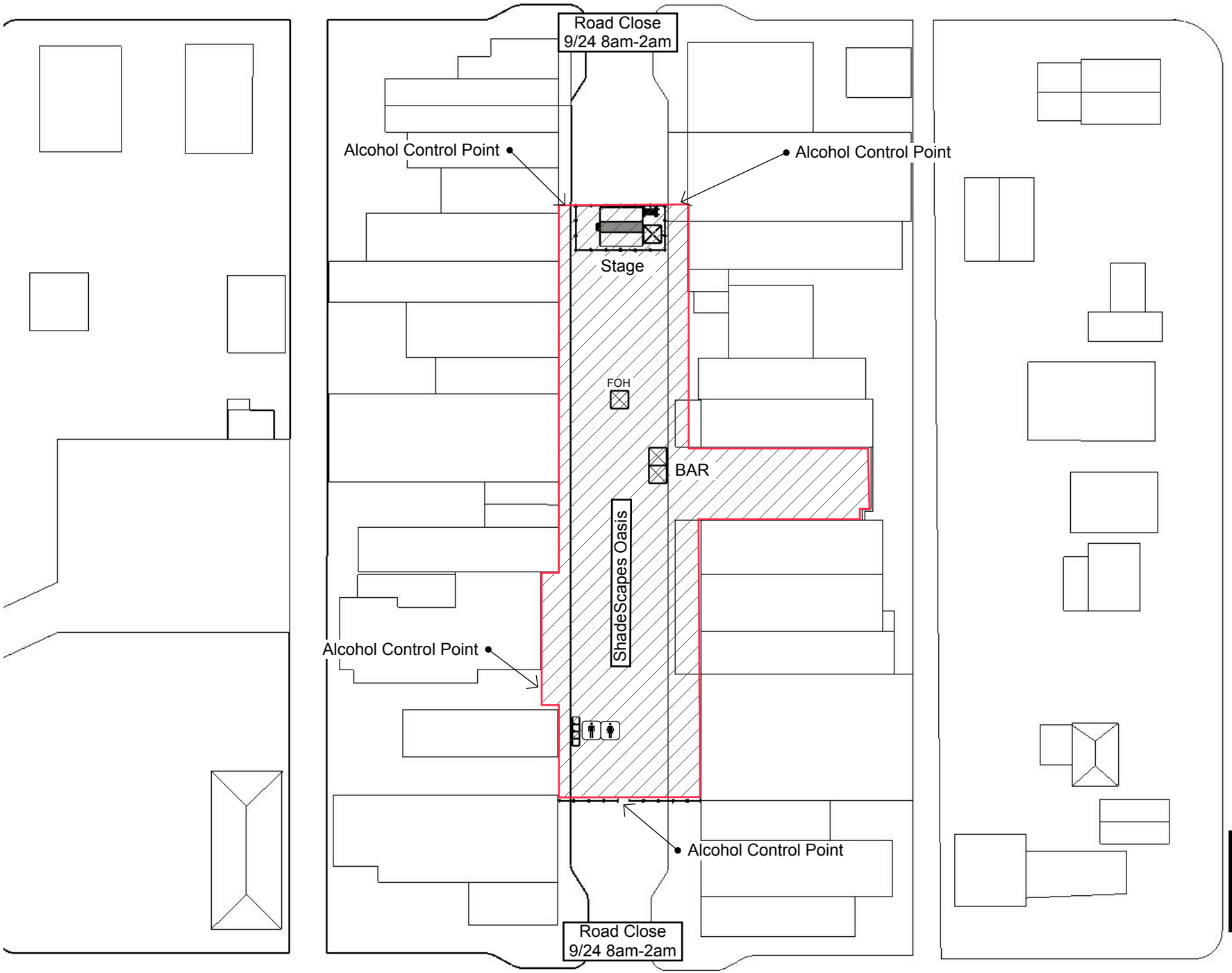
Notes:

Possible Motions:

Motion by: _____ 2nd: _____vote: _____

Vote:	Mayor Bachran	Trustee Knutson	Trustee Markle
Trustee Smith	Trustee Stelter	Trustee Valentine	Trustee Weber

AGENDA SUMMARY FORM



SITE

DRAWN BY
Judd Kleinmar

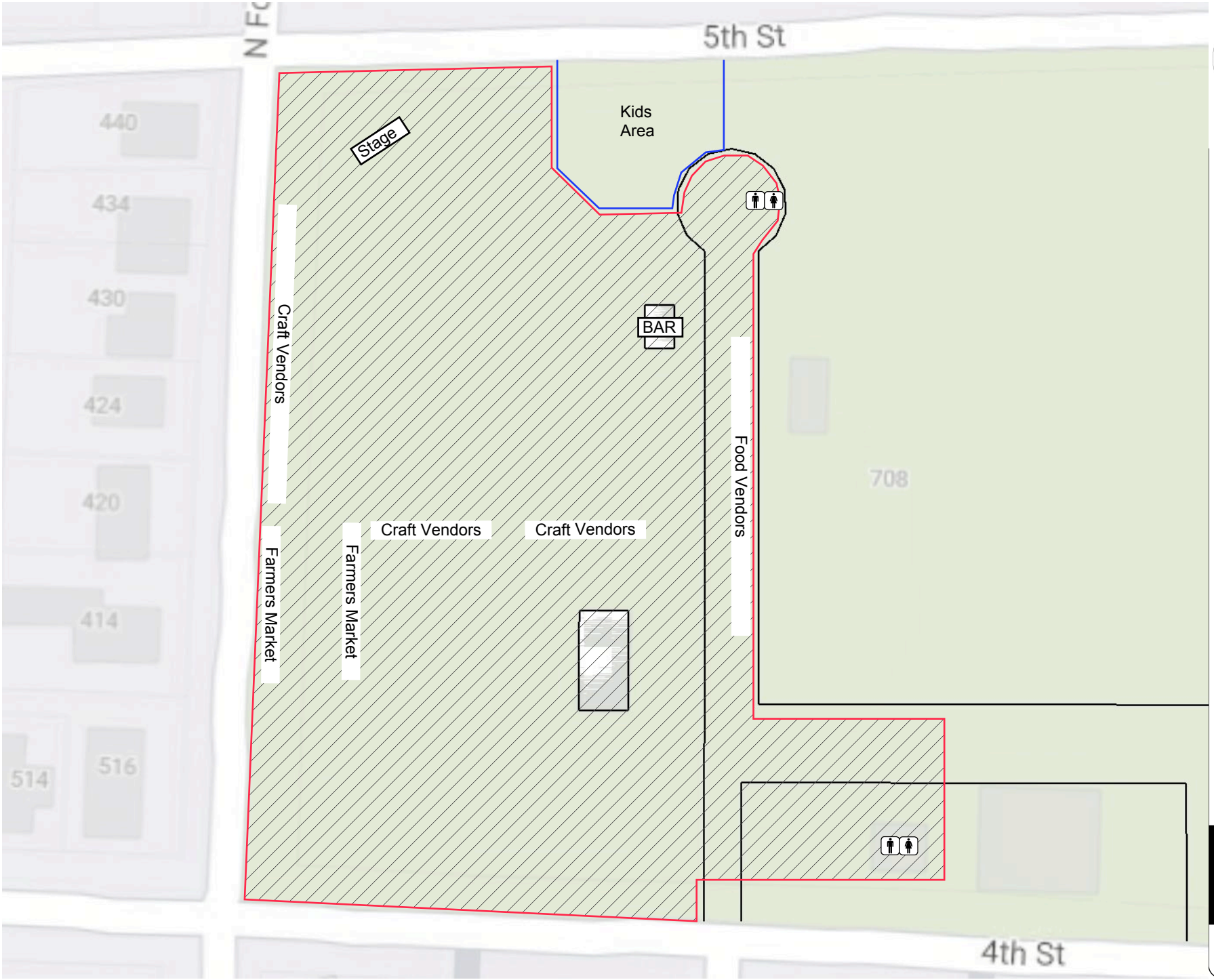
DESCRIPTION
Down Town Stage

PROJECT
MHF'22

Alcohol Control Area

a

01



DRAWN BY Judd Kleinmar
DESCRIPTION Town Park
PROJECT MHF'22

a

02

Corinne Ferguson

From: Amy DeLuca <cirquepaonia@gmail.com>
Sent: Monday, August 15, 2022 8:50 PM
To: Corinne Ferguson; Mary B
Cc: Judd Keinman; Rob Miller
Subject: Outline for MHF

Dear Corinne and Mary
My apologies for not getting this into you earlier today but I needed to confirm load in/out times for clarification on our original packet.

1. Our vision for closure was scaled back to the 200 block **ONLY** as a result of public feedback and Council concerns.
2. **NO street closure(s) will take place on Friday Sept 23rd or Sunday Sept. 25th**
3. Street closure on Saturday Sept. 24th is for 8am - 2am for the following reasons

- Our stage is scheduled to arrive between 9:30 and 10am. Lead time is to ensure the street is clear and ready for the stage.
- 1-2 hours are needed for stage set up
- 3 hrs for load in, set sound & lights
- Installation of outdoor dining area & umbrellas down the middle of Grand Ave w/multiple trailers unloading equipment, decor etc.
- Band load in and sound check 2-4p
- **"Dinner & Dancing" Music programming from 4:30- 10pm**
- Live music @ Paradise & Blue Sage 9:30 - 12 am.

*Public safety is paramount for the success of our event. Therefore we cannot remove the stage trailer or seating until the streets are cleared and everyone is safely out of the way.

4. This plan has been outlined and discussed with the police chief Laimanger.

We hope this will help the Trustees to better understand our needs and time frame for Saturday downtown. If anyone has questions or needs further

clarification of our intent please don't hesitate to reach out. Otherwise we wi see you on Wednesday at the meeting.

Sincerely,
Amy

Amy DeLuca, owner
Cirque Boutique & Gallery
***Ship: 224 Grand Ave. Suite 5**
Bill: PO Box 304
Paonia, CO. 81428
970-527-2221
Wed - Sat. 12-5p
www.cirqueboutiquepaonia.com

Town of Paonia

Application for Street Closure

Organization Name: NFVCC - Mt. Harvest Festival
Address: PO Box 143
Contact Person: Amy DELUCA Telephone #: 805-798-4806

Date of Requested Street Closure: Friday 9/23 - Sunday 9/25

Start Time	End Time	Street(s) and Block(s) Requested for Closure
9/23 4:30a 9/24 8am 9/25 8a	10 pm 10 pm 5p	100 > 200 Block grand ave + intersection o 2nd Street

Number of Participants Expected: _____

I have read the attached Street Closure Ordinance 2002-06 and fully accept all responsibilities required by the Town for this street closure. Attached to this application are the following:

- ◊ A copy of general liability insurance policy;
- ◊ A check in the amount of $25.00 per hour of street closure (minimum one hour, maximum charge, 4 consecutive hours—over 4 hours requires Board of Trustees approval)
- ◊ A check in the amount of $125.00 for deposit to be held by the Town of Paonia
- ◊ (The deposit will be returned to the applicant following the event in full if the street(s) are in the same condition prior to closure);
- ◊ Written proof of notification to all adjoining property owners and businesses; and
- ◊ Written description of any activity including vending and/or commercial occurring during the event.

Applicant Signature: Amy DeLuca Date: 6-6-22

Comments from Chief of Police or Proxy: _____

Town of Paonia Use Only

[ ] Approved [ ] Denied Date: _____

Signed: _____

Corinne Ferguson

From: Sam Light <saml@cirsa.org>
Sent: Friday, August 12, 2022 5:02 PM
To: Mary B
Cc: Corinne Ferguson; Dave K
Subject: RE: question about open meetings law

Hi Mayor, I hope all is well in Paonia. Here are a few comments on your question below:

- The Colorado Open Meetings Law (OML) requires that the Board post notice of its meetings and that "[t]he posting shall include specific agenda information where possible." Thus, I think it is best practice to state on the agenda, whenever possible, each matter that is to come before the Board for action. There is not much case law on what "where possible" means but from a risk management perspective, a conservative approach to avoiding potential disputes/claims over OML compliance is to list the matter on the agenda. Moreover, if it is not possible to state the matter on the agenda, I think the better practice in such a situation is to follow at least a two-step approach and first consider the question of a motion to reconsider (or similar motion) at one meeting and if that motion passes, to then set the actual second vote on the substantive matter for a subsequent meeting so that the matter can be but on the agenda for that subsequent meeting.

- Turning to more specific legal aspects of you question, the answer will depend in part on what rules the Board has adopted. I see the Town Code (Section 2-2-80) says meetings shall be conducted according to Robert's Rules. I am not a Robert's Rules expert but have a few comments. Unless you have a local rule stating otherwise, my understanding is that a motion to reconsider under Robert's can only be made *at the same meeting.* Thus, a request to take up a previous action at a subsequent meeting is better described as a motion to rescind or motion to amend an action previously taken. In either case, the approval of such a motion essentially "clears the deck" of the prior action, putting the Board in a position to vote again. Also, there are various rules around the motion/second, etc. for each type of motion; the article at this link may be a helpful summary of Robert's Rules around these issues: https://mrsc.org/Home/Stay-Informed/MRSC-Insight/January-2021/Using-Robert-s-Rules-to-Alter-a-Prior-Action.aspx.

- There are certain situations where reversing a vote is either simply not possible or would result in significant due process risks (separate from the question of compliance with the OML's "where possible" standard). For example, if the action under the approved motion has already been done, it can't be undone—for example, if a motion was to authorize an official to sign a contract and the official did so, that action can't be undone. On the due process point, and particularly for quasi-judicial matters, the Board should not attempt to reconsider and change a vote previously taken without it being properly noticed on an agenda and, depending on circumstances, it may be necessary to provide specific, additional notice to interested parties and potentially conduct further hearing proceedings before acting.

