Municipal Research News

LOCAL GOVERNMENT SUCCESS

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About MRSC

Municipal Research and Services Center (MRSC) is a nonprofit organization dedicated to proactively supporting the success of local governments through one-on-one consultation, research tools, online and in-person training, and timely, unbiased information on issues impacting all aspects of local governments.

For more than 80 years, local governments in Washington State have turned to MRSC for assistance. Our trusted staff attorneys, policy consultants, and finance experts have decades of experience and provide personalized guidance through Ask MRSC and our extensive online resources. Every year we help thousands of staff and elected officials research policies, comply with state and federal laws, and improve day-to-day operations through best practices.

Municipal Research News is published quarterly to inform, engage, and educate readers about ongoing and emerging issues. In print and online at the MRSC Insight blog, we cover such major topics as the Growth Management Act, the legalization of recreational marijuana, and the ever-evolving complexities of the Public Records Act, to name a few. When the legal landscape changes, we are here to clarify the issues and help local government leaders make the right decisions for their communities.

Washington Trivia Question

Which Washington city rolled out the first-ever police bicycle patrol unit in 1987? Answer on page 10

Your ideas and comments are appreciated. If you have news you would like to share or if you would like to write a short feature article, please contact the editor, Leah LaCivita, at lacivita@mrsc.org

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MRC HIGHLIGHTS

MRSC offers online and in-person training on a wide range of topics for local government staff with our live, interactive webinars being among our most popular option. Over 9,000 people attended an MRSC webinar in 2020. Did you happen to miss one? We’ve got you covered with our On-Demand Webinars!

PLAY IT AGAIN: OUR WEBINARS ARE READY WHEN YOU ARE

We produce roughly two webinars every month, generally 60- to 90-minutes long, featuring speakers from MRSC, Washington state and local governments — including cities, towns, counties, and special purpose districts — as well as consultants and trainers familiar with local government. We work hard to make sure the topics appeal to all local government types (cities, towns, counties, and special purpose districts) and that webinar content leaves attendees with best practices to implement as well as practical advice from the field. All of these are now available for purchase via our website, and several titles are free!

Our most popular webinar topics, like annual financial reporting or public records basics, are offered each year, updating content when needed to keep attendees knowledgeable and well-informed. We also pursue topics that seem apropos to the current challenges facing local government. For example, in 2020 we presented webinars on:

- Best practices in online public engagement,
- How to switch to online permitting,
- How the Public Records Act applies to law enforcement (as well as personnel) records,
- Overseeing public works jobsite supervision and safety,
- Applying First Amendment concerns to protests, petitions, social media, and signs,
- Using unit-price contracting, and more.

We also hosted multi-part webinar series on homelessness and affordable housing, budgeting, utility fiscal management, and local government’s role in promoting economic development, assisting local businesses, and retaining jobs.

GIVE IT A TRY!

It’s time to put on your headphones and turn up the volume. Our on-demand webinars are available when you need them and can be viewed repeatedly for a full year from the date of live webinar. All you need is a desktop, laptop, iPad, or phone and we supply any related handouts to help you follow along. Each on-demand webinar is only $30, and we offer 10 free on-demand webinar options, from our collection on the COVID-19 pandemic response for local government to building a housing needs assessment.

Check out what we have to offer if you are looking for affordable training that is targeted to your needs and experience as a local government staff or elected official. Our webinars can help you stay up-to-date on court decisions and state legislation, take a deep dive into a particularly challenging topic, or learn more about promising programs and practices that local governments across the state are offering.

Visit mrsc.org/Home/Training/On-Demand-Webinars to see the complete list of topics.

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KENNY DISEND
COVID-19 VACCINATIONS

IN THE LOCAL GOVERNMENT WORKPLACE

Planning for an eventual full return to the workplace is on everyone’s minds, and in thinking about that return, one issue being debated is the legality of requiring employees to take a COVID-19 vaccine as a condition to returning to work. We know employees can be required to take a COVID-19 test (but not a COVID-19 antibody test) in order to return to work, but what about vaccines? Although the answer appears to be “yes,” local government employers need to be aware of the laws that may impact mandatory vaccination policies, including the Americans with Disabilities Act and the Civil Rights Act of 1964.

