

Local Government Law News

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TAKING ACTION IN LOCAL GOVERNMENT: THE QUORUM REQUIREMENT

By Kash Stilz¹

The city was Pikeville, Kentucky. The year was...well like most things legal, there were multiple years involved. In November of 1917, the people of Pikeville elected Sydney Trivette to the office of police judge. When he resigned almost a year later, the city council appointed W.W. Reynolds to fill the vacancy.

In March of 1919, the council adopted an ordinance making the office of police judge appointive, giving themselves the power to appoint. Despite this ordinance, Pikeville held an election in November of that same year and elected George W. Pinson to the position. After the election of Pinson the new city council was elected. Before the newly elected council qualified to assume its duties, Reynolds resigned only to be reappointed on the same day by the council still in office. Then, in December of 1919 the newly elected and installed council appointed Pinson to the position of police judge. Governor Edwin P. Morrow issued a commission to Reynolds for the position, and Pinson sued to obtain the commission and for possession of the office.

When it adopted the March 1919 ordinance, the city council had six members. At that meeting three members and the mayor of the city were present. Pinson attacked the ordinance on grounds that it was invalidly enacted. Specifically, he asserted that because only three of the six council members were present and voting, and because the mayor did not vote, there was no quorum. Finding against Pinson, the high Court would lay down the general rules for quorum requirements applied to local government bodies.²

Thanks to the *Pinson* case and subsequent codification of its principles, Kentucky follows the general or "common law" rule that a majority of a local government legislative body constitutes a quorum and a vote of a majority of a quorum is sufficient to take action. This rule, sometimes referred to as the "majority-majority" rule, has been codified by the Kentucky legislature in several sections of the Kentucky Revised Statutes ("KRS"). Exceptions to this principle have also been codified by the legislature. These exceptions primarily concern the role of the mayor in determining the quorum requirement. Other exceptions simply provide that, for whatever reason, the general rule does not

apply. There are also certain variations to the general rule that really cannot be classified as exceptions, but do tweak the rule somewhat.

Two early cases arising in the cities of Springfield and Paducah demonstrate how the rule has been tweaked. City councils in Springfield and Paducah had passed ordinances while a quorum was present, but without all council members voting. In both cases the attacks on the ordinances were rejected by the high court. Discussing the rules concerning non-voting, but present members, the court in both cases stated that local government legislators who are present, but do not vote are said to acquiesce in the decision of the voting majority.³ The court in the Springfield case, however, noted that if a council member had an interest in the matter before the council, thus disqualifying that member from the vote, that member could not be counted toward the majority.⁴

At the city level, KRS 83.060(6) provides that, in the absence of a statute to the contrary, city legislative bodies may take action in accordance with the general or "common law" rule. It is here where the role of the mayor plays an important role in determining a quorum.

There are three forms of city government authorized by statute. Under the Mayor-Council Plan, KRS 83A.130 provides that the mayor is to participate in the council proceedings, but *cannot* vote except to break a tie. Thus, the mayor will not count towards the quorum unless there is a specific statute to the contrary. Such was the situation in the *Pinson* case because a specific statute stated the mayor

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DIRECTOR'S DESK

As a young attorney, it was my good fortune to serve as counsel to the New York State Office of Fire Prevention and Control. As you might imagine, the staff of that office has been much in my thoughts since September 11. So, too, have been the many other public servants who responded to the tragedy, many of whom, in seeking to aid victims, became victims themselves.

Watching the news coverage in the days after the terrorist attacks reinforced for me a lesson learned during my service in that office - the vital importance of local government in responding to emergencies. In New York, in Virginia, and in Pennsylvania, the initial responses came from local governments with their fire, police, and emergency medical services.

The modern view of local government's role in emergency management takes root in two acts of Congress in 1950, the Disaster Relief Act and the Civil Defense Act. Those acts split emergency management of natural disasters and war-related emergencies both conceptually and legislatively. That division began to break down in the 1970s, accelerated by the creation of the Federal Emergency Management Agency (FEMA) in 1978.

With the creation of FEMA came a new philosophy of emergency management - comprehensive emergency management. Championed by the National Governors Association, comprehensive emergency management refers to any government's responsibility and capability for managing all types of emergencies and disasters, coordinating the actions of many organizations and agencies. This includes all four phases of emergency activity - mitigation, preparedness, response, and recovery - and applies to all kinds of risks including natural disasters, technological disasters, enemy attacks, and energy and material shortages. Throughout the 1980s disaster preparedness became less concerned with preparedness for a nuclear attack and more concerned with natural and technological hazards. The chemical release

in Bhopal, India and the reactor accident at Chernobyl helped to heighten public awareness of risks other than an attack. With the attacks on the World

Trade Center and the Pentagon, it would seem we have come full circle. The threat of terrorism is bringing about a new sense of urgency in emergency management. At the national level the response includes the creation of an Office for Homeland Security. At the state level, the response is more varied. Kentucky, for example, held a series of 16 meetings across the state designed to inform local government officials, educators, and emergency service providers of the status of the terrorism threat and response in Kentucky. Local governments now must also respond.

In assessing what your local government might need to do, here are some questions suggested by the Alabama League of Municipalities (for more, visit www.alalm.org):

Have you review emergency operations plans in the last twelve months?