I apologize for not having a simple one-size-fits-all answer, but I hope this information is helpful. I am available to participate in a call if there are questions regarding my above comments. Lastly, I don't know if you currently have a Town Attorney but if so, you'll want to consult with them on this issue.

Best regards,

Sam

CIRSA
SAFERTOGETHER
Samuel J. Light
General Counsel
800.228.7136 Main
720.605.8002 Direct

From: Mary B <maryb@townofpaonia.com>
Sent: Friday, August 12, 2022 11:43 AM
To: Sam Light <saml@cirsa.org>
Cc: Corinne Ferguson <corinne@townofpaonia.com>; Dave K <DaveK@townofpaonia.com>
Subject: question about open meetings law

Sam,
Last night a situation came up that I need some advice about. A Board member who was absent at the previous meeting and objected to the vote taken on an agenda item in that meeting, brought the issue up again with nothing on the agenda and called for another vote.

My question is:
Can a Town Board reverse a previously agendized vote without putting it on the agenda?

Thanks for any help you can provide.

Mary

Corinne Ferguson

From: Mary B
Sent: Tuesday, August 16, 2022 9:01 AM
To: Corinne Ferguson
Subject: cml response
Attachments: Boards and Commissions Handbook Excerpt.pdf

From: Rachel Bender <rbender@cml.org>
Sent: Friday, August 12, 2022 2:57 PM
To: Mary B <maryb@townofpaonia.com>
Subject: RE: New form response

Hi Mary,

I am reaching out in response to your inquiry earlier today to CML. Just to make sure I am clear on your question, you are saying the town board previously voted on an item that was on the agenda; they now want to reverse that agenda item without putting it on the agenda again, correct? Assuming so, attached is an excerpt from one of the CML publications that will be helpful, talking about notice of the meeting. In short, the safest course of action is to provide notice by placing it on the agenda and addressing it at a public meeting since the Open Meetings Law applies when the public body convenes, and public business is discussed or formal action is taken. If the board desires to reverse without putting it on the agenda, I would recommend consulting with your town attorney first.

Please let me know if you need any additional assistance on this!

Thanks,
Rachel

CML | COLORADO MUNICIPAL LEAGUE

Rachel Bender
Associate Counsel
Colorado Municipal League
1144 Sherman Street
Denver, CO 80203
(303) 831-6411 · (866) 578-0936
rbender@cml.org · *www.cml.org*

From: info@cml.org <info@cml.org>
Sent: Friday, August 12, 2022 11:39 AM
To: CML <cml@cml.org>
Subject: New form response

Progress Sitefinity™

New form response

www.cml.org

Form: Contact CML
A new response was submitted on 12 August 2022, 11:38 AM.

First name	Mary
Last name	Bachran
Job title	Mayor
City or town	Paonia
Phone number	970-433-1433
Email	maryb@townofpaonia.com

Comment or Question	Can a Town Board reverse a previously agendized vote without putting it on the agenda? Thanks

View response

Meetings conducted by "telephone, electronically, or by other means of communication"

The General Assembly has included electronic, as well as "other means" of communication under the statutory definition of "meeting."[11]

The Open Meetings Law now explicitly subjects the e-mail communication of elected officials to the statutory requirements if it includes discussion of pending legislation or other public business.[12]

What this means is that the open meetings requirements apply to your board and commission, regardless of the manner in which the meeting is held. For example, if a discussion of official matters unfolds over email and a quorum of the body is included on the email, the open public meetings requirements apply.[13]

Retreats

Under the expansive definition of "meeting" in the statute, "any kind of gathering" that is held to discuss public business may qualify. Thus, if the retreat is attended by three or more members of the local public body, or by a quorum of the body (if fewer than three), and public business is discussed, the retreat qualifies as an open meeting to which requirements for notice apply.[14] Of course, an unlimited number of administrative staff members may attend the retreat, due to the specific exclusion of administrative staff from the "local public body" definition.[15]

Providing notice of the meeting

The public cannot exercise its right to attend open meetings unless given sufficient notice. Therefore, the Open Meetings Law requires that the public receive "full and timely notice" of any meeting held, and the posting shall include specific agenda information where possible.[16]

"Full and timely" notice

The statute does not explicitly specify or limit what may constitute "full and timely notice." The statute does, however, indicate that a meeting notice must be posted in the designated public place no less than twenty-four hours before the meeting.[17] The courts have found that the notice provisions of the Open Meetings Law establish a "flexible standard," the requirements

11 C.R.S. § 24-6-402(1)(b) A meeting is also described in the context of email communications, is presumed by many municipal attorneys to imply that such email communications must occur in a "chat room" format or otherwise be contemporaneous, in order to constitute a "meeting." At this writing, however, no Colorado court decision had adopted this presumption.

12 C.R.S. § 24-6-402(2)(d)(III) This requirement presents numerous potential practical problems for local government officials seeking to comply with the openness, notice, and other requirements of the Open Meetings Law, in the email context. Close consultation with the municipal attorney is advised.

13 However, electronic mail communication among elected officials that does not relate to pending legislation or other public business is not considered a meeting. C.R.S. § 24-6-402(2)(d)(III).

14 C.R.S. § 24-6-402(2)(c).

15 C.R.S.§ 24-6-402(1)(a).

16 C.R.S. § 24-6-402(2)(c),

17 C.R.S. § 24-6-402(2)(c).

of which may vary depending on the particular type of meeting involved.[18] However, the statute requires the local public body to designate the p[illegible] place where the body will post notice at its first regular meeting each y[illegible][19]

25

Emergency meetings

Unlike similar statutes from other states, the Colorado Open Meetings Law contains no reference to emergency meetings, which by their very nature present a challenge in terms of public notice. The Colorado Court of Appeals has recognized the need for municipalities to hold emergency meetings on occasion, and has upheld an ordinance providing for such meetings without prior public notice, where action taken would be ratified at a subsequent public meeting for which full and timely notice is provided.[20] The court defined an emergency as "an unforeseen combination of circumstances or the resulting state that calls for immediate action,"[21] and acknowledged that the notice requirement may be affected by the type of meeting involved.[22] While this decision finds no conflict between a local emergency meeting ordinance and the Open Meetings Law, officials should remain mindful of the law's intent and give as much notice as possible under the circumstances.

Direct notification requirements

The Open Meetings Law contains a provision requiring the clerk to maintain a list of persons who have requested, within the previous two years, direct notification of meetings, whether the request be for all meetings or only when certain specified policies will be discussed.[23]

The clerk is required to provide these persons with "reasonable advance notice" of such meetings, but the statute does not specify what sort of notice or what time frame will be considered reasonable.[24] Further, unintentional failure to give this direct notification will not invalidate actions taken at an otherwise properly published meeting.[25]

Minutes

The clerk, or other official in the clerk's absence, must take the minutes of any meeting of the local body "at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or could occur."[26] After the meeting, the minutes must be promptly recorded and are considered a public record open to inspection.[27]

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18 *Town of Marble v. Darien*, 181 P.3d 1148 (Colo. 2008) (citing Benson v. McCormick , 578 P.2d 651, 653 (Colo. 1978)); *VanAlstyne v. Housing Auth. of the City of Pueblo*, 985 P.2d 97, 100 (Colo. App. 1999).
19 C.R.S. § 24-6-402(2)(c).
20 *Lewis v. Town of Nederland*, 934 P.2d 848 (Colo. App. 1997); but *see VanAlstyne v. Housing Auth. of the City of Pueblo*, as to the limits of subsequent ratification of action taken in prior *non-emergency* meeting held without proper notice.
21 *Lewis v. Town of Nederland*, 934 P.2d 848, 851 (Colo. App. 1997) (quoting *Webster's Third New International Dictionary* 741 (1986)).
22 *Lewis v. Town of Nederland*, 934 P.2d 848, 851 (Colo. App. 1997).
23 C.R.S. § 24-6-402(7).
24 C.R.S. § 24-6-402(7).
25 C.R.S. § 24-6-402(7).
26 C.R.S. § 24-6-402(2)(d)(II).
27 C.R.S. § 24-6-402(2)(d)(II).

Corinne Ferguson

From: Mary B
Sent: Friday, August 12, 2022 12:28 PM
To: Corinne Ferguson
Subject: Fw: Notice - Agenda, etc. Please share with the Board
Attachments: Town of Marble v. Darien_ 181 P.3d 1148.PDF; Guy v. Whitsitt_ 469 P.3d 546.PDF

I called Jeff Conklin and asked him can the Board reverse a previously agendized vote without putting it on the agenda. Below is his reply.

Mary

From: Jeffrey J. Conklin <jjc@mountainlawfirm.com>
Sent: Friday, August 12, 2022 12:19 PM
To: Mary B <maryb@townofpaonia.com>
Subject: Notice - Agenda, etc.

Hi Mary,

Attached is the Colorado Supreme Court case regarding agenda notice requirements under the Colorado Open Meetings Law (COML). In short, to comply with notice requirements of COML, an ordinary member of the community should be able to understand whether an agenda item listed on the notice would include consideration of, and possible formal action on, the whatever the action is. Here, it sounds like the Permit for the Harvest Festival was not on the agenda at all. Further, it sounds like the Harvest Festival folks may have reasonably relied on the prior approval by taking steps to have the Festival at the previously approved location, including the expenditure of money. In my view, this is all legally problematic for the Town.

Also, you mentioned that there was some question regarding my firm's involvement in a CORA and COML case in the Town of Basalt that involved former Town Manager Mike Scanlon. That cased related to 4 meetings in 2016. This preceded our representation of the Town. I started representing the Town of Basalt in 2018 - https://www.aspendailynews.com/news/basalt-hires-new-town-attorney/article_5d17ca50-5fbd-11e8-8504-579b1962d0b1.html. At that point, the case had already been filed and was in the Court of Appeals. The Town was also represented by special counsel for the Appeal. That case is attached. In fact, I have cited this case in Paonia meetings in ensuring that motions to enter executive session contain as much information as possible without comprising the purpose of the executive session, not just the statutory citation. This is advice that was rejected by certain Trustees, notwithstanding this case.

Feel free to contact me with other questions.

Thanks,

Jeff

Karp.Neu.Hanlon PC
ATTORNEYS AT LAW

Jeff Conklin, ***Partner/Shareholder***

Glenwood Springs: 201 14th Street, Suite 200, P.O. Drawer 2030, Glenwood Springs, CO 81602*
Basalt: 200 Basalt Center Circle, Suite 200, Basalt, CO 81621

Aspen: 323 W. Main Street, Suite 301, Aspen, CO 81611
*Please direct mail to Glenwood Springs address.

Direct: 970.928.2124 | Main: 970.945.2261
jjc@mountainlawfirm.com | [www.mountainlawfirm.com]www.mountainlawfirm.com

Town of Marble v. Darien

Supreme Court of Colorado

April 14, 2008, Decided

Case No. 07SC01

Reporter
181 P.3d 1148 *; 2008 Colo. LEXIS 405 **

Petitioners: THE TOWN OF MARBLE, a Colorado statutory municipal corporation; THE TOWN COUNCIL OF THE TOWN OF MARBLE; and HAL SIDELINGER and ROBERT PETTIJOHN, in their official capacities as members of the Town Council, v. Respondents: LARRY DARIEN, DANA DARIEN, TOM WILLIAMS, and DAN BRUMBAUGH.

Subsequent History: Reported at *Town of Marble v. Darien, 2008 Colo. LEXIS 1409 (Colo., Apr. 14, 2008)*

Prior History: **[**1]** Certiorari to the Colorado Court of Appeals. Court of Appeals Case No. 05CA0587.

Darien v. Town of Marble, 159 P.3d 761, 2006 Colo. App. LEXIS 1918 (Colo. Ct. App., 2006)

Disposition: JUDGMENT REVERSED.

Core Terms

notice, Update, formal action, agenda, agenda item, posting, public meeting, meetings, court of appeals, public body, adjourn, marble, Quarry, reasonable manner, ordinary member, timely notice, full notice, master plan, monument, permanent structure, public business, attended

Case Summary

Procedural Posture
Respondent proposal proponents sued petitioner town and council members, alleging that the posted notice of a meeting concerning a proposal to erect a permanent monument at a town park was not full notice under the Colorado Open Meetings Law (OML), *Colo. Rev. Stat. § 24-6-401 et seq.* (2007). The Colorado Court of Appeals reversed a trial court's decision finding for the town and remanded with instructions to void the vote. The town appealed.

Overview
The notice of the meeting was full under *Colo. Rev. Stat. § 24-6-402(2)(c)* because an ordinary member of the community would have understood that the agenda item listed on the notice, the Mill Site Committee Update, would include consideration of, and possible formal action on, the proposal to erect a permanent monument in the town park. Thus, the notice sufficiently informed the public of the nature of the business to be considered. The notice did not need to precisely set forth every single item to be considered at a meeting. Moreover, the notice satisfied the requirement that specific agenda information be included in the notice where possible because the town had not made any misrepresentations concerning the action that could have been taken on the proposal. The term update, as used in the notice, indicated that a particular subject would be considered at the meeting. The OML imposed no requirement that specific advance notice be given of formal actions that could be taken, nor did it require adjournment and re-notification when the action already fell under a topic listed on the notice.

Outcome
The judgment was reversed. The trial court's order finding for the town and council members was reinstated.