Thus, before adoption of a mandatory vaccination program, a local government employer needs to do their due diligence on researching the issues. This article sets forth some of the main legal issues to consider.

MEDICAL ACCOMMODATIONS UNDER THE AMERICANS WITH DISABILITIES ACT

In terms of mandatory vaccination programs, the Americans with Disabilities Act (ADA) primarily comes into play with respect to: (1) an employer’s pre-screening questions asked prior to administering a vaccine, which may elicit information about a disability; (2) ADA-covered disability reasons that may prevent a person from receiving a vaccine; and (3) providing a reasonable accommodation for employees with ADA-covered disabilities that prevent them from taking a vaccine.

The U.S. Equal Employment Opportunity Commission (EEOC) recently released detailed guidance about the ADA and COVID-19 mandatory vaccination programs. Highlights from the EEOC guidance are as follows:

- The ADA permits employers to adopt qualification standards – such as a mandatory vaccination program – that prohibit employees from posing a direct threat to the health and safety of others in the workplace. In this circumstance, an unvaccinated employee could pose a direct threat to others in the workplace.
- A mandatory vaccination program may result in screening out or tending to screen out individuals with disabilities from employment because their disability prevents them from being vaccinated and, therefore, from being employed. If this occurs, the employer must show an unvaccinated employee would pose a “direct threat” to the health or safety of the employee or to others, one that cannot be eliminated or reduced by reasonable accommodation.
- If an unvaccinated employee does pose a direct threat, the employer must try to provide a reasonable accommodation for the unvaccinated employee, such as telework, so long as the accommodation does not pose an undue hardship to the employer (e.g., significant difficulty or expense).
- Prior to adopting a policy on vaccinations, local government employers should review the EEOC guidance in full, as well as Summit Law Group’s Mandatory COVID-19 Vaccination Policy Guidance for Washington Employers (www.summitlaw.com/uploads/pdf/clientalert-covidvaccineguidance20201218.pdf), which explores the direct threat and reasonable accommodation issues in greater detail.

RELIGIOUS EXEMPTIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A second issue to consider is whether Title VII of the Civil Rights Act of 1964 requires an employer to grant a religious exemption. Under Title VII of the Act, a sincerely held religious belief, practice, or observance can exempt an employee from a mandatory vaccination policy unless it imposes an undue hardship on the employer. Religious accommodations are subject to a lesser standard than medical accommodations, although the EEOC guidance recommends the employer assume an employee’s request is based on a sincerely held religious belief. The employer must provide religious accommodation — in this case, opting out of a mandatory vaccine — only if the accommodation does not pose even a de minimis burden on the employer.

CONSTITUTIONAL PROTECTIONS

The main constitutional arguments against government-mandated vaccination policies — e.g., substantive due process clause (14th Amendment), religious freedom clause (First Amendment) — apply to other state policies — e.g., substantive due process clause (14th Amendment), religious freedom clause (First Amendment) — apply to other state policies. Public health authorities have reasonably accommodated religious beliefs and practices, including requiring a religious exemption, to avoid undue burden on religious practice, or observance in situations where a direct threat is posed to religious beliefs. Public health authorities have reasonably accommodated religious beliefs and practices, including requiring a religious exemption, to avoid undue burden on religious practice, or observance in situations where a direct threat is posed to religious beliefs.

Washington State has used its police power in requiring vaccinations for children attending schools (see Chapter 28A.210 RCW), although it recognizes medical and religious exemptions. While this Washington State statute has not been subject to a constitutional challenge, similar school vaccination mandates in other states have been upheld as a valid exercise of police power (see Zucht v. Zuckert, which involved a 1920s mandatory vaccination program for school children in San Antonio, Texas, and was upheld as a constitutional exercise of city police power). Last year, in response to the measles outbreak, the State of New York eliminated the religious exemption for vaccination for school children; this also survived legal challenges.