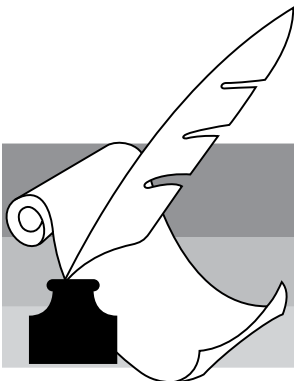
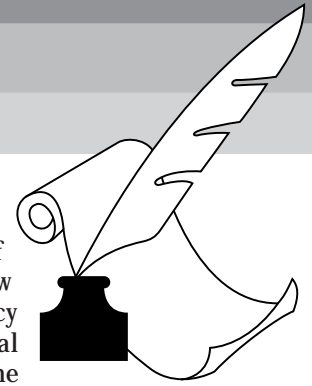
Within the last two years, have you had an emergency training exercise of the plan?

Does your community have adequate accounting and record keeping procedures to document requests to state and federal assistance programs?

Is your disaster organizational structure an extension of the day-to-day emergency structure?

Are your mutual aid agreements effective and current?

Several major local government organizations offer resources to help local governments with their ability to respond to domestic terrorism. Here are three examples. The International City/County Management Association has an Emergency Readiness e-Brochure at <http://www.icma.org/docs/10000079.pdf>. The National Association of Counties has a Counties and Homeland Security page at <http://www.naco.org/propgrams/homesecurity/index.cfm>. The National League of Cities also has a page at http://www.nlc.org/nlc_org/site/newroom/terrorism_response/index.cfm that includes a link to its Local Officials Guide entitled Domestic Terrorism: Resources for Local Governments. Of course, the Local Government Law Center is available to support your efforts.



counted towards the quorum number. Therefore, the court found against Pinson and upheld the ordinance and the appointment of Reynolds.

Under the Commission Plan of city government, KRS 83A.140 provides that the mayor participates and votes in all commission proceedings. In this form of city government, the mayor counts toward the quorum number.⁵ Finally, under the City Manager Plan, KRS 83A.150 provides that, like the Commission Plan, the mayor participates and votes in all proceedings of the council. Here, too, the mayor counts toward the quorum number.⁶

There is another rule particular to the role of the mayor that deserves mention. A case arose from the city of Lancaster concerning an ordinance passed requiring licensing of trade or merchant tailors. A quorum of the city council had been present when the ordinance was passed. The mayor, however, was not present. The statute at the time of the case required the mayor to preside over all city council meetings. One of the members of the city council was chosen as mayor pro tem in order to abide by the statute. This member also voted on the ordinance, something the mayor was only allowed to do in case of a tie. The ordinance was attacked on the grounds that the substitution of the mayor and the vote by the mayor pro tem were improper. The Court decided that this action taken by the city council was permissible. In the mayor's absence, the council may appoint a mayor pro tem, the mayor pro tem counts towards the quorum number, and the mayor pro tem may vote on the ordinance (though he or she may not subsequently vote to break a tie).⁷

At the county government level, KRS 67.078 provides that the fiscal court follows the general rule in all cases *except* when passing an ordinance. A majority of the fiscal court is required to pass an ordinance.⁸

Cases concerning quorum rules are sparse and dated. They were decided based on statutes that, for the most part, have been revised. Modern statutes concerning the quorum rules of a number of local governmental bodies are too numerous to list. Most such provisions follow the general rule that a majority of a legislative body constitutes a quorum and a majority of that quorum may take action. For example, under KRS 65.560 Riverport Authorities follow the general rule, as do single and multi-County Emergency Boards under KRS 65.666 and 65.668. The local government bodies supervising the pension systems for police and fire divisions in cities of the first and second class under sections 91.390 and 91.240 also follow the general rule.

There are also some local government bodies that do

not follow the general rule. That is, while a majority of the body may constitute a quorum, a majority of the entire body must vote on the issue in order for the action to be valid. Examples following this rule are the Local Government Training Advisory Councils under section 65.337 of KRS and the Air Pollution Control Board under section 77.080.

The rules concerning the quorum requirement are of vast importance. While the cases mentioned in this article all conclude with favorable results for the local government bodies, they also demonstrate that failure to follow the rules applicable to a given local government entity may very well mean nullification of the action taken. Before action is taken, be sure to check the Kentucky statutes to make certain exactly which rule applies to the action being taken.

1 Kash Stiz is a third-year law student at Salmon P. Chase College of Law. He prepared this article while participating in the college's Local Government Law Center Clinical Internship Program. He also contributed to the Supreme Court summary that appears under Decisions of Note.

2 *Pinson v. Morrow*, 224 S.W. 879 (Ky. 1920).

3 *Wheeler v. Commonwealth* 32 S.W. 259 (Ky. 1895); *City of Springfield v. Haydon*, 288 S.W. 337 (Ky. 1926).

4 *City of Springfield v. Haydon*, 288 S.W. 337 (Ky. 1926).