LexisNexis® Headnotes

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

HN1[] **Public Information, Sunshine Legislation**

The Colorado Open Meetings Law, *Colo. Rev. Stat. § 24-6-401 et seq.* (2007), that requires public bodies to provide full notice of public meetings.

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

HN2 **Public Information, Sunshine Legislation**

The Colorado Open Meetings Law, *Colo. Rev. Stat. § 24-6-401 et seq.* (2007), requires public meetings to be open to the public at all times. *Colo. Rev. Stat. § 24-6-402(2)(a)*. A public meeting is defined as all meetings of two or more members of any state public body at which any public business is discussed or at which any formal action may be taken.

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

HN3 **Public Information, Sunshine Legislation**

See *Colo. Rev. Stat. § 24-6-402(2)(c)*.

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

HN4 **Public Information, Sunshine Legislation**

The Colorado Open Meetings Law (OML), *Colo. Rev. Stat. § 24-6-401 et seq.* (2007), states as its underlying policy that the formation of public policy is public business and may not be conducted in secret. *Colo. Rev. Stat. § 24-6-401*. For this reason, the Supreme Court of Colorado has recognized that the OML is clearly intended to afford the public access to a broad range of meetings at which public business is considered. In determining whether the notice at issue is full, the court applies an objective standard, meaning that a notice should be interpreted in light of the knowledge of an ordinary member of the community to whom it is directed. This standard is warranted by the OML's stated purpose, which is to provide fair notice of public meetings to members of the community. *Colo. Rev. Stat. §§ 24-6-401* and *24-6-402(2)(c)*.

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

HN5 **Public Information, Sunshine Legislation**

The Colorado Open Meetings Law, *Colo. Rev. Stat. § 24-6-401 et seq.* (2007), fails to define the content of the required notice. The Supreme Court of Colorado holds that the full and timely notice requirement establishes a flexible standard aimed at providing fair notice to the public, explaining that satisfaction of this standard depends upon the particular type of meeting involved.

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

HN6 **Public Information, Sunshine Legislation**

The Supreme Court of Colorado declined to impose a precise agenda requirement for purposes of the Colorado Open Meetings Law, *Colo. Rev. Stat. § 24-6-401 et seq.* (2007), because it would unduly interfere with the legislative process. The full notice requirement should not be interpreted to interfere with the ability of public officials to perform their duties in a reasonable manner. In sum, the court adopted a flexible standard that would take into account the interest in providing access to a broad range of meetings at which public business is considered, as well as the public body's need to conduct its business in a reasonable manner.

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

HN7 **Public Information, Sunshine Legislation**

Under case law interpreting the Colorado Open Meetings Law, *Colo. Rev. Stat. § 24-6-401 et seq.* (2007), a notice need not precisely set forth every single item to be considered at a meeting. Such a requirement would violate a central teaching of the case law, that public bodies be permitted to conduct business in a reasonable manner, because it would prohibit them from addressing any item not specifically listed on the notice even though the item is reasonably related to a listed

item. Thus, a notice is sufficient as long as the items actually considered at the meeting are reasonably related to the subject matter indicated by the notice.

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

HN8 **Public Information, Sunshine Legislation**

The possibility of formal action is inherent in consideration of topics at public meetings, *Colo. Rev. Stat. § 24-6-402(2)(c)*.

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

HN9 **Public Information, Sunshine Legislation**

The Colorado Open Meetings Law, *Colo. Rev. Stat. § 24-6-401 et seq.* (2007), imposes no requirement that specific advance notice be given of formal actions that might be taken.

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

HN10 **Public Information, Sunshine Legislation**

The Colorado Open Meetings Law, *Colo. Rev. Stat. § 24-6-401 et seq.* (2007), does not impose a requirement of adjournment and re-notification when the action already falls under a topic listed on the notice, and the Supreme Court of Colorado declines to impose one.

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

HN11 **Public Information, Sunshine Legislation**

The statutory provision requiring the notice to include specific agenda information where possible, *Colo. Rev. Stat. § 24-6-402(2)(c)*, simply requires the public body to include specific agenda information in its posting when it is possible to do so; that is, when that information is available at the time of posting. The statute provides that the posting shall include specific agenda information where possible. Thus, if at the time of posting, it is possible to include specific agenda information, the notice shall include that information.

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

HN12 **Public Information, Sunshine Legislation**

The Colorado Open Meetings Law, *Colo. Rev. Stat. § 24-6-401 et seq.* (2007), prohibits bad-faith circumvention of its requirements.

Administrative Law > Governmental Information > Public Information > Sunshine Legislation

HN13 **Public Information, Sunshine Legislation**

The Colorado Open Meetings Law, *Colo. Rev. Stat. § 24-6-401 et seq.* (2007), requires full notice, not full attendance.

Headnotes/Summary

Headnotes

Colorado's Open Meetings Law - notice requirement - full notice - misleading notice - agenda requirement.

Syllabus

On January 8, 2004, the town council of the Town of Marble held a public meeting at which it voted to reject a proposal for erecting a permanent monument at a local park owned by the Town. Respondents, who are proponents of the proposal, brought suit, alleging that the posted notice of the meeting was not "full" notice, as required by Colorado's Open Meetings Law, because it did not expressly state that the council would be taking formal action on the proposal. After a bench trial, the trial court found for Petitioners. The court of appeals, however, reversed and remanded with instructions to

void the January 8th vote.

The Colorado Supreme Court reverses the court of appeals. The court holds that the notice of the January 8th meeting was "full" because an ordinary member of the community would understand that the agenda item listed on the notice would include consideration of, and possible formal action on, the park proposal. In addition, the court holds that because the notice contained the agenda information available at the time of posting, it satisfied the requirement that "specific **[**2]** agenda information" be included in the notice "where possible." Consequently, the court holds that the January 8th notice complied with the Open Meetings Law.

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Carver Schwarz McNab & Bailey, LLC, Christopher Kamper, Denver, Colorado, Attorney for Amicus Curiae, Common Cause of Colorado, Inc.

Judges: JUSTICE EID delivered the Opinion of the Court. JUSTICE MARTINEZ dissents.

Opinion by: EID

Opinion

[*1149] EN BANC

This case arises from an alleged violation of a provision of *HN1*[↑] the Colorado Open Meetings Law that requires public bodies to provide full notice of public meetings. On January 8, 2004, the town council of Petitioner Town of Marble held a public meeting at which it voted to reject **[**3]** a proposal for erecting a permanent monument at Mill Site Park, a local park owned by the Town. Respondents, who are proponents of the proposal, brought suit, alleging that the posted notice of the meeting was not "full" notice, as required by the Open Meetings Law, because it did not expressly state that the council would be taking formal action on the proposal. After a bench trial, the trial court found for Petitioners. The court of appeals, however, reversed and remanded with instructions to void the January 8th vote. *See* *Darien v. Town of Marble, 159 P.3d 761, 765-66 (Colo. App. 2006)*.

We granted certiorari and now reverse the court of appeals. We hold that the notice of the January 8th meeting was "full" because an ordinary member of the community would understand that the agenda item listed on the notice -- "Mill Site Committee Update" -- would include consideration of, and possible formal action on, the Mill Site Park proposal. In addition, we hold that because the notice contained the agenda information available at the time of posting, it satisfied the requirement that "specific agenda information" be included in the notice "where possible." Consequently, we hold that the January **[**4]** 8th notice complied with the Open Meetings Law.

I.

The Town of Marble ("Town") is a small community located in Gunnison County. The Town is named for the Yule Marble Quarry ("Quarry"), which is an active marble mining operation located four miles south of the Town. In 1981, the Town acquired land where the marble from the Quarry had previously been milled. The Town developed this **[*1150]** land into Mill Site Park, a public park that currently features remnants of the old mill, as well as pictures and historical facts pertaining to marble mining and the mill.

In the spring of 2002, the Town established the Mill Site Committee ("Committee") for the purpose of developing a plan for the future use of Mill Site Park. The Committee included two members of the town council ("Council"), two members of the Marble Historical Society, and two members of the public. The Committee was advisory only, meaning that it had no power to make decisions regarding the use of Mill Site Park.

The Quarry has supplied marble for many buildings and monuments, including the Tomb of the Unknowns monument in Arlington National Cemetery. That monument is in need of repair, and in 2003, Cemetery officials approached the Quarry **[**5]** operator about the possibility of supplying marble for a new monument. The Quarry operator then began discussions with the Town, the Marble Historical Society, and others about the possibility of cutting a new block of marble for the Tomb

of the Unknowns.

The Council has five members (including the mayor) and holds monthly meetings at which it conducts all business. At the Council's meeting on October 2, 2003, the Quarry operator presented a proposal for the Tomb of the Unknowns project ("TOU project"). This proposal recommended that two blocks be quarried and that the second block be displayed permanently in Mill Site Park. The proposal was discussed under an agenda item entitled "Review Visitor Center Priority List."

The TOU project proved divisive, as some residents of the Town ardently opposed a permanent monument in Mill Site Park. A meeting was held on November 1, 2003, to discuss the Quarry operator's proposal, and witnesses described the meeting as contentious. The issue was discussed again at the Council's November 6, 2003 meeting under an agenda item entitled "Mill Site Update." The mayor at the time, Wayne Brown, informed everyone that public comment would be limited because **[**6]** the Council was not planning on taking any formal action on the proposal at the particular meeting. Thereafter, six people spoke on the TOU project -- three in favor and three in opposition.

Also at the November 6th Council meeting, Mayor Brown made two motions, both of which passed, requesting permission to purchase road signs and permission to purchase maps. Brown made both motions during discussion of the agenda item entitled "Mayor's Update." Minutes from prior Council meetings establish that the Council had previously taken formal actions under agenda items entitled "Road Update" (August 5, 2003 meeting) and "Ice Rink Update" (October 2, 2003 meeting).

The next meeting of the Committee was scheduled for November 19, 2003. Prior to that meeting, Mayor Brown requested and received, by unanimous vote, the consent of the Council to (1) define the Committee's goals and objectives, (2) remind the Committee that it was advisory only and that the Council would make all decisions regarding the use of Mill Site Park, and (3) re-appoint Committee members on the condition that they promise to be objective. Mayor Brown accomplished these three goals at the November 19th Committee meeting, and **[**7]** he further asked the Committee to seek public input concerning the TOU project and to present its findings to the Council on February 5, 2004. At this point, the co-chairs of the Committee were Petitioner Hal Sidelinger and Respondent Dana Darien. Sidelinger was also a member of the Council.

The next discussion of the TOU project occurred at the Committee's meeting on December 11, 2003. Mayor Brown rescinded the February 5th deadline in an effort to give the Committee more time to develop proposals. Committee members discussed various ideas for development of Mill Site Park, and they decided to conduct a survey of property owners and registered voters. One of the Committee members, Connie Hendrix-Manus, prepared a memorandum of ideas for the park. Also, Plaintiff's Exhibit 28 contains a chart detailing five proposed levels of park development. The memorandum and chart do not focus solely on the TOU project; rather, they discuss a wide range of park-development issues, including preservation of **[*1151]** existing historical artifacts, restoration of landscaping, addition of a visitor's center or museum, maintenance of the park's ice skating rink, and provision for development costs.

The Council **[**8]** held its regular meeting on January 8, 2004. The notice of this meeting was posted at least twenty-four hours in advance in the usual location. The notice indicated the date, time, and location of the meeting and contained an agenda. In relevant part, the agenda states:

Mill Site Committee Update Hal Sidelinger 7:30 - 7:45
. Authorization for Mill Site Committee survey expenditure(s)
. Endorse replacement of MSC member

The bottom of the notice also provides, "The next [Council] meeting will be held Thursday, February 5, 2004. The next Mill Site Committee meeting will be held Thursday, January 15 at 7:00 p.m. . . . ." The Town clerk prepared the notice using the agenda information that had been determined at the time of posting. Fifteen citizens attended the meeting; fourteen of the fifteen opposed the TOU project.

In preparation for the January 8th Council meeting, Sidelinger reviewed the Town's master plan and discussed Mill Site Park with various concerned citizens and Mayor Brown. Sidelinger concluded that he could not support the TOU project because it proposed a permanent structure in Mill Site Park, which he believed violated the Town's master plan. [1] At the meeting, Sidelinger stated **[**9]** that the focus of the Committee should change, and he made a motion that the Town

[1] The Town's master plan states, "The community does not want to host more visitors by promoting, exploiting or otherwise marketing the Mill Site as an attraction. The historic site should be left in its existing state."

not allow a permanent structure for the TOU project in Mill Site Park. The motion passed four to one. The trial court found that Sidelinger "had no preconceived intent nor plan to make the motion to withdraw support of the TOU project prior to the discussion which occurred at the meeting." The Committee conducted its January 15th meeting, and continued to meet regularly thereafter.

In February 2004, Respondents brought suit against Petitioners, alleging that the notice of the January 8th meeting was insufficient under the Colorado Open Meetings Law, *§§ 24-6- 401 to -402, C.R.S.* (2007) ("OML"). After a bench trial, the trial court held for Respondents, concluding, in an order dated February 2, 2005, that the notice of the January 8th meeting was sufficient and that the Council was not required to indicate on the agenda that it might take formal action on the TOU project.