CONCLUSION

While not explored in this blog, other issues agencies should review are whether employees must be paid for the time it takes to get a vaccine (recommended) and whether a mandatory vaccination policy are a mandatory subject of bargaining (also recommended); these matters and more are analyzed in Summit’s Law’s Mandatory COVID-19 Vaccination Policy Guidance for Washington Employers. Vaccinations will become more readily available to the general public in 2021. And with those vaccinations the number of COVID-19 cases in Washington State should decline to the point where workplaces can fully reopen. Before fully reopening, local governments should put in place a clear vaccination policy so employees understand what is expected of them once they return to the workplace. MRSC will continue to follow this issue and update our own guidance periodically, including posting any employee vaccination policies on our COVID-19 Operations and Personnel Issues webpage.

BY FLANNARY COLLINS, MRSC MANAGING ATTORNEY

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What liability does a city have for damages done to private structures and utilities by tree roots from trees the city maintains on city right-of-way when those roots invade abutting private property?

Let’s start with the rules applicable to tree roots between adjoining properties. The general rule is that a property owner is liable for damage caused by tree roots that extend onto the property of another and cause damage. In *Forbus v. Knight* (1945) the Washington Supreme Court stated the following:

It is not the law that the owner of premises is to be charged with negligence if he fails to take steps to make his property secure against invasion or injury by an adjoining landowner. It is the duty of the one who is the owner of the offending agency to restrain its encroachment upon the property of another, not the duty of the victim to defend or protect himself against such encroachment and its consequent injury.

Street right-of-way is different than private property. Cities generally do not own right-of-way, they have an easement for street and utility purposes. See, e.g., *Puget Sound Alumni of Kappa Sigma, Inc. v. City of Seattle* (1967). So, the mere fact that a tree is in a right-of-way does not make it a tree for which a city is responsible. Abutting owners often plant and maintain trees in the right-of-way, especially the portion that is not part of the improved roadway. A city would not necessarily be liable for damage caused by roots from a tree in the right-of-way if it did not plant nor does it maintain the tree.

In *Rosengren v. City of Seattle* (2009), abutting owners were found to have a duty with respect to tree root damage to a sidewalk resulting from trees on their property, but adjacent to the right-of-way line. The court stated:

an abutting land owner has a duty to exercise reasonable care that the trunks, branches, or roots of trees planted by them adjacent to a public sidewalk do not pose an unreasonable risk of harm to a pedestrian using the sidewalk

Where the tree is planted and maintained by the city (or planted at the behest of the city in connection with development), then the duties outlined in the *Forbus v. Knight* case likely come into play. In many cases it is difficult to ascertain the source of root damage if there are multiple trees in the area. Many cities have standards for appropriate species to use as street trees, such as those that do not have invasive root systems.

How do some cities limit their liability when renting public facilities for private parties?

Protecting the city from liability for the negligence of anyone using city facilities is important and your city attorney and the city’s liability insurance provider may have some suggestions as well. Many cities, such as Bellingham, Issaquah, and Kent, include a statement similar to the following in their rental agreements:

The undersigned agrees to [...] and to save the City harmless for all liability, accident, injury or loss of property resulting from such use of said facility.

Many go a step further and include the requirement for proof of insurance, even requiring that the city be named as an additional insured party under the policy, such as the cities of SeaTac and Grandview. Port Angeles added a provision to its municipal code in Chapter 12.08 to include the requirement that applicants seeking a permit to use the Vern Burton Memorial Community Center for a special event with significant potential liability (as determined by the director, the risk manager, and the city attorney) furnish evidence of liability insurance of “not less than $2M bodily injury per person and $1M property damage, for any personal injury or property damage arising out of, or in any way caused by, the applicant’s use of the facility.”

Is a hold harmless agreement a guarantee against potential municipal liability?