5 OAG 81-211, 1981 Ky. AG LEXIS 218, June 11, 1981.

6 In cities of the first class, KRS 83.480 states that a majority of the Board constitutes a quorum and, following the general rule, may take action when a majority vote is attained. There is an exception to this rule. When the Board plans to move the meeting, two-thirds of the entire Board must move for the resolution. The mayor in this system has exclusive executive power and does not take part in voting. KRS 83.500. He does, however, have veto power.

7 *Shugars v. Hamilton* 92 S.W. 564 (Ky. 1906).

8 Chapter 67A of Title IX of K.R.S. prescribes the intricacies of urban-county governments, a hybrid of city and county governments. This system of local government is authorized by K.R.S. 67A.010. There is no section in this chapter, however, detailing the quorum requirements for urban-county governments.



DECISIONS OF NOTE



KENTUCKY SUPREME COURT

Municipal Liability - Special Relationship

A passenger in a car stopped by police left the scene of the stop in another car. The passenger then caused the second driver to lose control and strike a guardrail. The passenger suffered fatal injuries, and the driver proved to be legally intoxicated. The administrator of the estate filed a federal civil rights claim and a state negligence claim against the city and various police officers involved in the initial stop. The Circuit Court granted summary judgment for the city and the Court of Appeals reversed. Reversing the Court of Appeals, the Supreme holds that the police had no duty to protect the deceased from third-party harm. The passenger was never in police custody, and a special relationship between the passenger and the police never arose. *City of Florence v. Chipman*, 38 S.W.3d 387 (Ky. 2001).

Open Records Act - Educational Records

A newspaper reporter asked for information about student disciplinary actions. The school denied the request and the reporter appealed to the Attorney General. The Attorney General concluded that the school should release the records. The school appealed to the Circuit Court, which determined that the information was excluded from the Open Records Act because the Family Educational and Privacy Act applied to them. On appeal the Court of Appeals reversed the Circuit Court. The Supreme Court affirmed the Court of Appeals. Pointing out that here the school had the burden to show that the records sought fit within an exception to the Open Records Act, the school did not sustain the burden. The statistical compilation sought by the reporter was not an educational record within the meaning of the federal act. *Hardin County Schools v. Foster*, 40 S.W.3d 865 (Ky. 2001).

Circuit Court Clerk - Filling Vacancy

Two candidates to fill a vacancy in the office of circuit court clerk took a special clerk's examination to determine eligibility. One candidate passed. For several reasons, the Circuit Judge asked the Administrative Office of the Courts to administer the exam again to the unsuccessful candidate. The successful candidate sued, maintaining that the relevant Supreme Court rule prohibits more than one special examination. Distinguishing between election to and appointment to the position, the Supreme Court holds in a divided decision that in the appointment context the possibility of multiple examinations must be tolerated. *Franklin v. Lambert*, 41 SW3d 852 (Ky. 2001). [For a related cases see *Johnson v. Administrative Office of the Courts* below.]

Municipal Liability - Witness Protection

The Commonwealth Attorney, at the direction of the court, gave information to defense counsel that disclosed the identity of an informant who would testify against the defendants. The informant received no notice that his identity had been revealed. Before trial, one of the defendants murdered the informant. His estate sued on several theories. The Court of Appeals found no common law liability, but found liability under KRS 421.500(4). The Supreme Court found that a mistake was made in the course of codifying the statute. The Court of Appeals, therefore, made a fundamental mistake in relying on an erroneously codified statute. Properly read with the mistakenly omitted provision, no liability attaches to a violation of KRS 421.500(4). *Collins v. Hudson*, 48 S.W.3d 1 (Ky. 2001).

Municipal Liability - Proceeds from Insurance

A patient at a hospital operated by a county sued the hospital for negligence. At the time of the injury, the hospital was insured. The action against the county was dismissed as barred by sovereign immunity. An issue still remained concerning whether the suit could be brought for the sole purpose of measuring the claimant's entitlement to proceeds from the hospital's liability policy. Construing KRS 67.186, the Supreme Court holds that it can. *Reyes v. Hardin County*, 55 S.W.3d 337 (Ky. 2001).

KENTUCKY COURT OF APPEALS



County Ordinances - Applicability in Cities

The City of Louisville and the Fiscal Court of Jefferson County each enacted ordinances prohibiting discrimination based on sexual orientation and gender identity. The city ordinance prohibits discrimination in employment. The county ordinance prohibits discrimination in employment, public accommodations, and housing. A dispute arose whether the county ordinance was enforceable throughout the entire county, including the city. Construing KRS 67.087(7), the Court of Appeals holds that the county ordinance applies in both incorporated and unincorporated areas of the county. *Rogers v. Fiscal Court of Jefferson County*, 48 S.W.3d 28 (Ky. App. 2001).

UNITED STATES COURT OF APPEALS



County Engineer - Negligence

The representative of a person killed when his car ran a stop sign sued the county and the road supervisor. The action alleged negligence because the stop sign did not con-

form to Kentucky law and the intersection was not maintained as required by Kentucky law. Reading KRS 446.070 together with KRS 179.070, the court finds a private right of action for the county engineer's failure to remove from the right-of-way obstacles that present a hazard to traffic. The duty imposed on the county engineer to supervise the maintenance of county roads is sufficient to provide a basis for finding personal wrongdoing on the part of the public official. *Ezell v. Christian County*, 245 F.3d 853 (6th Cir. 2001).