The court of appeals **[**10]** reversed, holding "that the notice was not full, adequate, or fair under the circumstances" because it used the term "update," which the court interpreted to exclude the possibility that the Council would take formal action on the TOU project. *Darien, 159 P.3d at 765*. In addition, the court of appeals noted that by announcing the date of the Committee's next meeting, the notice "conveyed that the committee's work would continue and, hence, that there would not be a final decision regarding the project." *Id.* Finally, the court of appeals held that it was "possible" to include "specific agenda information" under *section 24-6-402(2)(c)* in this case because the Council could have adjourned, set a new meeting, and posted a new notice for that meeting that would include a specific agenda item stating that the Council would take formal action on the TOU project. *Id.* We granted certiorari and now reverse the court of appeals.

II.

A.

HN2[↑] The OML requires public meetings to be open to the public at all times. *§ 24-6-402(2)(a)*. A public meeting is defined as "[a]ll meetings of two or more members of any state public body at which any public business is discussed or at which any formal action may be **[**11]** taken." *Id.* Furthermore, the OML requires notice of public meetings as follows:

> *HN3*[↑] Any meetings at which the adoption of any proposed policy, position, resolution, rule, **[*1152]** regulation, or formal action occurs or at which a majority or quorum of the body is in attendance, or is expected to be in attendance, *shall be held only after full and timely notice to the public.* In addition to any other means of full and timely notice, a local public body shall be deemed to have given full and timely notice if the notice of the meeting is posted in a designated public place within the boundaries of the local public body no less than twenty-four hours prior to the holding of the meeting. The public place or places for posting such notice shall be designated annually at the local public body's first regular meeting of each calendar year. *The posting shall include specific agenda information where possible.*

§ 24-6-402(2)(c) (emphasis added). Here, there is no dispute that the notice to the public was "timely." Instead, the dispute focuses on whether the notice was "full."

HN4[↑] The OML states as its underlying policy that "the formation of public policy is public business and may not be conducted in secret." *§ 24-6-401*. **[**12]** For this reason, we have recognized that the OML is "clearly intended to afford the public access to a broad range of meetings at which public business is considered." *Benson v. McCormick, 195 Colo. 381, 383, 578 P.2d 651, 652 (1978)*; *accord Cole v. State, 673 P.2d 345, 347 (Colo. 1983)* (quoting *Benson*). In determining whether the notice at issue is "full," we apply an objective standard, meaning that a notice should be interpreted in light of the knowledge of an ordinary member of the community to whom it is directed. This standard is warranted by the OML's stated purpose, which is to provide fair notice of public meetings to members of the community. *See §§ 24-6-401 & -402(2)(c)*; *Benson, 195 Colo. at 383, 578 P.2d at 652*; *see also Hallmark Builders & Realty v. City of Gunnison, 650 P.2d 556, 560 (Colo. 1982)* (applying objective standard to notice of a public hearing on a zoning ordinance).

In *Benson,* we noted that *HN5*[↑] the OML fails to "define[] the content of the required notice." *195 Colo. at 383, 578 P.2d at 653*. We went on to hold that the full and timely notice requirement "establishes a *flexible standard* aimed at providing fair notice to the public," and we explained that satisfaction **[**13]** of this standard "depend[s] upon the particular type of meeting involved." *Id.* (emphasis added). In that case, the chairman of a legislative committee had posted a list of all bills that were *capable* of being considered at a

particular meeting. *Id.* A citizen challenged the adequacy of such notice, arguing that the committee chairman should be required to identify which bills would reasonably be reached at a given meeting. *Id.* We disagreed with this argument, concluding that the "full and timely notice" requirement was satisfied because "[l]egislative committee chairmen, as a practical matter, are rarely able to predict with certainty which matters will be considered at a particular meeting." *Id. at 384, 578 P.2d at 653*. ***HN6***[↑] We declined to impose a "precise agenda requirement" because it would "unduly interfere with the legislative process." *Id.* Finally, we concluded that the full notice requirement should not be interpreted to "interfere with the ability of public officials to perform their duties in a reasonable manner." *Id.* In sum, we adopted a "flexible" standard that would take into account the interest in providing access to "a broad **[**14]** range of meetings at which public business is considered," as well as the public body's need to conduct its business "in a reasonable manner."

B.

Applying *Benson's* "flexible" standard, we begin by considering the circumstances surrounding the Council's January 8th meeting. The nature of the business discussed at the meeting was the development of Mill Site Park. In particular, **[*1153]** the TOU project was discussed under the agenda item entitled "Mill Site Committee Update." [2] This title was consistent with those used in notices of previous Council meetings, where the TOU project had been discussed under agenda items entitled "Review Visitor Center Priority List" and "Mill Site Update." At the Council's November 19, 2003 meeting, the Committee was tasked with seeking public input concerning the TOU project, and the project was one of several Mill Site Park development proposals that the Committee considered at its December 11, 2003 meeting. The Committee's involvement with the TOU project was thus common knowledge, and in fact, Respondent Dana Darien was co-chair of the Committee.

Under these circumstances, an ordinary member of the Town's community would understand that the TOU project was a likely candidate for discussion under the topic "Mill Site Committee Update." And in fact, the project was discussed under that agenda item. Hal Sidelinger, co-chair of the Committee and member of the Council, was identified on the meeting notice as the person who would present the "Mill Site Committee Update." As part of his presentation, Sidelinger stated that the TOU project violated the Town's master plan because that plan did not permit permanent structures at the Mill Site. After discussion, Sidelinger moved that, consistent with the master plan, no permanent structure be erected in Mill Site Park, and the motion passed, effectively killing the TOU project. Because an ordinary member of the community would understand that the TOU project could be considered in relation to the "Mill Site Committee Update," we conclude that the notice of the January 8th meeting properly satisfied **[**16]** the OML's full notice requirement.

We observe that the notice of the January 8th meeting exceeds the notice given in the *Benson* case, which simply mentioned the bills that were capable of being considered at the particular meeting. Here, by contrast, the agenda stated that there would be a "Mill Site Committee Update," which would be reasonably understood to include consideration of the TOU project, and such consideration actually occurred. Thus, the notice sufficiently informed the public of the nature of the business to be considered. ***HN7***[↑] Under *Benson,* a notice need not precisely set forth every single item to be considered at a meeting. *195 Colo. at 384, 578 P.2d at 653*. Such a requirement would violate a central teaching of *Benson* -- that public bodies be permitted to conduct business "in a reasonable manner," *id.* -- because it would prohibit them from addressing any item not specifically listed on the notice even though the item is reasonably related to a listed item. Thus, a notice is sufficient as long as the items actually considered at the meeting are reasonably related to the subject matter indicated by the notice, which occurred in this case.

C.

Respondents argue, however, that **[**17]** the "Mill Site Committee Update" notice was not "full" notice, for two reasons. First, they argue that it was misleading because the term "update" is a term of limitation, in that it excludes the possibility that formal action of any kind could be taken with regard to the Mill Site and the TOU project. Second, they argue that it was not "full" because it failed to meet the statutory requirement that notice "shall contain specific agenda information where

[2] Two topics were listed under the "Mill Site Committee Update" agenda item: "Authorization for Mill Site Committee **[**15]** survey expenditure(s)" and "Endorse replacement of MSC member." As we discuss below, the agenda item "Mill Site Committee Update" was broad enough to include consideration of the TOU Project.

possible"; according to Respondents, it was "possible" to list the issue of whether the TOU project was consistent with the Town's master plan because the Council could have adjourned, set a new meeting, and included a more specific agenda item in the notice of that future meeting. We consider each argument in turn.

1.

According to Respondents, the term "update" suggests that the TOU project might be discussed, but not acted upon. The court of appeals agreed, concluding that by using the term "update," "the notice did not say that the Council would make a final decision and provided no basis for the public to infer that the Council would vote on whether to accept or reject the [TOU] project at its January 8 meeting." *Darien, 159 P.3d at 765*. **[**18]** We disagree with Respondents and the court of appeals, and hold that the notice was not misleading.

We note, as a preliminary matter, that the Town never promised to refrain from taking any formal action on the TOU project while **[*1154]** the Committee formulated its proposals. As Mayor Brown made clear at the November 19, 2003 Committee meeting, the Committee was merely advisory, and the Town retained full control over the decisions regarding the use of Mill Site Park. Thus, the Town did not make any misrepresentations concerning the action that could or could not be taken on the TOU project.

Nor did the use of the term "update" suggest that formal action would not be taken on the TOU project. Used in the context of the Town's notice, the term "update" indicated that a particular subject would be considered at the meeting. Here, that is exactly what happened. Sidelinger presented the "Mill Site Committee Update," which included his conclusion that the TOU project was inconsistent with the Town's master plan and his motion that the Council adopt the position that no project at the Mill Site could include a permanent structure. The Council's action on the topic was part of its consideration of **[**19]** the topic. Because ***HN8***[⬆] the possibility of formal action is inherent in consideration of topics at public meetings, *see § 24-6-402(2)(c)* (describing public meetings as, inter alia, "[a]ny meetings at which . . . formal action occurs"), the notice of the January 8th meeting did not have to state that the Council might take formal action on the TOU project.

In fact, the record shows that the Council regularly took formal action under agenda items with the word "update" in their titles. For example, at its November 6, 2003 meeting -- a meeting involving a discussion of the TOU project -- the Council took formal action twice under the agenda item entitled "Mayor's Update." Thus, the Council's past practice demonstrates that "update" was used as a word of description and did not convey any sort of limitation on the Council's ability to take formal action. The notification was not misleading, as the term "update" meant that a particular subject would be considered and potentially acted upon.

If we were to accept the Respondents' argument, and conclude that the term "update" could not be used to describe consideration of a particular topic if that consideration might lead to formal action, a public **[**20]** body such as the Town would be required to adjourn every time that consideration of an already noticed topic turned to action. At that point, the public body would be required to set a future meeting and issue a new notice of that meeting listing the fact that formal action might be taken on a particular topic. But ***HN9***[⬆] the OML imposes no requirement that specific advance notice be given of formal actions that might be taken. *Cf.* *Nev. Rev. Stat. Ann. § 241.020(2)* (2007) (requiring notices of public meetings to include, among other things, (1) the time, place, and location of the meeting; (2) an agenda with a clear and complete statement of the topics to be considered; and (3) *a description of what formal actions might be taken).* The General Assembly could have written the OML to require that specific notice of formal action be given. For example, with regard to state-agency rulemaking, it has required agencies to publish notice of (1) the time, place, and nature of any proposed rulemaking; (2) the authority for proposing the rule; and (3) "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *§ 24-4-103(3)(a), C.R.S.* (2007). Here, by contrast, **[**21]** the OML simply requires that notice be "full." That standard was satisfied in this case because the notice adequately informed the public of the subject matter of the meeting -- that is, the "Mill Site Committee Update."

Moreover, requiring the Council to adjourn, set a future meeting, and issue a new notice -- like requiring the agenda to precisely list every single item to be considered at a meeting -- would run afoul of *Benson*'s admonition that a public body be permitted to conduct its business in a reasonable manner. As noted above, the Council's discussion and consideration of a particular topic often led to action on that topic. Requiring the Council to adjourn, set a future meeting, and issue a new notice on a particular topic every time that discussion turns to action on an already noticed topic would unreasonably hamper the business and

operation of government.

Respondents also contend that because the notice of the January 8th meeting listed the date (January 15th) of the next Committee meeting, it suggested that the Committee's **[*1155]** work would continue and, by implication, that no formal action would be taken on the TOU project. The court of appeals agreed with Respondents, stating **[**22]** that "the most straightforward meaning of the notice was that the committee would continue its work at a meeting the following week." *Darien, 159 P.3d at 765*. However, the Committee actually did continue its work, as it met on January 15th and continued to meet regularly thereafter. The record demonstrates that the Committee was considering a whole host of options for the development of Mill Site Park in addition to the TOU Project, including restoration of the Park's landscaping and preservation of its existing historical artifacts. After the January 8th meeting, the Committee continued considering the options other than the TOU Project. Thus, the notice's suggestion that the Committee's work would continue did not preclude the Council's taking formal action on the TOU project at its January 8th meeting.

2.

Respondents raise a second ground to support their argument that notice was not "full" -- namely, that the notice failed to "include specific agenda information where possible," as required by the OML. *See § 24-6-402(2)(c)*. [3] Again, the court of appeals agreed with Respondents, finding that it was actually "possible" to adjourn the meeting and issue a notice of a future meeting that **[**23]** included an agenda item stating that the Council would take formal action on the TOU project. *Darien, 159 P.3d at 765*. The court reasoned that it would be "possible" to adjourn, set a future meeting, and issue a new notice because, among other things, there was a "lack of urgency" and an "absence of evidence that postponement of the decision would have unduly interfered with the ability of the [Council] to perform its duties." *Id.* In other words, according to the court of appeals, the "specific agenda information where possible" provision -- like the full notice provision -- requires a public body to adjourn, set a future meeting, and issue a new notice that includes specific notification of formal action when consideration of an already noticed topic turns to action.

For the same reasons that we disagree with the argument in the context above, we disagree with it here. ***HN10***[↑] The OML does not impose such a requirement of adjournment and re-notification when the action already falls under a topic listed on the notice, and we decline to impose one. Indeed, under the court **[**24]** of appeals' reasoning, a public body would be required to adjourn its meeting whenever there was the slightest deviation from the precise topic as stated in the notice, as it would almost always be "possible" to adjourn and meet again in the future. Again, this reading of the OML would place an unreasonable restriction on the conduct of public business by a public body.

HN11[↑] The statutory provision requiring the notice to include "specific agenda information where possible," *§ 24-6-402(2)(c)*, simply requires the public body to include specific agenda information in its posting when it is "possible" to do so -- that is, when that information is available at the time of posting. The statute provides, *"The posting* shall include specific agenda information where possible." *§ 24-6-402(2)(c)* (emphasis added). Thus, if at the time of "posting," it is "possible" to include specific agenda information, the notice "shall" include that information. Here, the requirement was met because the Town posted "specific agenda information" by including the available agenda information -- i.e., "Mill Site Committee Update" and corresponding agenda sub-items -- on the notice.