No, it is not a guarantee. It is not possible to say with absolute certainty that the use of a hold harmless agreement will protect a municipality against all potential liability. The effect of a hold harmless agreement might ultimately need to be decided by the courts, which would likely look at all the facts surrounding the situation, including the position of the individual who signs the hold harmless agreement.

Have a Question? Ask MRSC. Call us at (206) 625-1300 or (800) 933-6772 or submit your question online at mrsc.org
A REFRESHER ON THE GIFT OF PUBLIC FUNDS

The prohibition on gifts of public funds (GOPF) comes up in a myriad of situations. GOPF issues can arise in connection with large public/private projects (such as baseball stadiums) and on a small-scale (such as employee awards and recognition). In addition, GOPF analysis can differ in emergencies compared with more normal times. This article provides a summary of how GOPF issues are analyzed and tips for avoiding GOPF violations.

FUNDAMENTALS OF THE GOPF DOCTRINE
The prohibition on gifts of public funds is set forth in the Washington Constitution in Article 8, Section 7:

No county, city, town or other municipal corporation shall hereafter give any money, property, or loan its money, or credit to, or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm...

There are a few important things to remember about this provision:

- A separate constitutional provision (Article 8, Section 5) applies to Washington State. Even though the language of the two provisions are different, courts interpret them similarly, which means that cases involving the state may be helpful when analyzing GOPF issues under Article 8, Section 7.
- “Poor and infirm” is interpreted as poor or infirm — a recipient need not be both.
- The prohibition on lending of credit is separate and distinct from GOPF.
- GOPF does not apply when the recipient is another government entity, although both entities are required to properly account for the transaction under RCW 43.09.206(3).

TESTING FOR GOPF
Courts use a two-part analysis to determine if a local government has made a GOPF. The first question is whether the expenditure furthers a fundamental purpose of government. If the answer is “yes,” then there is no GOPF. If the answer is “no,” the next question is whether there is “donative intent” on the part of local government, or — in other words — whether there is a bargained-for exchange where the consideration received by the local government is legally sufficient.

What is a “fundamental purpose of government?” There is not a comprehensive definition or list of functions that fall into that category. The term is more narrowly defined than “public purpose” and it applies to core government functions like providing parks and fire and police protection. So, for example, it is not a GOPF for police to unlock vehicles at the request of motorists who have locked themselves out — doing so is part of the community caretaking function under Hudson v. City of Wenatchee (1999). A county did not make a GOPF when it provided relocation assistance to a business for business for flood control purposes under Citizen's Protection Res. v. Yakima County (2009). Such expenditures are not GOPFs because they involve functions that constitute generally expect their local governments to provide.

If an expenditure is not for a fundamental purpose of government, then the inquiry shifts to whether there is intent to make a gift or an absence of financial consideration. Courts will look at the specifics of the transaction involved to determine what the local government received in return (i.e., “consideration”) for its expenditure. It is not a question of whether the local government made a good or bad deal. Rather, the court assesses whether the consideration received is “legally sufficient.” The courts do not engage in an in-depth analysis of the adequacy of consideration because doing so interferes with governmental power to contract and would constitute judicial interference with government decision-making.

But a local government needs to be able to document the consideration received for its expenditures. An early example of a failure to do so is Johns v. Wadsworth (1914), in which a county contribution to an agricultural fair was struck down because the county maintained no direct control over how the money would be spent. More recent cases have reviewed the sufficiency of the consideration received by local government. For examples, see King County v. King County Taxpayers (1997), finding sufficient consideration for the Seattle Mariners baseball stadium lease, and CLEAN v. City of Spokane (1997), upholding city participation in construction and operation of downtown parking garage.

TIPS FOR REVIEWING GOPF ISSUES
Recent GOPF case law involves large and complex projects, but GOPF issues arise in day-to-day circumstances as well. Here are some tips for addressing possible GOPF situations:

- **Use contracts to define the scope and purpose of local government expenditures.** Johns v. Wadsworth makes clear that local governments cannot make donations, even if it is for a good cause. On the other hand, a local government can contract with nonprofit entities to provide services that the local government would be authorized to provide.
- **Make sure to document that restricted funds have been spent appropriately.** There are many city and county revenue sources that are limited to specific purposes. Expenditures of such funds must be consistent with statutory restrictions as well as the local government’s plans and policies. Expenditures that do not meet the applicable fund criteria may be deemed a GOPF.