School Dress Code - Free Speech

Two students wearing T-shirts displaying two Confederate flags on the back were told that the shirts violated the school dress code. When told to change shirts or turn them inside out, the students, with the support of their parents, refused. The students were suspended for three days and received a second three-day suspension when they repeated their conduct. The Court of Appeals first finds that the students had engaged in expressive conduct constituting speech. Then, after discussing the case law applicable to a school board's authority to regulate student speech, the Court of Appeals remands the case to develop the facts necessary to determine whether the school board acted within the scope of their constitutional authority to control student activity and behavior. *Castorina v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2001).

Public Employees - Freedom of Speech

An executive director of a housing authority who resigned under pressure brought suit against the authority alleging it retaliated against her for her exercise of her right to free speech. Finding that the case presented a "close question" on whether the speech at issue touched upon matters of public concern, the court nevertheless holds that the authority's interest in the efficient provision of public housing services outweighed the employee's interest in speaking on the issues. *Brandenburg v. Housing Authority of Irvine*, 253 F.2d. 891 (6th Cir. 2001).

Public Employees - Freedom of Speech

A community college did not renew the contract of an adjunct instructor after controversy arose over in-class discussion of "socially controversial words." The instructor sued, claiming retaliation for the exercise of his rights of free speech and academic freedom. College officials became involved in the matter only after a local civil rights activist brought the matter to their attention. Finding that the administrators were concerned only with avoiding the unpleasantness associated with a controversial subject, the Court of Appeals strikes the balance between the college and the instructor in favor of the latter. Further, the administrators do not have a qualified immunity defense. In light of "overwhelming precedent" establishing that the First Amendment does not tolerate an enforced orthodoxy in the class-

room, the actions of the administrators were objectively unreasonable. *Hardy v. Jefferson Community College*, 260 F.3d 671 (6th Cir. 2001)

UNITED STATES DISTRICT COURT



Circuit Court Clerk - Examination

Individuals who failed the examination for Circuit Court Clerk and a voter seeking to vote for one of them challenged the test as an undue burden on the electoral process. Applying the standards set out in *Burdick v. Takushi*, a 1992 decision of the U.S. Supreme Court, the district court finds the exam is a reasonable, nondiscriminatory restriction. The restriction imposed by the requirement of an exam serves a legitimate state interest in assuring that only qualified persons hold an important public office. The test takers' objections as to the content and administration of the exam do not establish a constitutional violation. *Johnson v. Administrative Office of the Courts*, 133 F.Supp.2d 536 (E.D. Ky. 2001).

Teacher Termination - Due Process

A school board terminated a veteran teacher, who requested and received a tribunal hearing to contest the termination. The tribunal upheld the school board, following which the teacher sued alleging violations of state and federal law. The federal claims included a claim that he was denied due process and a violation of his right to privacy. The court found that both the pre-termination procedure and post-termination hearing satisfied the requirements of due process. Further, the interest in his reputation that the teacher seeks to vindicate is not recognizable where reputation was altered as a result of his own actions. *Lafferty v. Board of Education of Floyd County*, 133 F.Supp.2d 941 (E.D. Ky. 2001).

Religious Freedom - Displaying Ten Commandments

Two counties and a school district amended displays of the Ten Commandments, earlier held unconstitutional, to include several other documents. The court finds the inclusion of the other documents insufficient to dilute the religious purpose behind the display. The governments' actual purpose was to endorse religion, not to advance the stated secular aims. While the Ten Commandments can be used in a teaching function or in a legal-historical function, the displays at issue do not fit into those categories. *American Civil Liberties Union of Kentucky v. McCreary County*, 145 F.Supp. 845 (E.D. Ky. 2001).

UNITED STATES SUPREME COURT



During the 2000-2001 term, the United States Supreme Court heard several cases important to local government. Prominent among them was *Palazzolo v. Rhode Island*, a case involving the Takings Clause. Mr. Palazzolo became the owner of property after a law restricting its development took effect. Rejecting the so-called “notice defense,” the Supreme Court allowed a suit challenging the law as a taking to proceed. The notice defense theory is that a person who takes property with notice of earlier enacted regulations should not be able to recover for lost value. The Supreme Court decided that future generations should be able to challenge unreasonable limitations on the use and value of land. This coming term watch for *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Authority*, another takings case this time involving a moratorium.

The Court also decided four cases involving Fourth Amendment search and seizure considerations. *City of Indianapolis v. Edmond* concerned automobile checkpoint stops. Indianapolis operated checkpoints the primary purpose of which was to search for illegal drugs. Because the search was for evidence of ordinary criminal wrongdoing without determining if there was individualized suspicion, the court said the stops were unconstitutional. The fact that the stops had as a secondary purpose a check of license and registration was not enough to save them. Checkpoints designed for the generalized prevention of crime do not have a strong enough connection between the interest that the government is attempting to protect and the means chosen to protect that interest.

Ferguson v. City of Charleston concerned a concerted effort of the Charleston police force and a local hospital to implement policies and procedures for administering drug tests to pregnant women suspected of using cocaine. In striking down this system, the Court paid special attention to the fact that the tests were obtained without consent and were intended for use by law enforcement personnel. The Court stated that if the policy in issue was to be proper the patients must be informed about their constitutional rights. The fact that the purpose of the program was to encourage

women to enter a drug treatment program was of no import.