Respondents contend that our interpretation **[**25]** of the OML's "specific agenda information where possible" requirement will allow public bodies to withhold agenda items by waiting until after notice is posted to formulate the true agendas for their public meetings. We agree with Respondents that ***HN12***[↑] the OML prohibits bad-faith circumvention of its requirements, but such behavior is simply not at issue in the case at bar. The trial court found that Sidelinger "had no preconceived **[*1156]** intent nor plan to make the motion" that he did, and Respondents do not challenge this factual finding on appeal. By listing "Mill Site Committee Update," the notice satisfied the requirement that "specific agenda information" be provided where possible. [4]

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[3] The provision requiring "specific agenda information where possible" was added to the OML in 1991, after we decided *Benson.*

[4] Finally, as a general matter, Respondents point to the fact that fourteen of the fifteen citizens who attended the January 8th Council meeting opposed the TOU project. Assuming this circumstance could be relevant, it is worth noting that ***HN13***[↑] the OML requires full notice, not full attendance. Moreover, the fact that the meeting drew fourteen people who had an

III.

We hold that the January 8th notice in this case satisfied the OML's "full" notice requirement because an ordinary member of the community would understand that the "Mill Site Committee Update" agenda item would include consideration of, and possible formal action on, the TOU project. In addition, we hold that because the notice contained the agenda information available at the time of posting, it satisfied the OML's requirement that "specific agenda information" be included "where possible." Because they provided full notice of the January 8, 2004 public meeting, we therefore hold that Petitioners did not violate the OML. Consequently, we reverse the court of appeals and reinstate the trial court's order of February 2, 2005.

Dissent by: MARTINEZ

Dissent

JUSTICE MARTINEZ, dissenting.

I disagree with the majority's holding that the public received "full" notice of the January 8th meeting. At **[**27]** this meeting, the Council decided the highly contentious issue of the TOU project, and yet none of the proponents of the project attended. In my view, the notice failed to fairly inform the public that the Council would take formal action on the TOU project at this meeting. Accordingly, I dissent.

Colorado's Open Meetings Law requires that the public receive "full and timely notice" of a public meeting. *§ 24-6-402(2)(c), C.R.S.* (2007). This notice requirement establishes "a flexible standard aimed at providing fair notice to the public." *Benson v. McCormick, 195 Colo. 381, 383, 578 P.2d 651, 653 (1978)*; *see* maj. op. at 11. Thus, as the majority correctly notes, this court must apply an objective standard, assessing the notice from the perspective of "an ordinary member of the community to whom it is directed." *See* maj. op. at 11; *see also Benson, 195 Colo. at 383, 578 P.2d at 653*.

Nevertheless, the majority fails to apply this objective standard and instead incorrectly focuses on the Council's subjective intent in using the term "update" in the January 8th meeting notice. The majority notes that the term "update" in the agenda item "Mill Site Committee Update" indicated that the Council **[**28]** intended to "consider" the Committee's work, *see* maj.op. at 16, but did not have any preconceived plan to take formal action on the TOU project. *See id.* The majority also observes that the Council previously discussed the TOU project under agenda items such as "Mill Site Update," *see id.* at 13, and regularly took formal action under agenda items labeled as "update." *See id.* at 17. Hence, the majority concludes that "the term 'update' [did not] suggest that formal action would not be taken on the TOU project." *Id.* at 16.

While generally the term "update" may include taking formal action, the content of the January 8th meeting notice excluded the possibility that the Council would take formal action on the TOU project at the meeting. The notice contained an agenda item "Mill Site Committee Update" as well as a specific description of that item -- "Authorization for Mill Site Committee survey expenditure(s)" and "Endorse replacement of [Mill Site Committee] member." Moreover, the notice also stated that the next Mill Site Committee meeting would take place a week later, on January 15th.

[*1157] As used here, the term "update" modified the word "Committee" rather than the words "Mill Site," thus **[**29]** suggesting the Council would discuss housekeeping matters concerning the work of the Committee rather than the TOU project itself. Additionally, the specific description of the agenda item provided content to the word "update," which further indicated that the consideration of the Committee's work would be limited to the specified matters. Finally, while the Committee's work was not limited to the consideration of the TOU project, the TOU project was a divisive and publicized issue that was in the forefront of the Committee's activities. Thus, as used here, "update" was a term of limitation, which, read together with the information on the next Mill Site Committee meeting, strongly implied that a decision on the TOU project was not imminent. Consequently, an ordinary member of the community did not have fair notice that the Council would take formal action on the TOU project. Indeed, none of the proponents of the TOU project attended the January 8th meeting.

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interest in the TOU project actually works against Respondents' argument, as it provides some circumstantial corroboration for the conclusion that the meeting's **[**26]** notice fulfilled the OML's stated purpose of affording public access to meetings where public business is conducted. *See* ***§ 24-6-401***; *Benson, 195 Colo. at 383, 578 P.2d at 652* (stating that the OML "was clearly intended to afford the public access to a broad range of meetings at which public business is considered").

This conclusion is entirely consistent with *Benson's* requirement that providing full notice not interfere with "the ability of public officials to perform their duties in a reasonable manner." *Benson, 195 Colo. at 384, 578 P.2d at 653*. **[**30]** According to the majority, requiring that the notice include more than "Mill Site Committee Update" would in effect prevent the Council from conducting business in a reasonable manner and thus would violate *Benson. See* maj. op. at 14. However, the majority's discussion of *Benson* fails to take into account the amendment of *section 24-6-402(2)(c)*, adopted after *Benson* was decided, requiring that a notice of a public meeting be posted and that "[t]he posting . . . include specific agenda information where possible." *See* ch. 142, sec. 1, *§ 24-6-402(2)(c)*, 1991 Colo. Sess. Laws 815, 816. Following this amendment, the statute encourages, but does not require, advance planning as to what matters are going to be transacted at a public meeting.

Here, the Council indicated that the "update" would concern funding of a survey to be conducted by the Committee and replacement of a Committee member. Consequently, while the notice here exceeded the notice in *Benson* in specificity, *see* maj. op. at 14, in contrast to *Benson,* the Council limited the scope of action that might be taken with respect to the Committee's work. Holding the Council to the limitation it chose to impose on itself does not, in **[**31]** any way, restrict the Council's ability to conduct its business in a "reasonable manner." Rather, it is consistent both with *section 24-6-402(2)(c)* and *Benson.*

Because the notice of the January 8th meeting did not fairly inform the public that the Council would take formal action on the TOU project, I dissent.

End of Document

Guy v. Whitsitt

Court of Appeals of Colorado, Division One

June 11, 2020, Decided

Court of Appeals No. 19CA0125

Reporter
469 P.3d 546 *; 2020 Colo. App. LEXIS 1104 **

Theodore Guy, Plaintiff-Appellant, v. Jacque Whitsitt, in her official capacity as a member of the Town Council and Mayor of the Town of Basalt, Colorado; Town Council of the Town of Basalt, Colorado, a home rule municipality; and Pam Schilling, in her official capacity as the Town Clerk and the Records Custodian for the Public Records of the Town of Basalt, Colorado, Defendants-Appellees.

Prior History: [1]** Eagle County District Court No. 16CV30322. Honorable Russell H. Granger, Judge.

Disposition: JUDGMENT REVERSED IN PART, APPEAL DISMISSED IN PART, AND CASE REMANDED WITH DIRECTIONS.

Core Terms

executive session, attorney-client, district court, legal advice, personnel matter, records, attorney's fees, disclosure, announcement, particular matter, subject matter, communications, compromising, matters, notice, privacy, negotiations, confidential, privileged, reassign, exempt, waive

Case Summary

Overview
HOLDINGS: [1]-The town council did not comply with the notice requirements of Colorado's Open Records Act (CORA), because the town did not comply with *Colo. Rev. Stat. § 24-6-402*, when it was possible to describe at least the subject matter of what was to be discussed without waiving the attorney-client privilege and consequently, the town council's failure to provide any information beyond the statutory citation authorizing an executive session for legal advice did not comply with the statutory requirement of identifying a particular matter in as much detail as possible without compromising the executive session; [2]-The employee did not have a privacy interest in his employment contract or certain aspects of his conduct as a public employee with the town, because CORA afforded a public employee only a narrow privacy interest in his personnel file.

Outcome
Judgment reversed in part, dismiss part of the appeal, and case remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1[] **Standards of Review, De Novo Review**

A question of law is subject to de novo review.

Administrative Law > ... > Public Information > Sunshine Legislation > Open Meetings

HN2[] **Sunshine Legislation, Open Meetings**

Colo. Rev. Stat. § 24-6-402 provides that meetings of public officials to discuss or take formal action on public business must be open to the public. *Colo. Rev. Stat. § 24-6-402(1)*, *(2)*. It does, however, allow members of a local public body to discuss several topics (or matters) in executive session closed to the public.

Evidence > Privileges > Attorney-Client Privilege > Scope

HN3 **Privileges, Attorney-Client Privilege**

The common law attorney-client privilege codified at *Colo. Rev. Stat. § 13-90-107(1)(b)* (2019), extends only to confidential matters communicated by or to the client in the course of gaining counsel, advice, or direction with respect to the client's rights or obligations, It does not protect any underlying and otherwise unprivileged facts that are incorporated into a client's communication to or with his attorney.

Evidence > Privileges > Attorney-Client Privilege > Scope

HN4 **Privileges, Attorney-Client Privilege**

The attorney-client privilege ordinarily does not encompass information about the subject matter of an attorney-client communication: merely disclosing the fact that there were communications or that certain subjects were discussed, however, does not constitute a disclosure waiving the privilege. The disclosure must be of confidential portions of the privileged communications. This does not include the fact of the communication, the identity of the attorney, the subject discussed, and details of the meetings, which are not protected by the privilege.

Administrative Law > ... > Public Information > Sunshine Legislation > Open Meetings

Evidence > Privileges > Attorney-Client Privilege > Scope

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

HN5 **Sunshine Legislation, Open Meetings**

That the subject matter of an attorney-client communication is ordinarily not privileged information is evident from, among other things, how it is treated under 5 U.S.C.S. § 552(a)(4)(B) (2018) of the Freedom of Information Act, the federal counterpart of Colorado's Open Records Act, *Colo. Rev. Stat. §§ 24-72-201 to 24-72-206* (2019).

Administrative Law > ... > Public Information > Sunshine Legislation > Open Meetings

Evidence > Privileges > Attorney-Client Privilege

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

HN6 **Sunshine Legislation, Open Meetings**

Freedom of Information Act and Colorado's Open Records Act, *Colo. Rev. Stat. §§ 24-72-201 to 24-72-206* (2019) exempt from public disclosure matters encompassed in a number of evidentiary privileges, including the attorney-client privilege. *Colo. Rev. Stat. § 24-72-204(1)(a)*.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Vaughn Indexes

HN7 **Methods of Disclosure, Vaughn Indexes**

Under Freedom of Information Act, when a public entity wishes to prevent the disclosure of requested public records, the public entity must submit an affidavit identifying the documents withheld, the exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption. The affidavit is called a Vaughn index, named for the decision which first imposed the requirement.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Vaughn Indexes

HN8 **Methods of Disclosure, Vaughn Indexes**

A Vaughn index (1) requires, among other things, a specific and detailed assertion of a privilege, although the index need not be so detailed that it compromises the purposes served by the privilege; and (2) should provide a specific description of each document claimed to be privileged where, typically, the description should provide each document's author, recipient, and subject matter.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Vaughn Indexes

HN9[] **Methods of Disclosure, Vaughn Indexes**

A proper Vaughn index regarding attorney-client privilege typically includes the author's name, the recipient's name, and some description of the topic.

Administrative Law > ... > Public Information > Sunshine Legislation > Open Meetings

HN10[] **Sunshine Legislation, Open Meetings**

A public employee has a narrower expectation of privacy than other citizens, and the public has an interest in knowing employee compensation and in certain instances, employee work performance. Indeed, Colorado's Open Records Act, *Colo. Rev. Stat. §§ 24-72-201 to 24-72-206* (2019), affords a public employee only a narrow privacy interest regarding his employment, i.e., in his personnel file. *Colo. Rev. Stat. §24-72-204(3)(a)(II)(A)*. It does not, however, protect from disclosure any employment contract or any information regarding amounts paid or benefits provided under any settlement agreement pursuant to the provisions of article 19 of this title, *Colo. Rev. Stat. § 24-72-204(3)(a)(II)(B)*, or applications of past or current employees, employment agreements, any amount paid or benefit provided incident to termination of employment, performance ratings, final sabbatical reports required under *Colo. Rev. Stat. § 23-5-123*, or any compensation, including expense allowances and benefits, paid to employees by the state, its agencies, institutions, or political subdivisions, *Colo. Rev. Stat. § 24-72-202(4.5)* (2019).

Civil Procedure > ... > Judges > Inability to Proceed > Disqualification & Recusal

HN11[] **Inability to Proceed, Disqualification & Recusal**

The extraordinary request for reassignment of a judge should be granted only when there is proof of personal bias or under extreme circumstances.