Context matters. An expenditure that may be a GOPF in “normal times” might be permitted in an emergency. The website for the Washington State Office of the Attorney General provides helpful guidance with respect to providing assistance to low-income individuals and small businesses during the COVID-19 emergency. Such assistance, during a protracted emergency, may be a “fundamental purpose of government” since it is intended to ameliorate the hardships caused by the COVID-19 pandemic. Of course, documenting the nexus between the assistance provided and the benefits to public health and welfare is of critical importance.

Oskar Rey, Legal Consultant, has practiced municipal law since 1995 and served as Assistant City Attorney for the City of Kirkland from 2005 to 2016. Oskar is a lifelong resident of Washington and graduated from the University of Washington School of Law in 1992. Oskar writes on a variety of local government issues including land use, zoning, code enforcement, public records, and public works. ore@mrsc.org
WHAT’S NEW FOR
WASHINGTON CYCLISTS?

This article looks at two recent pieces of state legislation related to bicycling.

ROLLING THROUGH STOP SIGNS

Last year Washington joined approximately 12 other states in allowing bicycles (and electric-assisted bicycles) to use the “safety stop,” also called the “Idaho stop.” (Idaho was the first state to adopt this type of legislation in 1982.)

Effective October 1, 2020, Substitute Senate Bill 6208 amends RCW 46.61.190(2) to allow a person operating a bicycle on the roadway to treat a stop sign as a yield sign. Does this mean we will suddenly see bicycles bombing through intersections? Of course not! As with any other vehicle, the statute requires the person operating a bicycle to 1). slow down to a speed reasonable for existing conditions and stop if safety requires it and 2). yield the right-of-way to oncoming and cross traffic if required to do so.

The new bill is not without its limitations. It does not apply to intersections controlled by traffic lights — only to traffic signs, stop signs at railroad crossings, and a “stop” signal used by a school bus.

This new law joins existing bicycle-friendly statutes related to obeying traffic control devices such as RCW 46.61.184, which allows a person operating a bicycle to (after using due care) proceed through an intersection controlled by a traffic light when the vehicle detection system does not trigger the light to change.

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SAFELY PASSING VULNERABLE ROADWAY USERS

The second bill is from the 2019 legislative session but went into effect on January 1, 2020. Substitute Senate Bill 5723 is intended to enhance the safety of persons operating bicycles (and other vulnerable roadway users such as pedestrians, persons riding animals, persons operating certain farm equipment, or as otherwise defined by RCW 46.61.526 (11)(c)).

It amends RCW 46.61.110 to require a vehicle that is passing a vulnerable roadway user to move completely into another lane. If there is only one lane of same-direction travel and it is not safe or legal to move completely into the lane of opposite-direction travel, the vehicle must slow down to “a safe speed for passing relative to the speed of the individual [being passed]” and give as much room as is safely possible, with three feet at a minimum, to the individual being overtaken.

The statute creates some additional fines for drivers who improperly pass vulnerable roadway users. Those additional fines go into a special “vulnerable roadway user education account” to be used by the Washington Traffic Safety Commission to educate law enforcement officers, prosecutors, and judges, as well as the general public.

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does SSB 5723 AFFECT EXISTING LAW?

The amendment does not eliminate any of the existing rules of the road. Vehicles were already required to “pass to the left at a safe distance.” Instead, this amendment provides more clarity at what exactly is “safe,” making it clearer what behavior could draw a fine. The amendment also does not authorize passing a vulnerable roadway user if safely passing would require the vehicle to cross double center lines.

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**PRA and OPMA Case Law Update**
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**An Introduction to Public Works Contracting**
Wednesday, February 17, 10:00–11:30am  |  Credits: CAEC

Learn more and register at mrsc.org/training