Atwater v. City of Lago Vista concerned an arrest for minor traffic violations. Arrested and put in jail for a seatbelt violation, a misdemeanor punishable by a fine, the driver in question challenged the arrest as an unreasonable seizure. The Supreme Court affirmed the validity of the arrest based on its understanding of the history of the common law and its recognition that the Fourth Amendment standards must be sufficiently clear that officers can apply them in the field.

Kyllo v. United States concerned the use of thermal imaging technology to gather information about goings on in the interior of a home. Here the technology was used to discover illegal marijuana cultivation. The court said that a warrantless search of a home is generally unreasonable. Use of sense-enhancing technology to get information that otherwise would require a physical intrusion into a constitutionally protected area also constitutes an unreasonable search.

Adult-oriented businesses were at issue in *City News and Novelty, Inc. v. City of Waukesha*. A local law required license to do business in the city of Waukesha, Wisconsin. The store filed as required, but the city denied an application for renewal. The store claimed this violated its First Amendment rights to free speech. The Supreme Court disagreed for two reasons. The store had withdrawn its renewal application after being initially denied, and it had ceased to operate as an adult-oriented store. Therefore, it was no longer in a position to bring a claim against the city.

Finally, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the Supreme Court struck down the regulation federal agencies had used to assert Clean Water Act jurisdiction over isolated intrastate waterways. The court gave a narrow reading to the Clean Water Act in order to avoid significant constitutional and federalism questions. It did not see that through the act Congress intended to change the balance between federal and state governments.



BE IT ORDAINED . . .

[Editors Note: With this issue *Local Government Law News* begins a new, recurring feature highlighting ordinances addressed to issues prominent in the news or the law reports. *Local Government Law News* welcomes your suggestions for inclusions in this column.]

In Moody, Alabama last summer a spitting cobra kept as a pet escaped its cage and its owner's house and spread fear among the townspeople. In Knoxville, Tennessee recently a 15-foot python escaped from its pen and caused general panic among the neighbors. In Little Rock, Arkansas drug dealers kept pumas loose in houses to make it harder for police to conduct searches. In Cincinnati, Ohio last year, a pet wolf fatally bit a five year-old boy. In Hood River County, Oregon a Missouri couple settled there in part because Oregon law would permit them to keep their pet cougars.

Situations such as these often prompt local governments to adopt ordinances concerning the keeping of wild or exotic animals as pets. An example of such an ordinance, adapted from a model drafted by the state bar of Michigan, follows.

AN ORDINANCE IN RELATION TO WILD ANIMALS AND EXOTIC ANIMALS.

(1) Keeping wild animals and exotic animals.

- (a) No person, partnership, or corporation shall possess or harbor any wild animal(s) and/or exotic animal(s). This prohibition does not apply to zoological parks, properly licensed transient animal exhibitions, circuses, or licensed veterinarians or licensed caregivers to wild animals.
- (b) For the purpose of this ordinance, "wild animal" means any animal which is not a domesticated companion animal, or any crossbreeds of these animals with domestic animals, or any descendant of any crossbreed. Such animals include, but are not limited to: any venomous snake, python or constrictor snakes, owls, porcupines, monkeys, raccoons, skunks, leopards, lions, tigers, lynx, bobcats, badgers, fox, coyote, wolves, wolf-hybrids, wolverines, squirrels, bears, deer, chipmunks, moose, elk, rabbits, opossum, beavers, ground hogs, moles, gophers, mice/rodents, bats, and birds.
- (c) For the purpose of this ordinance, "exotic animal" means any of the following described animals: all animals, including snakes and spiders, whose bite or venom is poisonous or deadly to

humans; apes including chimpanzees, gibbons, gorillas, and orangutans; baboons; bears; cheetahs; crocodilians and alligators; constrictor snakes; coyotes; elephants; gamecocks and other fighting birds; hyenas; jaguars; leopards; lions; lynxes; ostriches; pumas, also known as mountain lions and panthers; wolves and wolf hybrids; raccoons; skunks; and tigers.

- (2) Anyone in possession of a wild animal, exotic animal or a crossbreed of a wild animal or exotic animal with a domestic animal, shall meet the following requirements to keep the animal:
 - (a) Obtain a permit from the [designated official] within 90 days from the publication of this Ordinance. Permits shall be valid for one year from the date of issue, will be renewed if the owner is in compliance, and will be revoked at any time for noncompliance.
 - (b) Keep the animal in a tightly secured cage or pen and restrained at all times. The animal must be muzzled or caged when transported.
 - (c) Provide to the [designated official] written proof from a licensed veterinarian that the animal has been spayed or neutered, or written statements from a licensed veterinarian why the animal cannot or should not be spayed or neutered.
- (3) Instructions for Obtaining a Permit to Possess a Wild Animal or Exotic Animal.
 - (a) Submit to the [designated official] a site plan and drawing that will include property lines, existing structures and buildings and the location and size of the proposed cage or pen. The area and materials used must comply with standards set by the [designated official] and based upon the size and nature of the animal.
 - (b) File an application for permit and the appropriate fee.
 - (c) Show proof that liability insurance coverage is in place, specifically stating that the animal is covered.