Headnotes/Summary

Headnotes

***Guy, T v. Whitsitt* — Administrative Law — Colorado Sunshine Act — Open Meetings Law**

Syllabus

Under a provision in the *Colorado Open Meetings Law*, *sections 24-6-401 to -402, C.R.S. 2019*, a local public body may meet in closed, executive session if, among other things, it identifies for the public the "particular matter[s]" upon which it is to meet "in as much detail as possible without compromising the purpose for which the executive session is authorized," *§ 24-6-402(3)(a)*.

In this case, a division of the court of appeals considers whether the Town Council of Basalt complied with this provision by notifying the public only (1) that during executive session it would discuss "legal advice" and "personnel matters," *§ 24-6-402(4)(f)(I)*; and (2) of its statutory authority to discuss such matters.

The division concludes that the Town Council did not comply with the provision because it was possible to divulge some information about the subject of the legal advice or personnel matters discussed without compromising the purposes for which the executive sessions were called. The Town Council's failure to notify **[**2]** the public of any detail beyond mere recitation of a statutorily permitted topic violated the *Colorado Open Meetings Law*.

Counsel: Azizpour Donnelly, LLC, Katayoun A. Donnelly, Denver, Colorado; Killmer, Lane & Newman, LLP, Thomas D. Kelley, Denver, Colorado; Ballard Spahr, LLP, Steven D. Zansberg, Denver, Colorado, for Plaintiff-Appellant.

Law Office of Steven J. Dawes, LLC, Steven J. Dawes, Denver, Colorado, for Defendants-Appellees.

Judges: Opinion by JUDGE DAILEY. Harris and Johnson, JJ., concur.

Opinion by: DAILEY

Opinion

[*548] In this action to enforce the *Colorado Open Meetings Law (COML)*, *sections 24-6-401 to -402, C.R.S. 2019*, plaintiff, Theodore Guy, appeals that part of the district court's judgment entered in favor of defendants, Jacque Whitsett, in her official capacity as a member of the Town Council and Mayor of the Town of Basalt; the Town Council of the Town of Basalt, Colorado, a home rule municipality; and Pam Schilling, in her official capacity as Town Clerk and Records Custodian for the public records of the Town of Basalt, Colorado (collectively, the Town Council). Guy also appeals the district court's order on attorney fees.

We reverse the judgment in part, dismiss part of the appeal, and remand for further proceedings.

I. Background

During four **[**3]** public meetings in 2016, the Town Council went into executive session to discuss a combination of four statutorily permissible topics: (1) the purchase, acquisition, lease, transfer, or sale of property interests (property interests); (2) receiving legal advice on specific legal questions (legal advice); (3) determining positions relative to matters that are or may become subject to negotiations (negotiations); and (4) personnel matters. *See § 24-6-402(4)(a)*, *(b)*, *(e)*, *(f), C.R.S. 2019*.

In its public announcement of what would be discussed in executive session, the Town Council mentioned only that it would discuss property **[*549]** interests, legal advice, negotiations, and personnel matters, and cited the statutory provisions related thereto. No information was provided about what property interests, legal advice, negotiations, or personnel matters would be discussed.[1]

Guy (1) asserted, in a letter, that under *COML* the Town Council had to identify with some degree of particularity the matters to be discussed in executive sessions and (2) requested, under *Colorado's Open Records Act (CORA)*, *sections 24-72-201 to -206, C.R.S. 2019*, records of the executive sessions. The Town Council disagreed with Guy's assertion and denied Guy's requests for records either because no records existed, or, if they did, the records were "confidential, privileged, not a public record, and not subject to disclosure."

Guy instituted the present action by filing a combined (1) application for an order under *section 24-72-204(5)(a), C.R.S. 2019*, requiring the Town Council to show cause why records of the four executive sessions should not be disclosed; and (2) a complaint under *section 24-6-402(8)* for, as pertinent here, a declaration that the Town Council had violated COML's notice requirement with respect to all four executive sessions. In his pleadings, Guy alleged that the Town Council had failed to identify, as required by *section 24-6-402(4)*, "particular matters in as much detail as possible without compromising the purpose for which the executive session is authorized . . . ."

At a show cause hearing, the Town Council's attorney confirmed that, in announcing **[**5]** executive sessions, the Town Council's practice was to recite only the statutorily permissible purposes for such sessions and "nothing more."

The Town Council's attorney also testified that a "form" used by the custodian to announce the executive sessions contains a blank space to write in details regarding the "particular matter to be discussed."[2] For the four executive sessions at issue in this case, the space in the form was left blank.

Following the hearing, the district court issued a written order. In that order, the district court determined that (1) from its review of the executive sessions' recordings, no impermissible topics were discussed; (2) pursuant to *section 24-6-402(2)(d.5)(II)(B)*, those parts of the sessions pertaining to legal advice were not recorded; (3) the "personnel matters" discussed during those sessions concerned the Town's then-acting Town Manager, Michael Scanlon;[3] (4) *section 24-6-402(4)* had

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[1] For example, for one of the announced executive sessions, the Town Council meeting agenda stated verbatim:

> 1. The purchase, acquisition, lease, transfer or sale of property interests in accordance with *C.R.S. 24-6-402(4)(a)*.
>
> 2. A conference with the Town's attorney for the purpose of receiving legal advice on specific legal questions in accordance with *C.R.S. 24-6-402(4)(b)*;
>
> 3. Determining positions relative to matters that are or may become subject to negotiations in accordance with *C.R.S. 24-6-402(4)(e)*.
>
> 4. Personnel matters **[**4]** in accordance with *C.R.S. 24-6-402(4)(f)*.

[2] The line on the form says, "2. 'The particular matter to be discussed is _.'"

[3] Scanlon intervened in the case and filed an affidavit (1)

to be interpreted as applying a "reasonableness standard" in identifying "particular matters *in as much detail as possible*" (emphasis added), because hindsight "could always find some 'possible' way to further identify [a] particular matter"; (5) there were no "special circumstances that prohibited the Town [Council] **[**6]** from making a more detailed description" of the "negotiations" and "property issues" (that is, there were no "specific market concerns or other matters that would reasonably prevent the Town [Council] from at least identifying what the property and negotiations were"); but (6) the Town Council did not have to provide any detail in announcing that "legal advice" and "personnel matters" would be discussed in executive session because of the nature of the attorney-client privilege and Scanlon's privacy **[*550]** interests.[4]

Guy now appeals.

II. The Town Council Did Not Comply with the COML

Guy contends that the district court erred in ruling that the Town Council did not have to announce any "particular matter to be discussed" in executive session beyond merely mentioning the statutorily permissible topics of legal advice and personnel matters. We agree.

In analyzing the issue before us, we are not called on to review any findings of fact by the district court because the material facts in this case are undisputed. ***HN1***[↑] Instead, we are called on to review the district court's application of the *COML*, which involves a question of law subject to de novo review. *Ledroit Law v. Kim, 360 P.3d 247, 2015 COA 114, ¶ 47*.

HN2[↑] *Section 24-6-402* provides that, generally speaking, meetings **[**7]** of public officials to discuss or take formal action on public business must be open to the public. *§ 24-6-402(1)*, *(2)*. It does, however, allow "members of a local public body" to discuss several topics (or "matters") in executive session closed to the public:

> The members of a local public body subject to this part 4, *upon the announcement by the local public body to the public of the topic for discussion in the executive session*, including specific citation to this *subsection (4)* authorizing the body to meet in an executive session and *identification of the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized*, and the affirmative vote of two-thirds of the quorum present, after such announcement, may hold an executive session only at a regular or special meeting and for the sole purpose of considering any of the following matters . . . : [listing a number of topics].

§ 24-6-402(4) (emphases added).[5]

The issue in this case is whether, by merely mentioning the "particular matter[s]" of legal advice and personnel matters, accompanied by references to their respective statutory provisions, the Town Council complied with the statutory directive **[**8]** to identify "particular matter[s]" "in as much detail as possible without compromising the purpose for which the executive session is authorized." *Id.*[6]

In effect, the district court construed *section 24-6-402(4)* to require identification of a "particular matter" "in as much detail as *reasonably* possible without compromising the purpose for which the executive

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asserting a "privacy interest" in the records of the personnel matters discussed during the executive sessions and (2) not consenting to the release of any of those records "that include discussion or reference to of [sic] any of the following related to me: employment information; educational information; performance evaluations; reasons for separation; medical information; background check information; personal history; financial information; or disciplinary records."

[4] Subsequently, the district court ruled in Guy's favor on a claim that he was entitled under ***Colorado's Open Records Act***, ***sections 24-72-201 to -206, C.R.S. 2019***, to have access to specific text messages and emails between Town Council members about Town business. Because Guy succeeded on this claim, however, it is not a subject of this appeal.

[5] Strict adherence to the procedure is important because "[i]f an executive session is not convened properly, then the meeting and the recorded minutes are open to the public." *Gumina v. City of Sterling, 119 P.3d 527, 531 (Colo. App. 2004)*.

[6] This portion of the statute was added in 2001, *see* Ch. 286, sec. 2, § 24-6-402, 2001 Colo. Sess. Laws 1072-73, presumably to address a need for further explanation of the purposes for which executive sessions are convened. *See, e.g., Estate of Brookoff v. Clark, 429 P.3d 835, 2018 CO 80, ¶ 6* ("When we interpret a statute that has been amended, we presume the statutory amendment reflects the legislature's intent to change the law."); *Peoples v. Indus. Claim Appeals Office, 457 P.3d 143, 2019 COA 158, ¶ 23* ("[W]e do not presume that the legislature used language idly . . . ." (quoting *Lombard v. Colo. Outdoor Educ. Ctr., Inc., 187 P.3d 565, 571 (Colo. 2008)*)).

session is authorized."

We need not decide whether the district court erred in interpreting the statute in this manner. Guy does not attack the sufficiency of information provided so much as he does the Town Council's *failure to provide any information* beyond the mere mention of generic statutory categories of legal advice and personnel matters.

As we read the court's order, it upheld the Town Council's bare-bones notice for legal advice and personnel matters because, in its view, the very nature of the topics precluded the disclosure of any more information. That is, divulging any more information **[*551]** about those topics would (in the language of the statute) "compromis[e] the purpose[s] for which the executive session [was] authorized." *§ 24-6-402(3)*.

In our view, the district court misapplied the statute. We address separately each of the subjects **[**9]** upon which the court found no further information was necessary to provide to the public.

A. Legal Advice

As previously noted, the district court determined that the Town Council did not need to divulge any information besides announcing that an executive session has been called to discuss legal advice. The court reached that determination after considering the purposes served by, and the scope of, the attorney-client privilege. It is the court's perceived scope of the privilege that, in our view, lies at the heart of the court's ruling: because "[t]he attorney-client privilege may extend to the subject matter itself as well as to the details," "further information was not required[.]"[7]

HN3[] The district court was mistaken. The common law attorney-client privilege codified at *section 13-90-107(1)(b), C.R.S. 2019*, "extends only to confidential matters communicated by or to the client in the course of gaining counsel, advice, or direction with respect to the client's rights or obligations," *Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215, 1220 (Colo. 1982)*. It "does not protect any underlying and otherwise unprivileged facts that are incorporated into a client's communication to [or with] his attorney[.]" *Gordon v. Boyles, 9 P.3d 1106, 1123 (Colo. 2000)*; *id. at 1124* (The attorney-client privilege does not "encompass otherwise unprivileged facts disclosed **[**10]** in attorney-client relations, and unprivileged facts cannot become privileged merely by incorporation into a communication with an attorney.").

HN4[] Of more significance here, the privilege ordinarily does not encompass information about the subject matter of an attorney-client communication:

> [m]erely disclosing the fact that there were communications or that certain subjects were discussed, however, does not constitute a . . . disclosure [waiving the privilege]. The disclosure must be of confidential portions of the privileged communications. This does not include the fact of the communication, the identity of the attorney, the subject discussed, and details of the meetings, which are not protected by the privilege.

Roberts v. Legacy Meridian Park Hosp. Inc., 97 F. Supp. 3d 1245, 1252-53 (D. Or. 2015) (quoting 2 Paul R. Rice, *Attorney-Client Privilege in the United States* § 9:30 at 153-56 (2014)); *see also United States v. O'Malley, 786 F.2d 786, 794 (7th Cir. 1986)* ("[A] client does not waive his attorney-client privilege 'merely by disclosing a subject which he had discussed with his attorney'. In order to waive the privilege, the client must disclose the communication with the attorney itself.") (citation omitted); *Motorola Sols., Inc. v. Hytera Communs. Corp., No. 17 C 1973, 2019 U.S. Dist. LEXIS 110281, 2019 WL 2774126, at *2 (N.D. Ill. July 2, 2019)* (unpublished opinion) ("Courts have consistently held that the facts surrounding attorney-client communications, including **[**11]** the fact that they occurred, their dates, topics and subject matter are discoverable and not privileged."); *GFI Sec. LLC v. Labandeira, No. 01 CIV. 00793, 2002 U.S. Dist. LEXIS 4932, 2002 WL 460059, at *7 (S.D.N.Y. Mar. 26, 2002)* (unpublished opinion) ("The attorney-client privilege is not waived if merely the fact of the communication is disclosed, the substance of the communication is not at issue, and there is no prejudice to the opposing party. The substance of privileged communications is protected while the fact that they may have occurred is not."); *C.J. Calamia Constr. Co. v. Ardco/Traverse Lift Co., No. CIV.A. 97-2770, 1998 U.S. Dist. LEXIS 10580, 1998 WL 395130, at *3 (E.D. La. July 14, 1998)* (unpublished opinion) ("[T]he attorney-client privilege attaches to the substance of the communications exchanged; mere inquiry into the subject matter of the

[7] The court reasoned that because the attorney-client privilege can be waived by the voluntary disclosure of information to a third party, "providing additional detail about those confidential discussions [in executive session] carried the risk of an assertion that confidentiality had been waived."

communications **[*552]** is not precluded."). *But see United States v. Aronoff, 466 F. Supp. 855, 861 (S.D.N.Y. 1979)* ("[T]he privilege ordinarily protects a client from having to disclose even the subject matter of his confidential communications with his attorney.").