(d) Allow the [designated official] the freedom to inspect the area as necessary to assure that the health and safety needs are being met.

(e) Submit proof of being in compliance with all other local governmental unit laws and ordinances concerning the keeping of wild animals or exotic animals.

(4) Permit. Upon approval of an application to own or possess a wild animal or an exotic animal, the [designated official] shall issue a permit.

Related to the problem of wild or exotic animals is the problem of the vicious animal. Here is an example of an ordinance addressed to that issue, again adapted from the model drafted by the state bar of Michigan.

AN ORDINANCE IN RELATION TO VICIOUS ANIMALS.

(1) For the purpose of this ordinance, “vicious animal” means any animal that has a propensity, tendency, or disposition to attack, cause injury, or otherwise endanger the safety of persons or domesticated companion animals or that has behaved in such a manner that the owner knows or should have known that the animal had tendencies to bite or attack persons or other domestic companion animals. A vicious animal does not include an animal that bites or attacks a person or animal that is trespassing on the property of the animal’s owner. A vicious animal does not include an animal that bites or attacks a person or animal that provokes, torments, tortures, or treats an animal cruelly. A vicious animal does not include an animal that is responding in a manner that an ordinary and reasonable person would conclude was designed to protect a person if that person is engaged in lawful activity or is the subject of an assault or battery, or to protect itself or another animal.

(2) Standards for Keeping Vicious Animals. The keeping of vicious animals shall be subject to the following standards.

(a) Leash and Muzzle. No person shall permit a vicious animal to go outside of its kennel, pen, or the owner’s residence unless such animal is securely leashed with a leash no longer than four (4) feet in length. No person shall permit such an animal to be kept on a chain, rope, or other type of leash outside its kennel or pen unless a person is in physical control of the leash. Such

animals may not be leashed to inanimate objects such as trees, posts, buildings, etc. In addition, all such animals on a leash outside of the animal’s kennel, pen or the owner’s residence must be muzzled by a muzzling device sufficient to prevent the animal from biting persons or other animals.

(b) Confinement. All vicious animals shall be securely confined indoors or in a securely enclosed and locked pen or kennel, except when leashed and muzzled as provided in paragraph (a) above. Such pen, kennel, or structure must have secure sides and a secure top attached to its sides. A fenced-in yard by itself is insufficient to meet this standard. All structures used to confine such animals must be locked with a key or combination lock when such animals are within the structure. Such structure must have a secure bottom or floor attached to the sides of the pen, or the sides of the pen must be embedded in the ground to a depth of no less than two (2) feet. All structures erected to house such animals must comply with all zoning and building regulations. All such structures must be adequately lighted, ventilated, and kept in a clean and sanitary condition. The house or shelter for said animal shall be totally enclosed within the confinement structure.

(c) Confinement Indoors. No vicious animal may be kept on a porch, patio or in any part of a house or structure that would allow the animal to exit such building on its own volition. In addition, no such animal may be kept in a house or structure where window screens or screen doors are the only obstacles preventing the animal from exiting the structure.

(d) Signs. All owners, keepers or harborers of vicious animals shall within ten (10) days of the effective date of this Ordinance, display in a prominent place on their premises a sign, easily readable by the public from adjoining public roads or streets, using such words as “Beware of vicious animal” or other appropriate warning language. In addition, a similar sign must be posted on the kennel or pen of such animal.

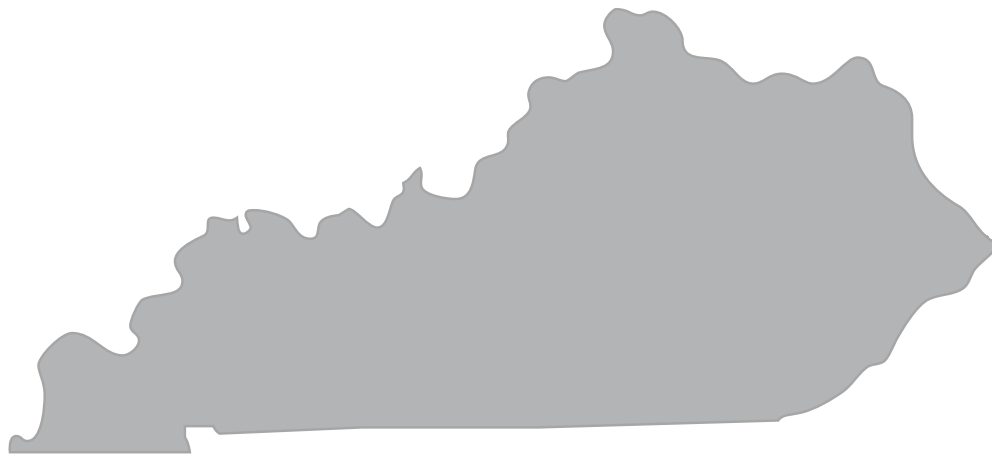
(3) Insurance Identification and Reporting Requirements.

(a) Insurance. All owners, keepers or harborers of vicious animals must, within ten (10) days of the

effective date of this Ordinance, obtain and maintain liability insurance in an amount of five hundred thousand dollars (\$500,000.00) for each occurrence for bodily injury to or death of any person or persons which may result from ownership, keeping, or maintenance of such animal.