HN5[↑] That the subject matter of an attorney-client communication is ordinarily not privileged information is evident from, among other things, how it is treated under the *Freedom of Information Act (FOIA)*, *5 U.S.C. § 552(a)(4)(B) (2018)*, the federal counterpart of *CORA*.[8]

HN6[↑] *FOIA* and *CORA* exempt from public disclosure matters encompassed in a number of evidentiary privileges, including as pertinent here, the attorney-client privilege. **[**12]** *City of Colorado Springs v. White, 967 P.2d 1042, 1056 (Colo. 1998)*; *see also § 24-72-204(1)(a)* (recognizing records are not authorized for disclosure if "such inspection would be contrary to any state statute" and the attorney-client privilege is codified in state statute).

HN7[↑] Under *FOIA*, when a public entity wishes to prevent the disclosure of requested public records, the public entity "must submit an affidavit 'identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption.'" *Burton v. Wolf, 803 F. App'x 120, 122 (9th Cir. 2020)* (quoting *Lahr v. Nat'l Transp. Safety Bd., 569 F.3d 964, 989 (9th Cir. 2009)*). The affidavit is called a *Vaughn* index, named for the decision which first imposed the requirement. *See Vaughn v. Rosen, 484 F.2d 820, 826, 157 U.S. App. D.C. 340 (D.C. Cir. 1973)*.[9]

HN8[↑] A *Vaughn* index (1) requires, among other things, a specific and detailed assertion of a privilege, although the index need not be so detailed that it compromises the purposes served by the privilege;[10] and (2) should provide a specific description of each document claimed to be privileged where, typically, the description should provide each document's author, recipient, and subject matter. *White, 967 P.2d at 1053-54*; *cf. Rein v. U.S. Patent & Trademark Office, 553 F.3d 353, 369 (4th Cir. 2009)* ("Without revealing any facts about the documents' contents, the Agencies have merely asserted their conclusion that the document is exempt, **[**13]** employing general language associated with the deliberative process privilege."); *Campaign for Responsible Transplantation v. U.S. Food & Drug Admin., 219 F. Supp. 2d 106, 112 (D.D.C. 2002)* (Short descriptions that "only provide a vague hint at the possible contents," such as "Internal Memo RE: Xeno," are insufficient.).

HN9[↑] A proper *Vaughn* index regarding attorney-client privilege typically includes the author's name, the recipient's name, and some description of the topic. *See, e.g., Leopold v. U.S. Dep't of Justice, 411 F. Supp. 3d 1094, 1104 (C.D. Cal. 2019)* (for emails sent to receive legal advice, disclosure of subject and participants and relating to testimony given by specific Federal Bureau of Investigation employees before congressional committees for distinct purposes is sufficient); *Rocky Mountain Wild, Inc. v. U.S. Forest Serv., 138 F. Supp. 3d 1216, 1224-25 (D. Colo. 2015)* (Descriptions such as "legal sufficiency review," "confidential factual and legal information," and "legal and policy advice" are "conclusory statements which do nothing more than recite the legal standard [and] fail to demonstrate a logical basis" for the claim of attorney-client privilege and "fail to provide sufficient detail[.]"); *All. of Californians for Cmty. Empowerment v. **[*553]** Fed. Hous. Fin. Agency, No. 13-CV-05618, 2014 U.S. Dist. LEXIS 190730, 2014 WL 12567153, at *1 (N.D. Cal. Sept. 4, 2014)* (remanding for the party to supply an adequate *Vaughn* index and "sufficiently detailed declarations" where the index contained entries that merely recite the elements of a claimed exemption, i.e., "[t]his document is being withheld in its entirety **[**14]** pursuant to *exemption (b)(5)*, containing deliberative process and attorney-client material"); *Carter, Fullerton & Hayes LLC v. Fed. Trade Comm'n, 520 F. Supp. 2d*

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[8] Though not identical, ***CORA*** and *FOIA* share the same purpose. "[T]hough our statutory language differs, the intent is the same: an agency cannot improperly withhold agency records, and if it does so, the courts are empowered to remedy the situation." *Wick Communs. Co. v. Montrose Cty. Bd. of Cty. Comm'rs, 81 P.3d 360, 363 (Colo. 2003)* (adopting for ***CORA*** the test from *FOIA* whether the public entity improperly withheld a public record, because *FOIA* is consistent with CORA's goals).

[9] "A *Vaughn* index is the *FOIA* equivalent of a [***C.R.C.P. 26(b)(5)(A)*** litigation] privilege log." *Rocky Mountain Wild v. U.S. Bureau of Land Mgmt., No. 18-CV-0314-WJM-STV, 2020 U.S. Dist. LEXIS 49488, 2020 WL 1333087, at *6 (D. Colo. Mar. 23, 2020)*.

[10] This requirement is substantially identical to the ***COML***, which requires a description of the particular matter "in as much detail as possible without compromising the purpose for which the executive session is authorized." ***§ 24-6-402(3)(a), C.R.S. 2019***.

134, 142 (D.D.C. 2007) (describing "Internal memo between staff attorneys of OPP deliberating/discussing whether to make recommendations to the Commission concerning the filing of an *amicus* brief" was appropriate).

Based on the reasoning in the above-mentioned authorities, we conclude that (1) it was possible (even reasonably possible) to describe *at least* the "subject matter" of what was to be discussed without waiving the attorney-client privilege, and, consequently, (2) the Town Council's failure to provide any information beyond the statutory citation authorizing an executive session for "legal advice" did not comply with the statutory requirement of identifying "a particular matter in as much detail as possible without compromising the purpose for which an executive session was called."[11] The district court erred in concluding otherwise.[12]

B. Personnel Matters

The district court determined that the Town Council could not identify with any more particularity the personnel matters to be discussed during the executive sessions because of the privacy interests of the **[**15]** Town Manager (Scanlon):

> Had the Town Council given more detail about the purpose of the discussion of the "personnel matters", i.e., the performance or continued employment of Mr. Scanlon, the Town Council may have violated Mr. Scanlon's privacy rights and breached the terms of his Employment Agreement. Evidence was presented that Mr. Scanlon has asserted a claim of retaliation for a recent announcement of an executive session involving his current employment. Thus, a more specific identification of the purpose of the executive session to discuss Mr. Scanlon's performance or continued employment would not be reasonable or possible in accordance with the statute because it would have compromised the purpose of the executive session.
>
> . . . .
>
> [D]isclosing Mr. Scanlon's employment or performance of [sic] the subject of the executive session exposed the Town to the risk that Mr. Scanlon would contend that his right to privacy would be compromised and that it would be a violation of his Employment Agreement. . . .
>
> In conclusion, this Court finds and rules that due to the specific facts in this case including the contractual provisions, Mr. Scanlon's objection to any public disclosure of his **[**16]** personnel issues, prior notice to Mr. Scanlon, and the identification that was provided, the provisions of *COML* were met and the executive sessions regarding Mr. Scanlon were properly convened. The Court also finds that given Mr. Scanlon's particular sensitivity and strong objections to any public disclosure, this Court's ruling **[*554]** would be the same even if there was not a contract between the Town and Mr. Scanlon.

We disagree with the conclusions reached by the district court. ***HN10***[↑] Driving our decision is the recognition that, as a public employee, Scanlon has a narrower expectation of privacy than other citizens, *Denver Publ'g Co. v. Univ. of Colo., 812 P.2d 682, 685 (Colo. App. 1990)*, and the public has an interest in knowing employee compensation, and, in certain instances, employee work performance. Indeed, *CORA* affords Scanlon only a narrow privacy interest regarding his employment, i.e., in his "personnel file." *See § 24-72-204(3)(a)(II)(A)* (denying, generally, the right of the public to access "personnel files").[13] It does not,

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[11] Indeed, as Guy points out in his opening brief, the Town Council subsequently started announcing the subjects of "legal advice" that would be discussed in executive session. *See, e.g.*, Basalt Town Council, *Special Meeting Minutes* 3 (Sept. 6, 2016), https://perma.cc/6AUD-AP7B (announcing that legal advice would concern "1) An August 25, 2016 ***Open Records Act*** request from Ted Guy and others; and 2) Mike Scanlon'[s] employment and his employment agreement"); Basalt Town Council, *Meeting Minutes* 4 (Oct. 18, 2016), https://perma.cc/CG6A-2SFQ (announcing that legal advice would concern "the Eagle County District Court Case Guy v. Whitsitt"). These are undisputed matters of public record, and, as such, we may take judicial notice of them. *See Peña v. Am. Family Mut. Ins. Co., 2018 COA 56, ¶ 14* (recognizing that a court may take judicial notice of public records).

[12] Our conclusion is based on the principle that "ordinarily" the subject matter of an attorney-client communication is not privileged information. To say that something is not "ordinarily' privileged, however, does not mean that it could never be privileged. We can conceive of extraordinary situations in which a colorable claim of privilege could be made regarding the very fact of a person's consultation with an attorney. This, however, is not one of them.

[13] "'Personnel files' means and includes home addresses,

however, protect from disclosure "any employment contract or any information regarding amounts paid or benefits provided under any settlement agreement pursuant to the provisions of article 19 of this title," *§ 24-72-204(3)(a)(II)(B)*, or "applications of past or current employees, **[**17]** employment agreements, any amount paid or benefit provided incident to termination of employment, performance ratings, final sabbatical reports required under *section 23-5-123*, or any compensation, including expense allowances and benefits, paid to employees by the state, its agencies, institutions, or political subdivisions," *§ 24-72-202(4.5), C.R.S. 2019*; *see also, e.g.,* Jefferson Cty. Educ. Ass'n v. Jefferson Cty. Sch. Dist. R-1, 378 P.3d 835, 2016 COA 10, ¶ 21 (holding that teachers' sick-leave records are not protected by *CORA*).

From these principles, it follows that Scanlon did not have a privacy interest in his employment contract or certain aspects, at least, of his conduct as a public employee with the Town. *See, e.g.,* Denver Publ'g Co., 812 P.2d at 684 (A settlement agreement is not protected by *CORA*: "in light of the clear intent of the *Open Records Act*, it is unreasonable for the defendants to have assumed they could restrict access to the terms of employment between a public institution and those it hires merely by placing such documents in a personnel file.").

Nonetheless, the Town Council asserts that, under the terms of its contract with Scanlon, the Town risked being sued if it provided the public any notice about anything related to Scanlon's employment. The simple answer to this, however, is that the Town may not, by contract, evade **[**18]** its statutory obligations. *Cf.* Cummings v. Arapahoe Cty. Sheriff's Dep't, 440 P.3d 1179, 2018 COA 136, ¶ 43 (contracts that abrogate statutory requirements violate public policy and are unenforceable). The Town's desire to limit its exposure to a possible legal action by Scanlon did not, in our view, justify negating the public's right to know the subject of what its officials would be discussing in secret.

For these reasons, we conclude that the Town's announcement should at least have notified the public that the personnel matters that would be discussed in executive session concerned Scanlon. The court erred in concluding otherwise.

C. Remedy

Because the Town Council did not comply with COML's notice requirements, Guy is entitled to the recordings and minutes of the executive session (to the extent they exist) involving the matters not properly noticed. *See* Gumina v. City of Sterling, 119 P.3d 527, 530 (Colo. App. 2004).

III. Attorney Fees

Section 24-6-402(9)(b) says, "[i]n any action in which the court finds a violation of this section, the court shall award the citizen prevailing in such action costs and reasonable attorney fees." The district court said that it would award Guy a reasonable amount of attorney fees only for that part of the case on which he had prevailed. But the **[*555]** court never determined an amount of fees, waiting to do so, **[**19]** as the parties requested, until this appeal was concluded. Because no amount of attorney fees has yet been awarded, there is no "final" appealable order with respect thereto. Williams v. Dep't of Pub. Safety, 369 P.3d 760, 2015 COA 180, ¶ 114. Consequently, that part of Guy's appeal concerning the district court's attorney fees order is dismissed.[14]

Guy has also requested — and is entitled to — an award of appellate costs under *C.A.R. 39* and attorney fees under *C.A.R. 39.1* and *section 24-6-402(9)(b)*.[15]

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telephone numbers, financial information, a disclosure of an intimate relationship filed in accordance with the policies of the general assembly, [and] other information maintained because of the employer-employee relationship . . . ." ***§ 24-72-202(4.5), C.R.S. 2019***. "[T]he general term of 'other information maintained because of the employer-employee relationship' only applies to those things which are of the same general kind or class as personal demographic information." Jefferson Cty. Educ. Ass'n v. Jefferson Cty. Sch. Dist. R-1, 378 P.3d 835, 2016 COA 10, ¶ 20.

[14] In any future proceeding, of course, Guy can point out to the district court that he has now prevailed on other aspects of his case as well.

[15] Contrary to the Town Council's assertion, Guy's success on his claims should not be ignored or discounted because he cited, in his briefs, an unpublished opinion from this court and unpublished decisions from other courts. In the first instance, the unpublished decision from this court was first permissibly cited for its persuasive value in the district court. *See* Patterson v. James, 454 P.3d 345, 2018 COA 173, ¶¶ 38-43. In the second instance, divisions of this court regularly cite with approval unpublished decisions from other jurisdictions. *See, e.g.*, People v. Sharp, 459 P.3d 725, 2019 COA 133, ¶ 36 n.7; Gagne v. Gagne, 459 P.3d 686, 2019 COA 42, ¶¶ 20, 36; People v. Garrison, 411 P.3d 270,2017 COA 107, ¶¶ 50,

We therefore remand the case to the district court to award Guy his costs and a reasonable amount of attorney fees incurred on appeal.