- (b) Identification photographs. All owners, keepers or harborers of vicious animals must, within ten (10) days of the effective date of this Ordinance, provide to the [designated official] two (2) color photograph of the registered animal clearly showing the color and approximate size of the animal.
- (c) Reporting requirements. All owners, keepers or harborers of vicious animals must, within three (3) days of the following incidents, report the following in writing to the [designated official]:
 - (i) The removal or death of a vicious animal.
 - (ii) The birth of offspring of a vicious animal.
 - (iii) The new address of a vicious animal if the owner moves within the County limits.
 - (iv) The animal is on the loose, has been stolen, or has attacked a person.

- (4) Rebuttable Presumption as to Pit Bulls and Wolf-Hybrids. There shall be a rebuttable presumption that Pit Bull dogs and Wolf-Hybrids and any other animal adjudicated as a dangerous animal are vicious animals for purposes of this Ordinance. "Pit Bull Dog" is defined for purposes of this Section to mean the Bull Terrier breed of dog, the Staffordshire Bull Terrier breed of dog, the American Pit Bull Terrier breed of dog, the American Staffordshire Terrier breed of dog, dogs of mixed breed or other breeds which breed or mixed breed is known as Pit Bulls, Pit Bull Dogs, or Pit Bull Terriers, and any dog which has the appearance and characteristics of being predominantly of the breeds of Bull Terrier, Staffordshire Bull Terrier, American Pit Bull Terrier, American Staffordshire Terrier, any other breed commonly known as Pit Bulls, Pit Bull Dogs or Pit Bull Terriers, or a combination of any of these breeds. A "Wolf-Hybrid" is defined for purposes of this Section to mean any animal having a lineage dating from 1900 with any wolf breed combined with any other domesticated dog.
- (5) Failure to Comply. If the owner, keeper or harborer of a vicious animal fails to comply with the requirements and conditions set forth in this Section and this entire Ordinance, the animal shall be subject to immediate seizure and impoundment and further disposition in accordance with this Ordinance.



OPINIONS OF THE ATTORNEY GENERAL

SUMMARIES OF SELECTED FORMAL OPINIONS OF THE ATTORNEY GENERAL

OAG 01-6

Subject: School Districts; sealed settlement agreements

Syllabus: A settlement agreement between a party litigant and a school district, sealed or unsealed, is a public record and can not be withheld from public disclosure, unless the document is properly excluded from disclosure by one or more of the exceptions set forth in KRS 61.878(1) of the Open Records Act or other applicable statutes.

Synopsis: Settlement of litigation by a governmental entity is a matter of legitimate public scrutiny. Settlement agreements containing confidentiality clauses are not sufficient to overcome the public's right freely and openly to investigate the payment of public funds as compensation for government-inflicted injury.

OAG 01-7

Subject: Residency requirements of school principals

Syllabus: A school board policy requiring school based decision-making councils to only hire applicants for the position of principal from residents of its county is contrary to both existing Kentucky education law and constitutional equal protection provisions.

Synopsis: State law gives a school board power to set qualifications for employees subject to the condition that they be consistent with the general school laws of the state. The Attorney General concludes that state law limits the board's ability to adjust the requirements for school personnel. It does not allow a school board to impose a residency requirement for principals. The Attorney General further concludes that, even if statute did not prevent a school board from imposing such a requirement, the state Constitution would. In the view of the Attorney General, a residency requirement would not advance its stated purpose of fostering community involvement. Neither would it foster an efficient school system.

SUMMARIES OF SELECTED OPEN RECORDS DECISIONS

01-ORD-114

An agency may prescribe a reasonable fee for making copies of public records, but the fee may not exceed the actual costs of reproduction and may not include staff costs. A police department attempted to recover staff costs in a response to a request for copies of an audio tape reasoning that the

tape was a record in a non-standard format. Reaffirming an earlier opinion that the concept of 'standard format' applies only to electronic and hard copy records, the Attorney General says the agency must recalculate its costs for the copy of the tape. The agency must also recalculate its costs for paper copies of other requested records. Its charge of fifteen cents per page was presumptively excessive. The attempt to justify the higher charges on the ground that the records would be put to a commercial purpose also fails. Here the requester is an attorney whose use of the record appears to fall within KRS 61.870(4)(b)(3).

01-ORD-117

In response to a request for records, a fire department advised the requester to be more specific as to the records sought. The fire department thereby "intended to alleviate any undue charges for fees and shipping and [to provide] accurate documentation per KRS 61.884." The Attorney General concludes that this response was neither an attempt to subvert the intent of nor a violation of the Open Records Act.

01-ORD-118

Relying on KRS 61.878(1)(a) a fire district denied a request for EMS run reports because the reports contained information of a personal nature. The Attorney General notes that KRS 216B.410 now provides that those reports are confidential. The section, therefore, preempts the application of KRS 61.878(1)(a) and the prior decisions of the Attorney General relative to EMS run reports. KRS 61.878(1)(l) excludes from public inspection "[p]ublic records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly." Thus EMS run reports must be withheld from disclosure absent a properly executed release.

01-ORD-124

A city advised a person that the records he sought were in storage and that manually to search the stored records would mean a month's delay in making the records available. The Attorney General opines that the delay is inordinate and represents a failure to afford timely access to records. The burden is on the agency to respond, even if it disrupts the agency's regular daily functions.

01-ORD-136

A city charged a copy fee of twenty cents per page, and the person requesting the copies questioned the reasonableness of the charge. After the city submitted its calculations to the Attorney General, the Attorney General undertook a lengthy recalculation, which is set out in the opinion. The Attorney General computed the city's cost at four cents per page, not the higher value computed by the city.

01-ORD-140

Asked for fiscal court records related to a certain real estate transaction, the custodian of the records responded that he was going on vacation the next day and that he would comply with the request upon his return. The result was a delay of thirteen days in complying with the request. "Whatever [the custodian's] aim," said the Attorney General, "we believe that his inaction amounted, as a practical matter, to a subversion of the Act's intent." It was the responsibility of the fiscal court to appoint an acting custodian to respond to the request within the required three days.

01-ORD-153

An electric plant board partially denied a request for meeting minutes and profit and loss statements on the ground that these were records which are generally recognized as confidential or proprietary and which, if openly disclosed, would permit an unfair commercial advantage to its competitors. This exception, however, applies only to records of private entities disclosed to a public agency, not to operational and financial records of the agency itself.

Under KRS 61.880 the Attorney General reviews complaints alleging violations of the Open Records Act and issues written decisions stating whether an agency violated the act. If no party timely appeals the decision, it has the force and effect of law. Copies of the decisions summarized here are available from the Local Government Law Center.

SUMMARIES OF SELECTED OPEN MEETINGS DECISIONS

01-OMD-110

Certain members of a fiscal court engaged in whispered discussions between individual members concerning a budget then under review. Members of the press asserted that the inaudible discussions were a violation of the Open Meetings Act. The fiscal court replied that the members were engaged in permissible discussions where the purpose was to educate the members on specific issues. The Attorney General disagreed with the fiscal court. In the opinion of the Attorney General, "the final sentence of KRS 61.810(2) cannot be construed to authorize whispered discussions among members of a public agency when a quorum of the agency's members are present in an open, public meeting, and the discussion focuses on an issue about which the agency has the option to take action. . . . [T]he meeting was required to be 'open to the public at all times . . .,' and not interrupted by whispered discussions to which the public was effectively denied access." As further support, the Attorney General noted that agencies have a duty to "provide meeting room conditions which insofar as is feasible allow effective public observation of the public meeting." The public has a right to observe and hear what transpires at a public meeting.

01-OMD-130

A fiscal court went into executive session to discuss pending litigation in which a deputy sheriff was a defendant. However, because the fiscal court was not itself party to the litigation, the Attorney General concludes that the exception provided by KRS 61.810(1)(c) is not available. To qualify for the

exception, the litigation must be proposed or pending litigation against or on behalf of the public agency.

01-OMD-141

A county public hospital's board of commissioners formed a nominating committee to recommend persons to serve on the board. The committee met and voted on the candidates in a manner that the county attorney alleged violated the Open Meetings Act. The Attorney General concluded that the nominating committee did not provide proper notice of its meeting, conducted what amounted to a secret ballot, and did not keep accurate minutes, all in violation of the act. The Attorney General dismissed the committee's attempt to portray the violations as merely technical. The opinion reaffirms a prior opinion that said, "The Act itself does not recognize a class of violations of lesser gravity than the remaining class of violations, and therefore capable of being dismissed as merely 'technical.'"

01-OMD-152

After the county attorney began a suit against the fiscal court and the judge/executive, the fiscal court went into a closed session at a special meeting to discuss "how, when, and where to seek legal advice" regarding the suit. The Attorney General concludes that this does not constitute "discussion of proposed or pending litigation" within the meaning of the Open Meetings Act. That exception, like the others, must be narrowly construed. Even if that exception could be stretched to apply in this circumstance, it was defeated by the presence of members of the public which amounted to selective admission.

01-OMD-166

A school site based council did not allow a member of the public to tape record its meeting. Based on an earlier opinion, the Attorney General reaffirms that for a public body to have a blanket policy against tape recording a public meeting is unreasonable and contrary to the spirit of the Open Meetings Act.

01-OMD-175

Owing to a scheduling conflict, a city council postponed its regular meeting and called a special meeting for the following week to do the business of the regular meeting. Included on the agenda for the special meeting were "discussion of old business," "discussion of new business," "open to the floor," and "open to counsel." A newspaper objected that these items violated the provision of the Open Meetings Act that limits discussion or actions at special meetings. The city, while acknowledging that the meeting was technically a special meeting, asserted that all in attendance understood it to be the monthly meeting of the council. Viewed in that light, the city maintained that the agenda was proper. The Attorney General disagreed. The practice of including open-ended agenda items on the agenda of a special meeting is inconsistent with the Open Meetings Act.

Under KRS 61.846 the Attorney General reviews complaints alleging violations of the Open Meetings Act and issues written decisions stating whether an agency violated the act. If no party timely appeals the decision, it has the force and effect of law. Copies of the decisions summarized here are available from the Local Government Law Center.

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