IV. Reassignment to a Different Judge

Finally, we note that Guy requests that we order further proceedings in this case be conducted by a different judge because the judge here purportedly "repeatedly evinced its disdain for citizens, like Mr. Guy, who invoke the courts' authority to compel public bodies to adhere to the law."

HN11[↑] This is an "extraordinary request," which should be granted only when "there is proof of personal bias or under extreme circumstances." *United States v. Aragon, 922 F.3d 1102, 1113 (10th Cir. 2019)* (quoting *Mitchell v. Maynard, 80 F.3d 1433, 1448 (10th Cir. 1996)*).

There is, in our view, no indication that the judge harbored any personal bias against Guy or his counsel. Nor did the judge fail to treat Guy's claims seriously or dispose of them **[**20]** in an arbitrary manner. Admittedly, the judge was skeptical about the overall value of Guy's lawsuit, saying in the order that

> • "[T]he value to the public of the required highly technical application of the law is *de minimis* in this case. This is a hyper technical ruling that places form over substance but one that is required by Colorado law."
> • "The Plaintiff stated multiple times that this was not a case about bad faith but rather a case requiring strict compliance with the statute - regardless of the practical value to the public. The Court notes the philosophical public value the case creates, but the Court also notes that in reality this case will more likely cause more harm to the public than good."[16]

But the court's comments must be viewed in context. The court had found that

> • "[i]t is beyond question that each of the executive sessions was held for a proper purpose";
> • Guy had not succeeded on claims that the notice of legal advice and personnel matters was deficient; and
> • "there may be considerable dispute regarding the reasonable amount of attorney fees that should be awarded. It is possible or even likely, that the cost of litigating the reasonableness of fees will be greater **[**21]** than the fees themselves."

Given the context in which the court made its comments, we do not perceive an attitude of "disdain" towards those who attempt to enforce the *COML*. The court's comments about the relative value of the case, philosophically and practically, were made against the backdrop of only limited **[*556]** success by Guy and the prospect of a hefty attorney fees request to be paid from the public till.

But things have changed. With Guy's success on appeal on other issues, the district court should be under no misapprehension about the value of his lawsuit.

All things considered, we have no reason to believe that (1) on remand, the judge would have substantial difficulty in casting aside his erroneous, previously expressed views; or (2) reassigning the case to a different judge is necessary to preserve the appearance of fairness. *See Aragon, 922 F.3d at 1113* (listing such considerations in the decision to reassign a matter to a different judge). Consequently, we deny Guy's request for reassignment to a different judge on remand. *See In re Kellogg Brown & Root, Inc., 756 F.3d 754, 763-64, 410 U.S. App. D.C. 382 (D.C. Cir. 2014)* ("[W]e will reassign a case only in the exceedingly rare circumstance that a district judge's conduct is 'so extreme as to display clear inability to render fair judgment.'" **[**22]** (quoting *Liteky v. United States, 510 U.S. 540, 551, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)*)).

V. Disposition

We reverse the portions of the district court's judgment determining that the Town Council did not violate COML's notice requirements for legal advice and personnel matters; dismiss the portion of Guy's appeal related to district court's attorney fee order; and remand to the district court with instructions to enter judgment for Guy on the parts of the judgment mentioned above and to award Guy his costs and reasonable attorney fees incurred on appeal.

53.

[16] The court had also commented during a hearing that (1) "at least as I read the statute, it was not the legislative intent to create a statute that would create an income stream for attorneys"; and (2) "[Y]ou can take it up with the Court of Appeals" [to tell me that you can] litigate for the sake of litigation to enrich attorneys . . . ."

JUDGE HARRIS and JUDGE JOHNSON concur.

End of Document

As provided by Trustee Weber

ORDINANCE **NO. 2002-06**

AN ORDINANCE OF THE TOWN OF PAONIA, COLORADO, AMENDING ORDINANCE NO. 2001 3.2 REGARDING STREET CLOSURE, THE CONDITIONS UPON WHICH ALLOWED AND THE PROCEDURES APPLICABLE AND PRELIMINARY THERETO.

WHEREAS, the Board of Trustees of the Town of Paonia,Colorado, have received comments of criticism of portions of Ordinance No. 2001-12 involving the closure of streets within the Town, and

WHEREAS, the Board of Trustees wishes to establish the conditions and procedures upon which a Street Closure permit may issue.

NOW, THEREFORE, BE IT ORDAINED by the Board of Trustees of the Town of Paonia, Colorado, as follows:

STREET CLOSURE PERMITS:

A. Persons and/or organizations requesting a parade or other event involving street closure within the Town limits must apply in writing to the Town Clerk for a Street Closure Permit. The Town Clerk shall submit such application to the Chief of Police, for comment, and to the Town Manager for review and denial or approval by the Town Manager.

B. The issuance of a Street Closure Permit shall be in accordance with applicable provisions herein, the provisions for street closure as set forth below, and any applicable provisions of the Ordinances of the Town regarding the private usage of public property. Such Permits are revocable by the Town Manager, the Mayor or Mayor Pro Tem,

C. The fee for submittal of a Street Closure Permit application shall be paid at the rate of $25.00 per hour of street closure, with a minimum of $25.00 and a maximum of a $100.00 fee. Additionally, there shall be a $125.00 deposit, which deposit shall be returned to the applicant subsequent to the event and upon Town Manager determination that the street and adjoining area is returned to the *same* condition as prior to the closure.

D. The application shall be submitted no less than thirty (30) days in advance of the event.

E. The Town Manager shall not approve any street closure if the Town does not have sufficient resources to properly manage the event in a manner consistent with the preservation of the public peace, health and safety and to provide for adequate traffic control, or if an adequate alternate route is not available if applicable.

F. The applicant shall provide proof of a general liability insurance policy in a minimum coverage equal to that specified in the Colorado revised Statutes Section 24-10-114 which names the Town, its officers, agents and employees as additional insureds for claims arising out of the event.

G. The closure shall be implemented and the route chosen in a manner that will cause the least inconvenience to the driving public, adjacent residents or businesses Consistent with the reasonable requirements of the event. The applicant shall submit and implement an adequate plan to control and organize the event in a manner consistent with all applicable Ordinances of the Town.

H. Applicable open container laws within the Town shall apply in all Street closure events.

I. Applicants shall also provide, as a requirement of Permit issuance, written proof of street closure notification to all adjoining property owners and businesses.

J. Applicants shall also provide a detailed description of any vending or commercial activity occurring coincident with the event. Separate Vending Permits shall not be required for all such commercial activities so described, but vendors shall be subject to all other permitting requirements, including but not limited to sales tax licenses.

K. For street closures events, the Town shall provide and install barricades and applicant shall arrange for and provide necessary trash containers.

L. Street closures shall not exceed five (5) hours in duration, except on Sundays and State of Colorado recognized holidays, when closure may occur for up to ten (10) hours,

N. The Town, upon permit approval, shall notify all emergency service providers accordingly.

INTRODUCED, READ, PASSED AND ORDERED PUBLISHED BY THE BOARD OP TRUSTEES 0F THE TOWN OF PAONIA, COLORADO, THIS DAY OF **2002.**

File Attachments for Item:

Resolution 2017-06 Rules of Conduct

AGENDA SUMMARY FORM

PAONIA COLORADO	Resolution 2017-06 Rules of Conduct

Summary:
As included at direction of Mayor Bachran.

Notes:

Possible Motions:

Motion by: _____ 2nd: _____vote: _____

Vote:	Mayor Bachran	Trustee Knutson	Trustee Markle
Trustee Smith	Trustee Stelter	Trustee Valentine	Trustee Weber

TOWN OF PAONIA, COLORADO
RESOLUTION NO. 2017-06

A RESOLUTION ESTABLISHING STANDARDS OF CONDUCT

FOR ELECTED OFFICIALS OF THE TOWN

WHEREAS, the Board of Trustees believes that the members of the Board, including the Mayor, must act at all times within the scope of their lawful authority, in accordance with the highest ethical standards, and in a manner that accords all persons with respect and dignity; and

WHEREAS, the Board desires to establish for itself, and for each member of the Board, including the Mayor, minimum standards of conduct to assure the same; and

WHEREAS, the failure to comply with such standards would constitute serious misconduct that would reflect poorly on the Town, and would detrimentally affect the credibility of the Board and the effectiveness of the Town in serving the community; and

WHEREAS, the Board intends that the standards of conduct established herein be enforceable by such consequences as will assure compliance therewith;

NOW THEREFORE, BE IT RESOLVED by the Board of Trustees of the Town of Paonia, Delta County, Colorado**,** that the following Board of Trustees Standards of Conduct are hereby adopted:

PAONIA BOARD OF TRUSTEES

STANDARDS OF CONDUCT

Section 1. **Scope of Authority.** The Mayor and each Trustee has only such authority as is conferred by applicable state statutes, and ordinances not inconsistent with such statutes. No member of the Board of Trustees, including the Mayor, shall act in a manner that exceeds such authority, including but not limited to:

a. No member shall purport to speak on behalf of the Board on any matter on which the Board has not taken a position, or represent a Board position inaccurately.
b. No member shall make commitments or promises individually on any matter for which a vote or consensus of the Board is required.
c. At Board meetings, no one member shall attempt to dominate the discussion. Each member shall strive to speak once on any topic, and then allow each other member to speak on that topic before speaking again. Members shall seek recognition from the presiding officer before speaking. Members shall primarily direct remarks at Board meetings to the Board as a whole, rather than engaging in back-and-forth arguments with another member.
d. No member shall act or attempt to act on any matter which is encompassed within the responsibilities of the Town Administrator or other staff member.
e. No member shall give orders to any staff member who reports directly or indirectly to the Town Administrator.

f. Excepting the provision in the Town Administrator's contract that he/she works under the "general supervision" of the Mayor; no member shall individually direct the work of the Town Administrator or other direct report of the Board. Any such directions shall only be given by the Board as a whole, and such direct reports shall be held accountable only for directions given by the Board as a whole.
g. The Mayor (or in the Mayor's absence the Mayor pro tem) shall be responsible for presiding over meetings of the Board. Except as otherwise specifically granted by the state statutes or ordinances not inconsistent therewith, the Mayor (and in the Mayor's absence the Mayor pro tem) shall, for all other purposes, have only the same powers as any other member of the Board.
h. Individual members may make reasonable inquiries to the Town Administrator concerning matters pertaining to their decision-making responsibilities, but shall be careful to avoid giving orders or directions.
i. Except where applicable laws or Town ordinances or resolutions specifically provide otherwise, no member shall allow or encourage any employee to disregard the chain of command within the Town, or involve himself or herself in employment matters below the level of the Board's direct reports.
j. No member shall direct or request the hiring or firing of any employee to or from any position that reports directly or indirectly to the Town Administrator.

Section 2. **Personal Conduct.** The Board of Trustees desires to serve as a positive example for civility, respect, and dignity in its dealings with one another, the Town's staff, citizens, and the business community. To that end, each member shall comply with the following standards of personal conduct:

a. Each member shall respect the rights of others to be heard and given due consideration of their views.
b. Each member shall recognize that the Mayor has the right, in consultation with the Town Administrator, to establish the agenda for all meetings.
c. No member shall berate, intimidate, or belittle others for expressing their opinions or viewpoints, or engage in speech that is inflammatory, defamatory, demeaning, bullying, or threatening.
d. No member shall make disparaging remarks about any Town employee in a public setting. While criticism about job performance may be a valid topic of discussion, members shall choose a setting appropriate for such discussion.
e. No member shall fail to comply with any provision of the Town's employee handbook with respect to the treatment of employees, including but not limited to provisions concerning prohibited harassment, discrimination, and bullying.
f. Each member shall direct all inquiries or requests for staff support to the Town Administrator, and shall respect the time limits on staff support.
g. Each member shall comply at all times with applicable state statutes, the Paonia Municipal Code and the Rules of Procedure adopted by the Board.

Section 3. **Consequences for Violation of Standards of Conduct.** Any member of the Board who violates these standards of conduct is subject to disciplinary action. Such disciplinary action shall be taken upon approval by a vote of a majority of the Board members in office. No member shall vote on any matter pertaining to his or her own discipline. The Board reserves the right to take one or more of the following steps, after consideration of the seriousness, duration, and/or repeated nature of the violation:

a. Remedial or educational training on the subject of the violation intended to avoid or prevent future violations;
b. Public warning;
c. Removal from any appointed Board position or policy liaison role;
d. A resolution of public censure;
e. A request that the member resign from his or her elected office; or
f. Removal from office in accordance with C.R.S. Section 31-4-307.

INTRODUCED, READ, PASSED, AND ADOPTED THIS 11th DAY OF APRIL, 2017.

By s/s

Corinne Ferguson, Town Clerk

By s/s

Charles Stewart, Mayor

File Attachments for Item:

Adjournment

AGENDA SUMMARY FORM

PAONIA COLORADO	Adjournment

Summary:

Notes:

Possible Motions:

Motion by: _____ 2nd: _____vote: _____

Vote:	Mayor Bachran	Trustee Knutson	Trustee Valentine
Trustee Stelter	Trustee Smith	Trustee Markle	Trustee Weber